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Presidential Documents

Title 3—

The President

Memorandum of April 12, 2024

Delegation of Authority Under Section 506(a)(2) of the Foreign Assistance Act of 1961

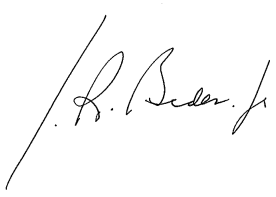
Memorandum for the Secretary of State

By the authority vested in me as President by the Constitution and the laws of the United States of America, including section 621 of the Foreign Assistance Act of 1961 (FAA), I hereby delegate to the Secretary of State:

(1) the authority under section 506(a)(2) of the FAA to direct the drawdown of up to $60 million in articles and services from the inventory and resources of any agency of the United States Government and military education and training from the Department of Defense for the purposes and under the authorities of chapter 8 of part I of the FAA to provide anti-crime and counternarcotics assistance to countries that contribute personnel to the Multinational Security Support Mission for Haiti and to the Haitian National Police; and

(2) the authority to make the determination required under such section to direct such a drawdown.

You are authorized and directed to publish this memorandum in the *Federal Register*.



THE WHITE HOUSE,
Washington, April 12, 2024

[FR Doc. 2024–09431
Filed 4–29–24; 8:45 am]
Billing code 4710–10–P

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OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 120

RIN 3206–AO63

Guidance Procedures

AGENCY: Office of Personnel Management (OPM).

ACTION: Final rule.

SUMMARY: This final rule removes existing regulations concerning procedures applicable to the issuance of OPM's guidance documents. OPM is taking this action because President Biden revoked the authority for the regulations in an Executive order (E.O.) on January 20, 2021. Furthermore, OPM finds that the current procedures are impracticable and lack the flexibility needed for issuing guidance internally.

DATES: This final rule is effective on May 30, 2024.

FOR FURTHER INFORMATION CONTACT: Kirsten J. Moncada, Executive Director, Office of the Executive Secretariat, Privacy, and Information Management at 202–936–0251.

SUPPLEMENTARY INFORMATION:

I. Background

Pursuant to E.O. 13891, ''Promoting the Rule of Law Through Improved Agency Guidance Documents,'' OPM published a final rule (85 FR 65651, October 16, 2020) that established the procedures and requirements regarding the issuance, revision, and withdrawal of guidance documents codified at 5 CFR part 120. On January 20, 2021, President Biden issued E.O. 13992, ''Revocation of Certain Executive Orders Concerning Federal Regulation'' (86 FR 7049, January 25, 2021), which revoked several E.O.s, including E.O. 13891, and directed agencies to take the necessary steps to rescind regulations implemented pursuant to E.O. 13891. This rule fulfills that requirement. In accordance with E.O. 13992, OPM is removing 5 CFR part 120 from the Code of Federal Regulations.

In addition to the procedural requirements established at 5 CFR part 120, OPM created a ''Guidance'' web page at *https://www.opm.gov/guidance* pursuant to E.O. 13891. OPM has found that it is impracticable to maintain a single, comprehensive, and up-to-date collection of guidance documents. In fact, most of OPM's website at *https://www.opm.gov* consists of guidance for prospective, current, and former employees; retirees and annuitants; and agencies. Very little of that guidance was issued as stand-alone documents susceptible to the processes set forth in 5 CFR part 120. Therefore, after consideration and review, OPM has concluded that the existing regulations create unnecessary burden for the agency and deprive the agency of necessary flexibility to determine how best to issue public guidance.

Accordingly, OPM rescinds 5 CFR part 120 in its entirety and will remove the Guidance web page. As has been OPM's practice predating the rule, OPM will continue to make guidance available to the public on its website at *https://www.opm.gov.*

II. Waiver of Notice of Proposed Rulemaking

Under the Administrative Procedure Act, an agency may waive the normal notice and comment procedures if the action is a rule of ''agency organization, procedure, or practice.'' *See* 5 U.S.C. 553(b)(A). The Civil Service Reform Act's additional provisions for rulemaking by OPM incorporate this exception. *See* 5 U.S.C. 1105. Since, like the rule it is rescinding, this rule is not a substantive rule but a rule of agency procedure, notice and comment are not necessary.

III. Expected Impact of This Rule

This rule removes regulations pertaining to OPM's internal procedures on issuing guidance documents. As such, they were for the use of OPM personnel only and did not create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its agencies or other entities, its officers or employees, or any other person. 5 CFR 120.12. Accordingly, we expect the economic impact of removing those regulations, if any, to be minimal.

IV. Procedural Issues and Regulatory Review

A. Regulatory Review

OPM has examined the impact of this rule as required by Executive Orders 12866, 13563, and 14094, which direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public, health, and safety effects, distributive impacts, and equity). OMB has determined this rule is not a ''significant regulatory action'' under section 3(f) of Executive Order 12866, as amended by Executive Order 14094.

B. Regulatory Flexibility Act

A Regulatory Flexibility Analysis is not required for this final rule because OPM is not required to publish a general notice of proposed rulemaking for this matter. *See* 5 U.S.C. 601(2), 604(a).

C. Federalism

OPM has examined this rule in accordance with Executive Order 13132, ''Federalism,'' and has determined that this rule will not have any negative impact on the rights, roles and responsibilities of State, local, or Tribal governments. Therefore, in accordance with Executive Order 13132, ''Federalism,'' OPM has determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

D. Civil Justice Reform

This regulation meets the applicable standards set forth in Executive Order 12988.

E. Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of $100 million or more in any year and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

F. Paperwork Reduction Act of 1995

This rule will not impose any reporting or recordkeeping requirements

subject to the Paperwork Reduction Act, 44 U.S.C. 3501–3521.

G. Congressional Review Act

This action pertains to agency organization, procedure, or practice, and does not substantially affect the rights or obligations of non-agency parties. Accordingly, it is not a ''rule'' as that term is used in the Congressional Review Act, 5 U.S.C. 804(3)(C), and the reporting requirement of 5 U.S.C. 801 does not apply.

List of Subjects in 5 CFR Part 120

Administrative practice and procedure.

PART 120 [REMOVED AND RESERVED]

■ For the reasons stated in the preamble, and under the authority of 5 U.S.C. 301 and E.O. 13992, OPM removes and reserves 5 CFR part 120.

Office of Personnel Management.

Kayyonne Marston,

Federal Register Liaison.

[FR Doc. 2024–09192 Filed 4–29–24; 8:45 am]

BILLING CODE 6325–67–P

DEPARTMENT OF ENERGY

10 CFR Part 1021

[DOE–HQ–2023–0063]

RIN 1990–AA48

National Environmental Policy Act Implementing Procedures

AGENCY: Office of the General Counsel, Department of Energy.

ACTION: Final rule.

SUMMARY: The U.S. Department of Energy (DOE or the Department) is revising its National Environmental Policy Act (NEPA) implementing procedures (regulations) to add a categorical exclusion for certain energy storage systems and revise categorical exclusions for upgrading and rebuilding powerlines and for solar photovoltaic systems, as well as to make conforming changes to related sections of DOE's NEPA regulations. These changes will help ensure that DOE conducts an appropriate and efficient environmental review of proposed projects that normally do not result in significant environmental impacts.

DATES: This rule is effective May 30, 2024.

ADDRESSES: Documents relevant to this rulemaking are posted at *www.regulations.gov* (*Docket: DOE–HQ–2023–0063*). These documents include: the notice of proposed rulemaking, public comments, this final rule, and DOE's Technical Support Document, which provides additional information regarding the changes and a redline/strikeout version of affected sections of the DOE NEPA regulations indicating the changes made by this rule.

FOR FURTHER INFORMATION CONTACT: For information regarding DOE's NEPA regulations, contact Ms. Carrie Abravanel, Deputy Director, Office of NEPA Policy and Compliance, at *carrie.abravanel@hq.doe.gov* or 202–586–4798.

SUPPLEMENTARY INFORMATION:

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I. Introduction and Background

The National Environmental Policy Act, as amended, (42 U.S.C. 4321 *et seq.*) requires Federal agencies to provide a detailed statement regarding the environmental impacts of proposals for major Federal actions significantly affecting the quality of the human environment. The Council on Environmental Quality (CEQ) regulations implementing NEPA (40 CFR parts 1500–1508) require agencies to develop their own NEPA implementing procedures to apply the CEQ regulations to their specific programs and decision-making processes (40 CFR 1507.3). DOE promulgated its regulations entitled ''National Environmental Policy Act Implementing Procedures'' (10 CFR part 1021) on April 24, 1992 (57 FR 15122), revised these regulations on five subsequent occasions,[1] and now revises these regulations again with this rule.

NEPA establishes three types of environmental review for Federal proposed actions—environmental impact statement, environmental assessment, and categorical exclusion—each involving different levels of information and analysis. An environmental impact statement is a detailed analysis of reasonably foreseeable environmental effects prepared for a major Federal action significantly affecting the quality of the human environment (42 U.S.C. 4332(2)(C) and 40 CFR part 1502 and section 1508.1(j)). An environmental assessment is a concise public document prepared by a Federal agency to set forth the basis for its finding of no significant impact or its determination that an environmental impact statement is necessary (42 U.S.C. 4336(b)(2) and 40 CFR 1501.5, 1501.6, and 1508.1(h)). A categorical exclusion is a category of actions that the agency has determined, as established in its agency NEPA procedures, normally does not have a significant effect on the human environment and therefore does not require preparation of an environmental assessment or environmental impact statement (40 CFR 1501.4, 1507.3(e)(2)(ii), and 1508.1(d)). DOE's procedures for applying categorical exclusions require the Department to consider several conditions (described in section II of this document), including whether extraordinary circumstances exist such that a normally excluded action may have a significant environmental effect.

II. Establishment and Use of Categorical Exclusions

CEQ issued guidance in 2010 on establishing, applying, and revising categorical exclusions under NEPA (75 FR 75628; December 6, 2010). CEQ explained, ''Categorical exclusions are

[1] July 9, 1996 (61 FR 36222), December 6, 1996 (61 FR 64603), August 27, 2003 (68 FR 51429), October 13, 2011 (76 FR 63764), and December 4, 2020 (85 FR 78197).

not exemptions or waivers of NEPA review; they are simply one type of NEPA review. To establish a categorical exclusion, agencies determine whether a proposed activity is one that, on the basis of past experience, normally does not require further environmental review. Once established, categorical exclusions provide an efficient tool to complete the NEPA environmental review process for proposals that normally do not require more resource intensive [environmental assessments or environmental impact statements]. The use of categorical exclusions can reduce paperwork and delay, so that [environmental assessments or environmental impact statements] are targeted toward proposed actions that truly have the potential to cause significant environmental effects.''

DOE establishes and revises categorical exclusions pursuant to a rulemaking, such as this one, for defined classes of actions that the Department determines are supported by a record showing that the actions normally do not have significant environmental impacts, individually or cumulatively. To establish the record in this rulemaking, DOE evaluated environmental assessments prepared by DOE and by other Federal agencies, categorical exclusions established by DOE and by other Federal agencies, categorical exclusion determinations, technical reports, applicable requirements, industry practices, and other publicly available information. DOE summarized this information in the preamble to the notice of proposed rulemaking and in a Technical Support Document that was issued alongside the notice of proposed rulemaking (88 FR 78681; November 16, 3023). DOE provided the public with an opportunity to review and comment on DOE's proposed changes. DOE reviewed all comments received on the notice of proposed rulemaking, added information to the Technical Support Document, revised the categorical exclusions addressed in this rule (section III of this document), and prepared responses to public comments (section IV of this document).

In addition to developing a substantiation record to support the establishment or revision of a categorical exclusion, DOE also conducts a project-specific environmental review when determining whether one or more categorical exclusions applies to a proposed action. This entails evaluation of a proposed action against several requirements included in DOE's NEPA regulations. DOE must determine on a case-by-case basis, in accordance with 10 CFR 1021.410(b), that: (1) the proposed action fits within a categorical exclusion listed in appendix A or B to subpart D of part 1021, including (in the case of categorical exclusions listed in appendix B) the integral elements set forth in appendix B; (2) there are no extraordinary circumstances [2] related to the proposal that may affect the significance of the environmental impacts of the proposed action and require preparation of an environmental assessment or environmental impact statement, consistent with 40 CFR 1501.4(b)(1) and (b)(2); and (3) the proposal has not been improperly segmented [3] to meet the definition of a categorical exclusion, there are no connected or related actions with cumulatively significant impacts, and the proposed action is not precluded by 40 CFR 1506.1 or 10 CFR 1021.211 as an impermissible interim action.

As part of its determination of whether the proposed action fits within a categorical exclusion, DOE evaluates whether the proposed action satisfies conditions included within the text of the individual categorical exclusion. These conditions are discussed generally in this section and in more detail in section III of this document, which describes the changes that DOE is making in this final rule. For example, each of the categorical exclusions included in this rulemaking contains requirements that the proposed action incorporate applicable standards and follow best management practices. These standards and practices can vary by technology and location. Also, they change over time to reflect lessons learned and to address emerging technologies and practices. The Technical Support Document provides links to and summarizes information on some of the relevant standards and best management practices for the categorical exclusions that are included in this rulemaking. As another example, the changes included in this rulemaking specify conditions regarding siting proposed actions on previously disturbed or developed land. DOE defines previously disturbed or developed as ''land that has been changed such that its functioning ecological processes have been and remain altered by human activity. The phrase encompasses areas that have been transformed from natural cover to non-native species or a managed state, including, but not limited to, utility and electric power transmission corridors and rights-of-way, and other areas where active utilities and currently used roads are readily available'' (10 CFR 1021.410(g)(1)). As DOE explained in a 2011 notice of proposed rulemaking, ''In DOE's experience, the potential for certain types of actions to have significant impacts on the human environment is generally avoided when that action takes place within a previously disturbed or developed area, *i.e.,* land that has been changed such that the former state of the area and its functioning ecological processes have been altered'' (76 FR 218; January 3, 2011). DOE's experience reviewing proposed projects across the United States since 2011 supports this same conclusion. As another example, in categorical exclusion B4.14 for certain energy storage systems, DOE allows siting within a small area contiguous to a previously disturbed or developed area. DOE also has more than a decade of experience implementing categorical exclusions that allow construction on land that is contiguous to previously disturbed or developed areas. The area of contiguous land affected would be small as discussed in 10 CFR 1021.410(g)(2). Any proposed use of contiguous land is subject to review against all the conditions relevant to the categorical exclusion, including the integral elements that require consideration of effects on threatened and endangered species and their habitat, historic properties, and other environmentally sensitive resources. The Technical Support Document includes summaries of environmental assessments for projects proposed on previously disturbed or developed land and on contiguous land.

As previously noted, DOE's NEPA regulations also include ''integral elements'' that apply to all categorical exclusions listed in appendix B to subpart D of part 1021 (appendix B, paragraphs (1) through (5)). Although the integral elements are not repeated for each categorical exclusion, they are part of the definition of each categorical exclusion listed in appendix B, and DOE must consider them as part of its determination whether the proposed action fits within a categorical exclusion (10 CFR 1021.410(b)(1)). Integral elements require that, to fit within a categorical exclusion, the proposed action must not threaten a violation of applicable environment, safety, and

[2] DOE defines extraordinary circumstances as ''unique situations presented by specific proposals, including, but not limited to, scientific controversy about the environmental effects of the proposal; uncertain effects or effects involving unique or unknown risks; and unresolved conflicts concerning alternative uses of available resources.'' (10 CFR 1021.410(b)(2))

[3] Segmentation can occur when a proposal is broken down into smaller parts in order to avoid the appearance of significance of the total action. (10 CFR 1021.410(b)(3))

health requirements; require siting and construction or major expansion of waste storage, disposal, recovery, or treatment facilities; disturb hazardous substances, pollutants, or contaminants that preexist in the environment such that there would be uncontrolled or unpermitted releases; have the potential to cause significant impacts on environmentally sensitive resources; or involve governmentally designated noxious weeds or invasive species, unless certain conditions are met.[4] DOE defines ''environmentally sensitive resource'' as a resource that has typically been identified as needing protection through Executive order, statute, or regulation by Federal, state, or local government, or a federally recognized Indian tribe. Environmentally sensitive resources include historic properties, threatened and endangered species or their habitat, floodplains, and wetlands, among others (10 CFR part 1021, subpart D, appendix B).

In determining whether a proposed action fits within a categorical exclusion, DOE may review information provided by an applicant, in its application and during follow-up requests; information from systems maintained by DOE, another Federal agency, or external party (*e.g.,* geographic information systems); information from site visits; information from discussions or consultations with Federal, state, local, or tribal governments; and information from other sources as needed. At any point during this review, DOE can determine that additional information is needed to make a categorical exclusion determination or decide to prepare an environmental assessment or environmental impact statement.

Only if DOE determines that all the applicable requirements and conditions of the categorical exclusion (including the integral elements, as applicable) have been met will it proceed to review the proposed action for extraordinary circumstances, and potentially proceed to issue a categorical exclusion determination. DOE regularly posts its categorical exclusion determinations at *www.energy.gov/nepa/doe-categorical-exclusion-cx-determinations.*

III. Changes Made in This Final Rule

A. Overview

In this final rule, DOE adds a categorical exclusion for certain energy storage systems and revises categorical exclusions for upgrading and rebuilding powerlines and for solar photovoltaic (PV) systems. DOE also makes conforming changes to other categorical exclusions, to a class of actions normally requiring an environmental assessment, and to a class of actions normally requiring an environmental impact statement (10 CFR part 1021, subpart D, appendices B, C, and D). DOE's process for developing the proposed changes is described in the notice of proposed rulemaking. The final changes, including differences from what was included in the notice of proposed rulemaking, are discussed in sections III.B through III.D of this final rule. These changes do not require any changes to or otherwise affect categorical exclusion determinations completed prior to the effective date of this final rule.

In addition, the notice of proposed rulemaking mistakenly included the text of paragraph (b) of categorical exclusion B5.1, Actions to conserve energy or water, and a new paragraph at B5.1(c). DOE did not intend to include that regulatory text in the notice of proposed rulemaking and has removed it from this final rule. DOE is not making changes to categorical exclusion B5.1 paragraph (b) or adding paragraph (c) at this time but may propose such changes in a future rulemaking.

B. Changes to Categorical Exclusion B4.13 for Upgrading and Rebuilding Existing Powerlines and Related Provisions

Powerlines are a critical component of the electric grid that move electricity from facilities that generate electricity to our communities, businesses, and factories. Upgrading and rebuilding[5] powerlines extends their useful life. Upgrades and rebuilds also can help reduce the need for new powerlines and can allow the replacement of components with newer, more efficient and resilient technology.

One example is reconductoring. Conductors are the wires that carry electricity. Most of the existing electric grid uses conductors with a steel core for strength surrounded by aluminum for the electrical current. More recently, conductor designs (referred to as advanced conductors) with composite or carbon cores, in place of steel, have come into use. Advanced conductors provide a variety of benefits including increased capacity. By increasing the capacity of powerlines it is possible to integrate renewable energy and other sources of electricity into the grid without the need to build new powerlines. Use of advanced conductors reduces line losses (*i.e.,* power lost during transmission and distribution of electricity) relative to traditional conductors, thereby improving efficiency.[6] Improvements to capacity and efficiency can help to ensure reliability, reduce costs to consumers, and reduce greenhouse gas (GHG) emissions associated with electricity generation, transmission, and distribution.

Upgrading and rebuilding powerlines also can avoid or reduce adverse environmental impacts, such as by relocating small[7] segments of the existing line to avoid a sensitive environmental resource. Upgrading and rebuilding powerlines also can enhance resilience. For example, an upgrade or rebuild project might convert segments of existing overhead powerlines to underground lines or replace old powerline poles to ensure continued safe operations.

Categorical exclusion B4.13 currently applies to upgrading or rebuilding ''approximately 20 miles in length or less'' of existing powerlines and allows for minor relocations of small segments of powerlines. With this final rule, DOE removes the mileage limitation, adds options for relocating within an existing right-of-way or within otherwise previously disturbed or developed lands, specifies conditions for widening a right-of-way under this categorical exclusion to comply with applicable electrical standards, and adds new conditions.

The potential significance of environmental impacts from upgrading or rebuilding powerlines is more related to local environmental conditions than to the length of the powerlines. For example, the presence of environmentally sensitive resources along the existing right-of-way is more pertinent than the length of the existing powerlines to be upgraded or rebuilt. DOE reviewed environmental assessments for powerline upgrades and rebuilds of various lengths. (*See*

[4] This is a summary description of the integral elements. *See* 10 CFR part 1021, subpart D, appendix B for the full text.

[5] A transmission line rebuild is typically a replacement of conductor and equipment without increasing capacity. Transmission line design and new materials and equipment would meet current standards and electrical clearance requirements. A transmission line upgrade is typically a replacement of conductor and equipment, or the addition of sensors or other advanced technology, to increase the line's capacity, such as by increasing the operating voltage or increasing the temperature rating.

[6] Grid Strategies, LLC, ''Advanced Conductors on Existing Transmission Corridors to Accelerate Low Cost Decarbonization,'' March 2022, available at: *https://acore.org/wp-content/uploads/2022/03/Advanced_Conductors_to_Accelerate_Grid_Decarbonization.pdf.*

[7] *See* 10 CFR 1021.410(g)(2) for a discussion of ''small'' in the context of determining the applicability of a DOE categorical exclusion.

Technical Support Document, p. 2.) The length of the projects is based on the endpoints, which are commonly substations (*e.g.,* rebuild the powerline from substation A to substation B). Environmental assessments and other information summarized in the Technical Support Document, as well as DOE's experience with powerline upgrades and rebuilds, do not indicate a particular mileage limit that would mark a threshold for significant impacts. DOE's experience comes from operating transmission systems for more than 50 years that currently include more than 25,000 miles of powerlines.

In this final rule, DOE clarifies options for relocating powerlines within the scope of categorical exclusion B4.13. Relocating segments of a powerline can improve resilience, avoid sensitive resources, or serve other purposes. (*See* Technical Support Document, p. 13, DOE/EA–1967 for an example of relocation to avoid a rock fall and landslide area, thereby moving the powerline to a more stable area.) The prior version of B4.13 encompassed ''minor relocations of small segments of the powerlines.'' This final rule makes the change included in the notice of proposed rulemaking to delete ''minor'' because it is unnecessary to qualify ''relocations of small segments'' with ''minor.'' Also, DOE is revising B4.13 to specify that small segments of powerlines may be relocated ''within an existing powerline right of way or within otherwise previously disturbed or developed lands.'' The prior version of B4.13 did not include this limitation. In addition, DOE is making three clarifying changes in response to public comment on the notice of proposed rulemaking (discussed in section IV.B of this document). In this final rule, DOE adds ''powerline'' before ''right-of-way'' such that B4.13 now specifies that the categorical exclusion applies to projects ''within an existing powerline right-of way.'' The final rule also specifies that upgrading or rebuilding powerlines might include widening of an existing right-of-way to comply with electrical standards (*e.g.,* increasing voltage may require a wider clearance to either side of the powerline to avoid fires or other accidents).

Commenters sought clarification regarding whether and how B4.13 includes widening of a right-of-way. A right-of-way may need to be widened to meet electrical standards due to a variety of factors associated with powerline upgrades and rebuilds such as changes in voltage, type of conductor (wires carrying the electrical current), and span length (distance between poles or towers). This widening keeps the area around a powerline clear of vegetation and other potential hazards to reduce risk of fires, power outages, and other accidents. (*See* Technical Support Document, p. 36.) Widening a right-of-way was part of the scope of the version of categorical exclusion B4.13 in effect prior to this final rule. (*See,* Technical Support Document, p. 18, Categorical Exclusion Determination for the Palisades-Swan Valley Transmission Line Rebuild for a project requiring widening in some areas of the rebuild project.) In this final rule, DOE has added to categorical exclusion B4.13 that, ''Upgrading or rebuilding existing electric powerlines also may involve widening an existing powerline right-of-way to meet current electrical standards if the widening remains within previously disturbed or developed lands and only extends into a small area beyond such lands as needed to comply with applicable electrical standards.''

Finally, DOE clarifies that the ''categorical exclusion does not apply to underwater powerlines.'' These changes in the final rule better state DOE's intention for the changes included in the notice of proposed rulemaking.

The revisions to categorical exclusion B4.13 included in this final rule provide additional flexibility for powerline upgrade and rebuild projects consistent with the requirements for a categorical exclusion. While DOE has removed the mileage limit, DOE will continue to apply the conditions, including integral elements, described in section II of this document when deciding whether a particular proposed action qualifies for categorical exclusion B4.13. This review includes consideration of extraordinary circumstances and integral elements, such as the potential for significant impacts on environmentally sensitive resources, amongst other considerations. At any point during the review of a proposed action, DOE may determine that it must prepare an environmental assessment or environmental impact statement, rather than apply categorical exclusion B4.13 to the proposed action. In other words, inclusion of the revised categorical exclusion B4.13 in DOE's regulations does not bring all powerline upgrade or rebuild projects within the scope of the revised categorical exclusion.

DOE's review of environmental assessments and other information in preparing this rulemaking revealed that proposals to upgrade or rebuild powerlines normally incorporate practices that avoid or reduce potential land disturbance, erosion, disturbance of environmentally sensitive resources, and take other measures to protect the environment in the project area. To account for this, DOE has added a condition requiring that, to qualify for the categorical exclusion, the proposed project be in accordance with applicable requirements and incorporate appropriate design and construction standards, control technologies, and best management practices. This condition, together with the integral elements and consideration of extraordinary circumstances (described in section II of this document), will help to ensure that a proposed upgrade or rebuild of an existing powerline would be sited and designed appropriately.

DOE also is making a conforming change to its class of action, C4, that normally requires an environmental assessment for upgrading and rebuilding existing powerlines more than approximately 20 miles in length. That conforming change removes the reference to powerline length and, instead, clarifies that an environmental assessment normally would be prepared when the proposed action does not qualify for categorical exclusion B4.13.

C. New Categorical Exclusion B4.14 for Certain Energy Storage Systems and Related Provisions

For purposes of this rulemaking, an energy storage system is a device or group of devices assembled together, capable of storing energy in order to supply electrical energy at a later time. Energy storage can be used to integrate renewable energy (such as wind and solar energy) into the electric grid, help generation facilities operate at optimal levels to meet customer demand, and reduce the use of less efficient generating units that would otherwise run only at peak times. An energy storage system also provides protection from power interruptions and serves as reserve power in case of power outages or fluctuations. The most familiar type of energy storage system is a group of electrochemical batteries and associated equipment referred to as a battery energy storage system. Another form uses a flywheel, which converts excess electricity from the grid to kinetic energy in a fast-spinning rotor. As needed, the stored energy is converted back to electricity and returned to the grid or put to other use.

DOE and others have been developing large-scale energy storage systems for decades. Deployment of these systems has increased over the past decade. Today, energy storage systems support the operation of electric transmission facilities, microgrids, energy generation

facilities, and commercial and industrial facilities.[8]

In this rule, DOE establishes a new categorical exclusion, B4.14, for the construction, operation, upgrade, or decommissioning of an electrochemical-battery or flywheel energy storage system within a previously disturbed or developed area or within a small area contiguous to a previously disturbed or developed area. Section II of this document includes discussion of DOE's definition of previously disturbed or developed area and DOE's experience referring to contiguous areas in its categorical exclusions. The total acreage used for an energy storage system will be defined by the needs of the proposed project. Based on past experience, DOE anticipates that energy storage systems typically require 15 acres or less and would be sited close to energy, transmission, or industrial facilities. (*See* Technical Support Document, p. 41.) Consistent with this expectation and because contiguous land might be undisturbed and undeveloped, DOE proposed that siting outside a previously disturbed or developed area be limited to a ''small'' contiguous area. DOE would determine whether a contiguous area is small, based on the criteria discussed in 10 CFR 1021.410(g)(2), ''in the context of the particular proposal, including its proposed location. In assessing whether a proposed action is small, in addition to the actual magnitude of the proposal, DOE considers factors such as industry norms, the relationship of the proposed action to similar types of development in the vicinity of the proposed action, and expected outputs of emissions or waste. When considering the physical size of a proposed facility, for example, DOE would review the surrounding land uses, the scale of the proposed facility relative to existing development, and the capacity of existing roads and other infrastructure to support the proposed action.'' In addition, the notice of proposed rulemaking included conditions that the proposed project be in accordance with applicable requirements (such as land use[9] and zoning requirements) and incorporate appropriate design and construction standards, control technologies, and best management practices. For this final rule, DOE includes those conditions and, in response to public comment, adds a condition that the proposed project also incorporate appropriate ''safety standards (including the current National Fire Protection Association 855, Standard for the Installation of Stationary Energy Storage Systems).'' (*See* section IV.C of this document and Technical Support Document, p. 56.) In addition, DOE would ensure that the proposed project satisfies the integral elements and review the proposal for extraordinary circumstances, as described in section II of this document. This review ensures that DOE considers the potential environmental effects of a proposed energy storage system prior to determining whether categorical exclusion B4.14 applies. In proposing this categorical exclusion, DOE evaluated environmental assessments and findings of no significant impact prepared by DOE and other Federal agencies, categorical exclusion determinations made by DOE, and other information. In response to public comment on the notice of proposed rulemaking, DOE also reviewed additional information on accidents, fires, and other safety considerations, including guidance to improve safety and minimize the risk of fires. (*See* Technical Support Document, p. 41.)

For consistency with the new categorical exclusion B4.14, DOE made changes to three related categorical exclusions. Based on its past experience with energy storage systems, in 2011, DOE added ''power storage (such as flywheels and batteries, generally less than 10 MW)'' as an example of conservation actions in categorical exclusion B5.1, Actions to conserve energy or water. DOE also added ''load shaping projects (such as the installation and use of flywheels and battery arrays)'' to the list of example actions in categorical exclusion B4.6, Additions and modifications to transmission facilities. In this final rule, DOE has deleted ''power storage (such as flywheels and batteries, generally less than 10 MW)'' from the examples in B5.1. DOE does not include the 10 MW (megawatt) limit in new categorical exclusion B4.14 because capacity, whether denominated in megawatts as a measure of instantaneous output or megawatt-hours as a measure of the total amount of energy capable of being stored, is not a reliable indicator of potential environmental impacts. Including a capacity limit within the categorical exclusion could mean that technology improvements resulting in more power storage within the same physical footprint may not qualify for the categorical exclusion even though the potential environmental impacts have not changed. DOE also deleted the example of flywheels and battery arrays from B4.6 but retained the reference to ''load shaping projects'' and added ''reducing energy use during periods of peak demand'' as a new example. DOE added a note to B4.6 that energy storage systems are addressed in B4.14. DOE also added this note to categorical exclusion B4.4, Power marketing services and activities, which was established in 1992 and lists storage and load shaping as examples. These conforming changes will avoid confusion over which categorical exclusion and associated conditions apply to energy storage systems.

D. Changes to Categorical Exclusion B5.16 for Solar Photovoltaic Systems and Related Provisions

Solar PV technology converts sunlight into electrical energy. Individual PV cells, which may produce only 1 or 2 watts of electricity, are connected together to form modules (otherwise known as panels). The modules are combined with other components (*e.g.,* to convert electricity from direct current (DC) to alternating current (AC)) to create a solar PV system. These systems can be located in a wide variety of locations and sized for an individual home or business up to utility-scale, generating hundreds of megawatts.[10]

Solar PV systems do not release GHGs while operating, though, as with any industrial activity, manufacturing and installing solar PV systems can release GHGs. The U.S. Energy Information Administration reports that, ''Studies conducted by a number of organizations and researchers have concluded that PV systems can produce the equivalent amount of energy that was used to manufacture the systems within 1 to 4 years. Most PV systems have operating lives of up to 30 years or more.'' [11] Thus, on a life-cycle basis, solar PV systems provide many years of electricity generation without GHG emissions.

DOE established categorical exclusion B5.16, Solar photovoltaic systems, in 2011 to include the installation,

[8] The U.S. Energy Information Administration published information about large-scale energy storage for electricity generation (*www.eia.gov/energyexplained/electricity/energy-storage-for-electricity-generation.php*) and market trends for battery storage (*www.eia.gov/analysis/studies/electricity/batterystorage/*). Also, DOE published an energy storage market report in 2020 (*www.energy.gov/sites/prod/files/2020/12/f81/Energy%20Storage%20Market%20Report%202020_0.pdf*).

[9] On DOE sites and in other locations, land use planning may be documented in a site land use plan, or be subject to siting processes or other comparable systems. Use of land use and zoning requirements is inclusive of these processes.

[10] DOE's Solar Energy Technologies Office has a website that describes solar PV technologies (*www.energy.gov/eere/solar/solar-photovoltaic-technology-basics*).

[11] U.S. Energy Information Administration ''Solar explained'' available at *www.eia.gov/energyexplained/solar/solar-energy-and-the-environment.php;* retrieved March 21, 2024.

modification, operation, and removal of solar PV systems located on a building or other structure or, if located on land, within a previously disturbed or developed area generally comprising less than 10 acres. In this final rule, DOE changes ''removal'' of a solar PV system to ''decommissioning.'' Decommissioning encompasses recycling and other types of actions that occur when a facility is taken out of service. DOE also removes the acreage limitation for proposed projects. Based on DOE's experience, acreage is not a reliable indicator of potential environmental impacts. As discussed in section II of this document, the potential significance of environmental impacts is more related to local environmental conditions than to acreage. DOE's review of various environmental assessments indicate that an acreage limit would not serve as an appropriate indicator of significant impacts. This conclusion is illustrated, for example, by environmental assessments for solar PV projects larger than 1,000 acres on previously disturbed or developed land that would not result in significant environmental impacts. (*See* Technical Support Document, p. 74.)

The nature and significance of environmental impacts is determined by a proposed project's proximity to and potential effects on environmentally sensitive resources and other conditions that are accounted for in categorical exclusion B5.16, including in the integral elements and in extraordinary circumstances, as described in section II of this document. DOE will consider the integral elements and the presence of any extraordinary circumstances when reviewing a proposed solar PV project's eligibility for this categorical exclusion. This review would ensure that DOE considers potential environmental impacts of a proposed solar PV system prior to determining whether categorical exclusion B5.16 applies. For example, in preparing the Technical Support Document, DOE observed that some large solar PV systems have been proposed for agricultural land. While integrating solar PV systems with farms may provide a variety of economic and environmental benefits to farmers,[12] doing so also raises questions about land use and the protection of important farmlands. One of the integral elements requires that the project must not be one that would have the potential to cause significant impacts on environmentally sensitive resources, including on prime or unique farmland, or other farmland of statewide or local importance (10 CFR part 1021, appendix B, paragraph (4)(v)). The requirement to consider extraordinary circumstances also will help ensure that DOE considers potential impacts on farmland and surrounding communities when deciding whether to apply the categorical exclusion.

Public comments raised concern about impacts of solar PV systems on wildlife and habitat. (*See* section IV.D.2 of this document.) In response to those concerns and to clarify DOE's intent, DOE has added a condition that the proposed project be ''consistent with applicable plans for the management of wildlife and habitat, including plans to maintain habitat connectivity.'' Further, one of the integral elements applicable to categorical exclusion B5.16 requires that the project must not be one that would have the potential to cause significant impacts on environmentally sensitive resources, including threatened or endangered species or their habitat (10 CFR part 1021, appendix B, paragraph (4)(ii)). The conditions added to B5.16 better ensure that solar PV systems are installed and operated in a manner that is protective of all species and their habitat.

DOE also has made conforming changes in appendix C, Classes of Actions that Normally Require EAs but not Necessarily EISs, and in appendix D, Classes of Actions that Normally Require EISs. These appendices each include a class of actions, C7 and D7, that associates the level of NEPA review for interconnection requests and power acquisition with the power output of the electric generation resource. In 2011, DOE proposed for C7 that an environmental assessment normally would be required for the interconnection of, or acquisition of power from, new generation resources that are equal to or less than 50 average megawatts ''and that would not be eligible for categorical exclusion under 10 CFR part 1021'' (76 FR 233; January 3, 2011). DOE did not receive public comment on the proposed addition regarding categorical exclusion eligibility. In the 2011 final rule, DOE did not include the condition regarding eligibility for a categorical exclusion. DOE explained this decision by stating ''to improve clarity, DOE is removing the previously proposed condition that the new generation resource 'would not be eligible for categorical exclusion under this part.' DOE normally would not prepare an environmental assessment when a categorical exclusion would apply. Therefore, the condition is unnecessary and potentially confusing'' (76 FR 63784; October 13, 2011). DOE's practice continues to be that it ''normally would not prepare an environmental assessment when a categorical exclusion would apply.'' However, in light of the change to B5.16—which removes the acreage restriction for solar PV systems, thereby allowing the categorical exclusion to apply to systems generating up to hundreds of megawatts—DOE believes that including a condition in C7 is appropriate and helpful. It will clarify DOE's practice that an environmental assessment is normally required ''unless the generation resource is eligible for a categorical exclusion.'' DOE did not propose a similar condition in 2011 for D7, which applies to new generation resources greater than 50 average megawatts. DOE has added the same condition to both C7 and D7 for the reasons previously described. For D7, DOE also specifies that an environmental impact statement is not required when an environmental assessment was prepared that resulted in a finding of no significant impact. This is standard practice, and DOE added this text only to avoid any potential confusion.

IV. Comments Received and DOE's Responses

DOE published a Request for Information (RFI) in the **Federal Register** on November 15, 2022 (87 FR 68385), to help DOE identify activities associated with clean energy projects and clean energy infrastructure that should be considered for new or revised categorical exclusions. Thirty-three individuals or entities responded to the Request for Information.[13] DOE responded to those comments relevant to this rulemaking in the notice of proposed rulemaking and does not repeat those responses here.

The notice of proposed rulemaking (88 FR 78681; November 16, 3023) announced a public review period ending on January 2, 2024. In response to public requests, DOE subsequently extended the public review period through January 16, 2024 (88 FR 88854; December 26, 2023). DOE received approximately 115 comment submittals from individuals, industry trade groups, environmental and community organizations, state, Tribal, and local governments, and other entities. DOE has considered the comments on the proposed rulemaking received during the public comment period as well as all late comments. DOE has incorporated

[12] U.S. Energy Information Administration ''Solar explained'' available at *www.eia.gov/energyexplained/solar/solar-energy-and-the-environment.php;* retrieved March 21, 2024.

[13] The Request for Information and public comments are available at *www.regulations.gov/docket/DOE-HQ-2023-0002/comments.*

some revisions suggested in these comments into the final rule. The following discussion describes the comments received, provides DOE's response to the comments, and describes changes to the rule resulting from public comments. Section IV.A of this document includes comment summaries and responses that address DOE's proposed revisions collectively or address related topics such as NEPA implementation. Sections IV.B, IV.C, and IV.D include comment summaries and DOE's responses regarding powerline upgrades and rebuilds, energy storage systems, and solar photovoltaic systems, respectively.

A. General Comments on Proposed Amendments

DOE received comments that expressed support for the rulemaking, as well as comments in opposition to the proposed rulemaking. DOE appreciates the commenters adding their perspectives to the rulemaking process. DOE responds to those comments that included detailed feedback on the proposed rulemaking.

1. Comments Supporting An Expansion of the Rulemaking

Some commenters requested that DOE expand this rulemaking to add additional categorical exclusions for clean energy technologies, electricity transmission, and related programs. These comments include suggestions to add categorical exclusions for carbon capture, utilization, and storage, including the installation of direct air capture technologies; geothermal exploration, permitting, and development; hydrogen pipelines, production, and combustion; adding capacity and making improvements to existing water power facilities; energy generation projects that qualify for investment or production tax credits under the Inflation Reduction Act; small-scale, renewable natural gas projects; small-scale nuclear power reactors (generally less than 350 megawatts); wind power; and other clean energy projects. Comments also suggested that DOE add categorical exclusions for interstate and interregional transmission lines; high-voltage direct current transmission lines; and microgrids. In addition, comments suggested that DOE add new categorical exclusions for vegetation management and expand the list of examples included in DOE's existing categorical exclusion for actions to conserve energy or water (B5.1).

DOE considered each of these comments and decided not to modify this rule to include these suggested new or revised categorical exclusions. DOE currently lacks sufficient technical support to determine whether the suggested activities normally do not result in significant environmental impact. Also, DOE noted that several of the suggestions overlap with DOE's existing categorical exclusions. For example, DOE has applied its existing categorical exclusions to microgrid projects and vegetation management, and DOE's existing categorical exclusions for powerline projects apply to high-voltage direct current lines and alternating current lines. DOE would need to evaluate whether changes to the scope of its existing categorical exclusions would be appropriate. DOE will retain the comments for further consideration in any future rulemaking regarding DOE's NEPA procedures.

2. Comments Regarding NEPA and Other Environmental Requirements

Commenters noted that implementation of DOE's proposed changes may be affected by the pending Phase 2 revisions of the CEQ NEPA Implementing Regulations.[14] Some commenters recommended coordination with CEQ on this rulemaking to ensure consistency, while other commenters requested that this rulemaking not proceed until CEQ has promulgated its final rule. DOE consulted with CEQ while preparing this rule consistent with consultation requirements in the CEQ regulations (40 CFR 1507.3(b). This consultation included consideration of whether DOE's changes are consistent with the CEQ regulations.

Other commenters stated that clear environmental regulations and guidelines for the different technologies are still needed and therefore this rulemaking is premature. DOE recognizes that environmental requirements and practices will continue to change as technology advances and awareness increases about potential impacts and ways to avoid or lessen those impacts. DOE's categorical exclusions, including the ones addressed in this rulemaking, require projects to incorporate the requirements and best practices applicable at the time that DOE is considering whether to apply the categorical exclusion to a particular proposed action. In addition, DOE regularly reviews its categorical exclusions to determine whether they continue to be appropriate in light of new information and requirements.

Commenters recommended that DOE evaluate whether the proposed rulemaking could affect coastal uses or resources in states or territories with a Coastal Zone Management Program pursuant to the Coastal Zone Management Act. Commenters recommended that DOE adopt internal procedures to ensure compliance with the Coastal Zone Management Act regardless of the level of NEPA review. DOE recognizes that compliance with the Coastal Zone Management Act is an independent responsibility regardless of the level of NEPA review. DOE will continue its practice of coordinating with the relevant state agency to ensure compliance with the Coastal Zone Management Act, when applicable.

3. Comments Regarding Public Engagement

Some commenters expressed concern that the public comment periods on the Request for Information and notice of proposed rulemaking overlapped with the winter holiday season. DOE appreciates that there are competing schedule demands and that these may fall hardest on small organizations and community members. DOE provided an initial 45-day comment period for the Request for Information and reopened that public comment period for an additional 30 days, and DOE extended the 45-day comment period for the notice of proposed rulemaking by 14 days to provide interested individuals and organizations additional time to provide comments. DOE received comments from a broad range of organizations and individuals who raised many substantive issues.

Commenters emphasized the importance of public involvement in decision-making, expressing that under NEPA, affected communities must be able to voice their concerns about projects, especially on public lands. Some commenters stated that creating a categorical exclusion removes safeguards for communities and investigation of adverse impacts, including cumulative impacts. Other commenters stated that the applicability criteria of the proposed rule would require substantive review by DOE to identify a project's eligibility for a categorical exclusion followed by DOE's consideration of the individual conditions in the categorical exclusion, which would deprive DOE of anticipated efficiencies at the expense of public participation. Commenters requested that DOE provide public comment opportunities for categorical exclusion determinations. While DOE may choose to provide opportunities for public comment at any time, DOE's normal practice is not to request public comment before making a categorical exclusion determination. This is

[14] *See* CEQ's notice of proposed rulemaking published on July 31, 2023 (88 FR 49924).

consistent with CEQ and DOE NEPA regulations.

Commenters asked DOE to post categorical exclusion determinations (including sufficient information to demonstrate proper use) that rely on the proposed categorical exclusions on the DOE website in a timely fashion for public review. DOE's practice is to post categorical exclusion determinations for actions listed in appendix B of its NEPA regulations, which includes all of the categorical exclusions included in this rulemaking, on the DOE website generally within two weeks of the determination (10 CFR 1021.410(e) and *www.energy.gov/nepa/doe-categorical-exclusion-cx-determinations*). A categorical exclusion determination includes a description of the proposed action, the categorical exclusion(s) applied, and confirmation that conditions associated with the categorical exclusion(s) were satisfied.

4. Comments Regarding Tribal Resources

A federally recognized Indian Tribe expressed concern about the potential impacts of DOE's proposed rule on its treaty reserved rights and cultural resources and practices. As explained in section II of this document, DOE conducts an environmental review at both the stage of establishing or revising a categorical exclusion and at the stage of determining whether one or more categorical exclusions applies to a proposed action. This final rule establishes and revises categorical exclusions in DOE's NEPA procedures; this final rule will not result in environmental impacts and is not a proposal to apply any categorical exclusion to particular proposed actions. When determining whether one or more categorical exclusions applies to a proposed action, DOE conducts a project-specific environmental review. This review includes consideration of extraordinary circumstances and integral elements, including the potential for significant impacts on environmentally sensitive resources, amongst other considerations. ''An environmentally sensitive resource is typically a resource that has been identified as needing protection through Executive order, statute, or regulation by Federal, state, or local government, or a federally recognized Indian Tribe'' (10 CFR part 1021, appendix B, paragraph (4)). Environmentally sensitive resources include ''(i) Property (such as sites, buildings, structures, and objects) of historic, archeological, or architectural significance designated by a Federal, state, or local government, Federally recognized Indian tribe, or Native Hawaiian organization, or property determined to be eligible for listing on the National Register of Historic Places'', among others (10 CFR part 1021, subpart D, appendix B).

B. Comments Regarding Upgrading and Rebuilding Powerlines

1. Comments Requesting Clarifications Regarding Categorical Exclusion B4.13

Commenters asked DOE to clarify that categorical exclusion B4.13 would apply to projects that receive Federal loans or grants and not only to transmission lines that impact Federal land. Other commenters requested clarification that categorical exclusion B4.13 covers all types of powerlines, including powerlines that feed into a Federal electric transmission system. DOE clarifies here that categorical exclusion B4.13 could apply to proposals for DOE financial assistance, including loans and grants, as well as any other DOE action subject to NEPA, so long as the proposed action satisfies all conditions of the categorical exclusion.

Commenters asked DOE to clarify whether the scope of categorical exclusion B4.13 includes improvements to existing maintenance and repair access roads that are not used for powerline upgrades or rebuilds. Commenters noted that existing access roads may not be suitable for the types of heavy construction equipment associated with rebuilding powerlines and that use of large construction equipment for rebuild projects may require improving existing access roads, such as widening roads, clearing surrounding trees, and adding gravel for stability to allow work under varying weather conditions. DOE responds that categorical exclusion B4.13 could include improvements to, and reconstruction of, access roads, laydown areas, and related work that are part of the proposed action and would take place within the existing right-of-way or relocation area. DOE also could consider whether categorical exclusion B1.13, Pathways, short access roads, and rail lines, would be appropriate for certain needed access roads. Consistent with DOE's NEPA regulations, the full scope of the proposed action must satisfy all conditions of DOE's categorical exclusions, including the integral elements (10 CFR part 1021, subpart D, appendix B) and consideration of extraordinary circumstances, segmentation, and cumulative impacts (10 CFR 1021.410(b)). DOE also notes that where access roads are not suitable for heavy equipment, replacement poles and other equipment sometimes are delivered to the project site by helicopter.

Commenters requested that categorical exclusion B4.13 include use of existing transportation rights-of-way, including those owned by railroads and highways managed on the public's behalf. DOE recognizes that highway and railroad rights-of-way may be appropriate locations for new powerlines. However, different criteria were used to establish highway and railroad rights-of-way than would be used for new powerlines, and DOE does not have sufficient information at this time to support a categorical exclusion for such projects. DOE will retain the comment for potential consideration in a future NEPA rulemaking. Commenters also requested that DOE designate existing transportation rights-of-way as National Interest Electric Transmission Corridors (NIETCs) pursuant to Section 216 of the Federal Power Act. DOE appreciates this suggestion, but designating NIETCs is beyond the scope of this rulemaking.

Commenters asked that DOE ensure that use of categorical exclusion B4.13 be as transparent and clear as possible. Commenters requested that DOE clarify definitions of the applicable conditions, parameter language, and extraordinary circumstances that would determine applicability of the categorical exclusion. DOE responds that to provide transparency in the use of categorical exclusions, DOE began posting categorical exclusion determinations online in 2009. DOE will continue to regularly post categorical exclusion determinations for B4.13 and other categorical exclusions listed in appendix B of DOE's NEPA regulations (10 CFR part 1021, subpart D) at *www.energy.gov/nepa/doe-categorical-exclusion-cx-determinations.* DOE has added discussion of the conditions that apply to categorical exclusions in sections II, III, and IV of this final rule.

The proposed changes to categorical exclusion B4.13 included relocation of small segments of powerlines within an existing right-of-way or within otherwise previously disturbed or developed lands. Commenters requested that DOE narrow the categorical exclusion, such as by including only actions within the powerline's existing right-of-way, within a minor widening of the existing right-of-way within otherwise previously disturbed or developed lands, or within another existing utility or electric power transmission corridor or right-of-way where active utilities and currently used roads are readily available. DOE appreciates these suggestions but finds that they would limit flexibility to

relocate small sections of powerlines to previously disturbed or developed lands that are outside an existing powerline right-of-way and to widen a right-of-way as needed to meet electrical standards, including when the widening extends to a small area beyond previously disturbed or developed lands. Such relocation consistent with the conditions placed on the use of categorical exclusion B4.13 normally would not pose a potential for significant environmental impacts. (*See* Technical Support Document, p. 2.) Moreover, such relocation may allow improvements to environmental protection by moving small sections of a powerline around a sensitive resource.

Commenters requested clarification on whether the limitation that small segments of powerlines may be relocated within an existing right-of-way or within previously disturbed land encompasses rights-of-way other than that of the powerline being relocated. DOE intends this language to encompass other powerline rights-of-way so long as safety, reliability and other conditions are met. To help clarify this point, DOE added ''powerline'' so that the wording in this final rule is ''within an existing powerline right-of-way.'' Commenters asked that DOE clarify what is considered to be a right-of-way and pointed, as an example, to the Department of Transportation's definition of existing right-of-way for highway projects (23 CFR 771.117(c)(22)). The meaning of right-of-way varies by context. The right-of-way for a powerline may be defined through an agreement, such as an easement, with a private landowner, permit from a land management agency, or other mechanism conveying rights to construct and maintain the powerline and associated facilities. For purposes of this rulemaking, DOE is referring to the cleared right-of-way, *i.e.,* the right-of-way where vegetation management and other practices are necessary for safety reasons (*e.g.,* to avoid the potential to cause fire). The width of that cleared right-of-way is based on design criteria (*e.g.,* line voltage). (*See* Technical Support Document, p. 36.)

Commenters explained that when upgrading powerlines to a higher voltage, current electrical standards may require wider rights-of-way than were established when powerlines were built. Commenters recommended that categorical exclusion B4.13 include expansion of an existing right-of-way to meet current electrical standards and that DOE revise the categorical exclusion to state that small segments of powerlines may be relocated ''within or adjacent to'' an existing right-of-way. Commenters also expressed concern about the risk of fire being started by overhead powerlines. DOE includes in this final rule that categorical exclusion B4.13 encompasses widening of the cleared right-of-way to meet current electrical standards. As discussed in section III of this document, the categorical exclusion may only apply when such widening ''remains within previously disturbed or developed lands and only extends into a small area beyond such lands as needed to comply with applicable electrical standards.'' There are existing rights-of-way that are not bounded entirely by previously disturbed or developed lands. In such locations, it may be necessary to extend part of the right-of-way into undisturbed land in order to meet the applicable electrical code for the entire length of the powerline upgrade or rebuild project. It is common for the widening to be only about 40 feet or less (*i.e.,* 20 feet or less on each side of the right-of-way). Before deciding whether to apply categorical exclusion B4.13 for such widening, DOE would review the proposed action against all the conditions applicable to categorical exclusion B4.13, including integral elements and the consideration of extraordinary circumstances.

2. Comments Regarding Effects on Wildlife and Habitat

Some commenters stated that powerline projects may fragment or reduce habitat or otherwise adversely affect wildlife by removing trees, widening the right-of-way, creating greater barriers to animal movement, and in other ways. Commenters stated that some of the environmental assessments included in DOE's Technical Support Document involved projects that would remove hundreds of trees. These commenters suggested that DOE had overlooked the potential for significant environmental impacts from these effects on habitat and that an environmental assessment may be better able to account for these impacts. They referred to research linking habitat loss with declines in wildlife populations and to the deaths of birds by collision with powerlines and from electrocution.

Commenters recommended that relocating powerlines avoid bird travel routes and consider alternative designs and structures, visual cues, and other methods to avoid or reduce impacts to birds and other species and their habitats. DOE responds that these are common considerations in planning upgrades and rebuilds of existing powerlines, including relocating or widening rights-of way. DOE's integral elements require that the project must not be one that would have the potential to cause significant impacts on environmentally sensitive resources, including threatened or endangered species or their habitat or species protected under the Migratory Bird Treaty Act (10 CFR part 1021, appendix B, paragraph (4)(ii)). Categorical exclusion B4.13 also requires projects to incorporate appropriate design and construction standards, control technologies, and best management practices, which may include measures to reduce effects on birds. In addition, applicants must comply with all applicable state and Federal laws, including applicable requirements imposed by state wildlife agencies or Federal land management agencies, including to identify potential high-risk bird strike areas, identify shifts in bird flight patterns, and develop marking plans and design features to reduce associated risks. These requirements ensure that projects covered by categorical exclusion B4.13 will not have significant effects on birds.

Other commenters stated that managed lands in forested areas, including transmission line corridors, can provide early successional habitat for native bees and other pollinators, substantially improving species richness and abundance of bees relative to adjacent forest areas. Commenters also stated that transmission corridors can benefit some species of birds, deer, and plants. The ability of these corridors to provide areas for food, nesting, and shelter are enhanced with habitat management practices (such as leaving habitat trees, planting low-growing native vegetation, and removing invasive plant species), which typically accompany transmission development.

DOE recognizes that a combination of adverse and beneficial impacts can accompany upgrades and rebuilds of existing electric powerlines. As described in section II of this document, the terms of categorical exclusion B4.13, including the integral elements, ensure that projects would not have a significant effect on species and habitat. If a project does not satisfy these elements, or extraordinary circumstances exist that make significant effects likely, DOE must prepare an environmental assessment or environmental impact statement, rather than apply a categorical exclusion.

3. Comments Regarding Sulfur Hexafluoride

Commenters stated that transmission lines leak sulfur hexafluoride, a greenhouse gas 26,000 more times potent than carbon dioxide. For this final rule, DOE supplemented the

Technical Support Document with information regarding sulfur hexafluoride, a potent greenhouse gas that has a high global warming potential. Sulfur hexafluoride is used in gas-insulated switchgears, breakers, and lines in the transmission sector. Transmission operators follow manufacturer guidelines, state requirements, and federal handling and reporting requirements, including the Greenhouse Gas Reporting Program under the Clean Air Act, as applicable, for use and handling of sulfur hexafluoride. Improved engineering and equipment design, advances in leak detection and repair, and alternative insulating gases with lower global warming potentials have resulted in the reduction of sulfur hexafluoride emissions from the electric power sector over time. Further, upgrading and rebuilding powerlines with newer equipment that requires less or no sulfur hexafluoride or has reduced leakage rates and improved monitoring further contribute to a reduction in sulfur hexafluoride emissions across the electric transmission sector. (*See* Technical Support Document, p. 40.)

4. Comments Regarding Endangered Species Act Section 7 Consultations

Commenters stated the DOE could encourage programmatic Endangered Species Act Section 7 consultations for specific regions and cited the programmatic biological assessment prepared by DOE's Western Area Power Administration for wind energy development and interconnection requests in the Upper Great Plains Region as a relevant example. DOE responds that the referenced programmatic biological assessment analyzed information and identified a list of conservation measures for 28 species of concern. Western Area Power Administration and the U.S. Fish and Wildlife Service developed a review and approval system based on consistency forms and checklists of conservation measures for each species. If a wind project developer commits to implement the applicable conservation measures, Western Area Power Administration's consultation responsibilities under Section 7 of the Endangered Species Act are concluded when Western Area Power Administration and the U.S. Fish and Wildlife Service review and sign the consistency forms; no separate Section 7 consultation is required unless the particular project involves a listed species, critical habitat, or an effect that was not addressed in the programmatic biological assessment. DOE supports using programmatic consultations and similar approaches to improve the efficiency of implementing the Endangered Species Act, the National Historic Preservation Act, and other laws. These requirements are separate from the requirements of NEPA, and reliance on a categorical exclusion for NEPA compliance does not affect DOE's obligations under other laws.

5. Comments Regarding Effects on Communities

Commenters stated that, by affecting land previously unused as transmission line right-of-way, rerouting transmission lines may affect local land use, affect people's relation with their environment, and impact neighborhoods and communities. DOE recognizes that these are considerations in developing a proposal to reroute powerlines and relies on the terms of categorical exclusion B4.13, including the integral elements, and the consideration of extraordinary circumstances to ensure that projects would not have a significant effect on communities.

6. Comments Regarding Technical Support for Revisions to Categorical Exclusion B4.13

Commenters stated that the environmental assessments included in the Technical Support Document for the notice of proposed rulemaking were prepared for projects in the Bonneville Power Administration and Western Are Power Administration systems. However, the categorical exclusion could be applied to projects in any region of the United States. In response to this comment, DOE reviewed seven additional environmental assessments and findings of no significant impact prepared by other Federal agencies for powerline upgrade or rebuild projects in Kentucky, Minnesota, Mississippi, Missouri, North Dakota, and Wisconsin. These NEPA documents support DOE's determination that powerline upgrade and rebuild projects normally do not pose a potential for significant environmental impacts. DOE added these seven environmental assessments to the Technical Support Document for this final rule.

Commenters also pointed to the environmental assessment for Midway Benton No. 1 Rebuild Project as an example of where project changes were needed to lower potential environmental impacts. DOE included a wide and diverse range of environmental assessments in the Technical Support Document. These environmental assessments and findings of no significant impact demonstrate that, in the aggregate, these types of projects normally do not pose a potential for significant environmental impact and, thus, are appropriate for a categorical exclusion. DOE stated in the Technical Support Document for the notice of proposed rulemaking that, ''Inclusion of these environmental assessments does not mean that the proposed projects would have qualified for any categorical exclusion as proposed in this rulemaking. That determination would be made on a case-by-case basis.'' (*See* Technical Support Document, p. 1.) DOE did not intend to indicate that it had determined that a categorical exclusion would have been appropriate for that project. Rather, DOE found that consideration of the environmental assessment for the Midway Benton No. 1 Rebuild Project, along with other information in the Technical Support Document, helped DOE understand whether the proposed revisions to categorical exclusion B4.13 are appropriate. DOE will continue to consider each proposed project on its own merits in deciding whether to apply a categorical exclusion or prepare an environmental assessment or environmental impact statement.

7. Comments Regarding Underwater Powerlines

Commenters stated that the scope of categorical exclusion B4.13 should not include upgrading and rebuilding existing offshore, underwater powerlines. These commenters referred to potential adverse environmental impacts resulting from the propellers on boats used during upgrade and rebuild projects, trenching, turbidity, boulder relocation, and electric fields. DOE did not intend that categorical exclusion B4.13 would include underwater powerlines. DOE has added a statement in this final rule specifying that the categorical exclusion does not apply to underwater powerlines.

8. Comments Regarding NEPA Implementation

One commenter recommended that DOE consider NEPA efficiencies, such as utilizing programmatic regional reviews for transmission projects. The commenter also recommended that DOE streamline NEPA processes to support designation of transmission corridors and financial assistance for transmission projects. DOE supports taking steps to improve the efficiency of NEPA and other environmental review requirements, without undermining the purposes of these processes, to support timely and effective decision making.

Some commenters stated that a categorical exclusion is inappropriate for transmission line upgrade or rebuild

projects. DOE responds that these comments express a misunderstanding of the purpose of categorical exclusions and how categorical exclusions are applied to particular proposed actions. For example, some commenters stated that a categorical exclusion determination does not require any environmental documentation beyond that a proposed action belongs in a specific category. As explained in section II of this document, to qualify for the categorical exclusion, a proposed action must satisfy all the conditions in the categorical exclusion, including integral elements, and DOE must evaluate for any extraordinary circumstances. Some commenters pointed to one environmental assessment included in the Technical Support Document that considered impacts on cultural resources and suggested that such analysis would not have been required under a categorical exclusion. In fact, for all categorical exclusions listed in appendix B of its NEPA regulations (10 CFR part 1021), DOE requires consideration of whether the proposed action would violate any applicable environmental requirements and whether the proposed action would have the potential to cause significant impacts on environmentally sensitive resources, including ''Property (such as sites, buildings, structures, and objects) of historic, archeological, or architectural significance designated by a Federal, state, or local government, Federally recognized Indian tribe, or Native Hawaiian organization, or property determined to be eligible for listing on the National Register of Historic Places'' (10 CFR part 1021, subpart D, appendix B, paragraph (4)(i)). In addition, DOE's responsibility to comply with the National Historic Preservation Act is independent of its NEPA responsibilities. With the revised categorical exclusion B4.13, DOE would have considered the potential impacts on cultural resources before making a decision and could determine that an environmental assessment is more appropriate than applying a categorical exclusion.

Some commenters described the purpose of a categorical exclusion in an overly limiting way, for example, as for actions that are benign or have no adverse effect whatsoever. CEQ, however, defines a categorial exclusion as ''a category of actions that the agency has determined, in its agency NEPA procedures (§ 1507.3 of this chapter), normally do not have a significant effect on the human environment'' (40 CFR 1508.1(d)). The categorical exclusions included in this rulemaking are consistent with CEQ's regulations.

Some commenters questioned whether additional NEPA review would be necessary for powerlines that already have been reviewed under NEPA. In general, a proposed project in which DOE is financing, undertaking, or providing other support for the upgrade or rebuild of a powerline has the potential to cause environmental effects. The NEPA review process provides methods for DOE to evaluate the potential significance of those impacts. Any documentation from past NEPA or other environmental reviews can inform, and potentially simplify, the required environmental review of the currently proposed project.

C. Comments Regarding Energy Storage Systems

1. Comments Regarding Accidents at Battery Energy Storage Systems

Commenters expressed concern regarding the safety of lithium-ion battery energy storage systems, including risks associated with a thermal runaway event. Commenters stated that DOE's Technical Support Document did not address risks from thermal runaway.

A thermal runaway event is when lithium-ion batteries become unstable, potentially resulting in high temperatures, battery failure, venting of gas or particulates, smoke, or fire. As one way to help control the impacts of such an event, a battery energy storage system is comprised of modules that physically isolate and control thermal runaway events from the larger battery energy storage system. Government agencies, including DOE, and standard setting organizations such as the National Fire Protection Association conduct research on thermal runaway events and other accident scenarios involving lithium-ion and other battery technologies. These organizations recommend practices and develop standards to lessen the likelihood and consequence of such events, and to respond to thermal runaway events and other accidents if they occur. For example, to stay current with best practices and knowledge, the National Fire Protection Association updates its standards every three to five years.

Commenters stated that fires at battery energy storage systems are challenging to extinguish and must be allowed to burn out for days. Commenters also stated that fires can emit large volumes of toxic gases, such as hydrogen fluoride, hydrogen cyanide, and hydrogen chloride. Commenters stated that these releases of toxic fumes can result in large plumes that necessitate evacuations of nearby populations and that there is insufficient time to implement a shelter-in-place approach because there is no mechanism to communicate quickly enough to surrounding communities. Commenters further stated that safety standards in the Technical Support Document for the notice of proposed rulemaking did not consider the public health risk of toxic gas released during a battery energy storage system fire.

DOE has supplemented the Technical Support Document in response to these comments. DOE reviewed and added information on hazard consequences analyses that address toxic gas plume dispersion modeling in the event of a battery energy storage system fire or thermal runaway event, including characterization of those toxic gases and potential health effects. These analyses evaluated toxic gas dispersion, including hydrogen fluoride, hydrogen cyanide, and carbon monoxide, using site-specific factors to determine the maximum distance that may result in a level of concern for nearby residents or first responders. These analyses identified the endpoint distances as 30, 51, and 210 feet from the release point. The maximum airborne concentration estimated at these distances is such that nearly all individuals could be exposed to for up to one hour without experiencing or developing irreversible or other serious health effects or symptoms that could impair an individual's ability to take protective action. The analyses indicated that assumptions were chosen that tended to overstate the expected consequences. A hazard consequence analysis is a site-specific analysis, and the examples provided in the Technical Support Document indicate that a safety incident at a battery energy storage facility would generally not result in adverse health impacts beyond the facility's property line. (*See* Technical Support Document, p. 63.) Further, DOE notes that battery energy storage facilities that qualify for the new categorical exclusion would be required to incorporate appropriate safety standards including the current National Fire Protection Association 855 Standard. National Fire Protection Association Standard 855 requires the development of emergency response plans.

Commenters also stated that toxic chemicals could be used to put out battery energy storage system fires. Commenters expressed concern about runoff from fire suppression water or fire retardant, the lack of containment systems for this runoff, the resulting risk of soil and groundwater pollution, and

potential impacts to water resources. Commenters stated that fire-extinguishing water used at the East Hampton Energy Storage Center in East Hampton, NY, contaminated a sole-source aquifer used for drinking water with toxic chemicals. Commenters stated that fighting battery energy storage system fires could require up to 2 million gallons of water over a three-day period and that there are no spill containment systems in place at battery energy storage systems to catch fire water suppression runoff.

DOE has supplemented the Technical Support Document to include best management practices regarding spill control plans from individual projects as well as requirements from National Fire Protection Association Standard 855 to minimize spill risk during normal operation and in the event of a fire. (*See* Technical Support Document, p. 41.) Site-specific spill prevention plans are typically developed for individual projects as a standard best practice. DOE further notes that the emerging consensus in the firefighting community is that water should be used sparingly in responding to battery energy storage system fires to minimize potential risk of contamination to water resources.

Commenters stated that there is a lack of appropriate training for emergency responders in the event of an incident at a battery energy storage system and that available training and resources are limited. National Fire Protection Association Standard 855 requires the development of emergency response plans, mandates initial and annual training, and recommends inclusion of emergency response personnel in these trainings. The Technical Support Document also includes recommendations from the American Clean Power Association and the New York Battery and Energy Storage Technology Consortium and Fire and Risk Alliance for the development of emergency response plans and pre-incident planning and incident response.

Commenters stated that the chance of fire at a utility-scale battery energy storage system is 1 in 30 to 1 in 50 and that the average age of a battery that catches fire is 18 months. Several commenters pointed to past battery energy storage system fires including those in Surprise, AZ, Chandler, AZ, Moss Landing, CA, and in New York State. DOE responds that a recent Pacific Northwest National Laboratory report [15] noted that the Electric Power Research Institute's (EPRI's) database identifies 14 fires involving large, grid-connected battery energy storage systems in the U.S. ''To place that number in context, there were 491 large, utility-scale projects in the U.S. as of April 2023, for a fire incidence rate of about 2.9 percent. No [battery energy storage system] fire in the U.S. has resulted in loss of life, and many of the affected facilities were able to resume operation.'' DOE acknowledges that battery energy storage facilities present safety risks if not managed properly and have resulted in past safety incidents. DOE reviewed the U.S. fires reported in the EPRI database and confirmed that few if any injuries occurred, apart from the 2019 Surprise, AZ, incident that involved multiple severe injuries. Lessons learned from that 2019 event have since led to improvements in safety standards and first responder training. The battery energy storage systems that qualify for categorical exclusion B4.14 would be built and operated using the most current safety standards, including those identified in the National Fire Protection Association 855 Standard.

Commenters stated that DOE's Technical Support Document included small-scale projects (less than 10 megawatts) and mobile facilities and thus did not consider that the risk of thermal runaway increases with the number of battery cells and facility size. DOE notes that the Technical Support Document for the notice of proposed rulemaking also included environmental assessments for battery energy storage systems ranging from approximately 20 megawatts up to 225 megawatts storage capacity. For this final rule, DOE supplemented the Technical Support Document with information to clarify that appropriate battery energy storage system designs can prevent fire risk from increasing with facility size. Energy storage system failures are designed to be contained to the unit of origin, for example, by providing sufficient spacing between modules or enclosures to avoid a fire from spreading. Systems also may include fire suppression, smoke detectors, sprinkler systems, and fire barriers, as applicable to the design. Because of these safety features, the risk of a fire incident at a battery energy storage project does not increase with project size; the two are decoupled in a well-designed system that prevents a fire in one unit from spreading to neighboring units. (*See* Technical Support Document, p. 56.)

Commenters stated that DOE's Technical Support Document was inadequate because the battery energy storage systems included have not been built, and operational safety has not yet been proven. Commenters also asserted that design standards and best management practices cited in the Technical Support Document, such as UL 9540A, are not sufficient to mitigate the risk of thermal runaway. DOE notes that battery energy storage systems have experienced rapid growth in recent years. According to the U.S. Energy Information Administration, currently planned and operational U.S. utility-scale battery capacity totaled around 16 gigawatts at the end of 2023. (*See* Technical Support Document, p. 41.) This growth in deployment of battery energy storage systems provides real-world information on design and operation that feeds into efforts to continuously improve the safety of these facilities, such as through the ongoing development and revision of applicable safety standards.

DOE is aware that battery energy storage facilities present a risk of safety incidents, including the risk of a thermal runaway event that may result in fire. To ensure that battery energy storage systems are designed and operated using layers of protection, current best practices, and the most up-to-date standards, categorical exclusion B4.14 may only be used for proposed battery energy storage systems that comply with appropriate safety standards, including the current National Fire Protection Association Standard 855. The requirements and depth of National Fire Protection Association Standard 855 would ensure that battery energy storage systems are designed using current best practices to minimize the potential for a safety incident that could result in a thermal runaway. Also, the National Fire Protection Association Standard 855 requires the development of a hazard mitigation analysis, which is a method to evaluate potential failure modes and their cause and effects, in order to develop methods to prevent failure during system operation. Further, the National Fire Protection Association updates its standards every 3 to 5 years, ensuring that its standards continue to reflect current best practices.

Commenters stated that meeting the including UL 9540A standard cited in DOE's Technical Support Document would not prevent a thermal runaway event once started. DOE notes that in a UL 9540A test a thermal runaway event is intentionally created to better understand how the cell performs under failure, which helps to design fire safety

[15] Energy Storage in Local Zoning Ordinances (Pacific Northwest National Laboratory, 2023): *www.pnnl.gov/main/publications/external/technical_reports/PNNL-34462.pdf.*

features to limit the propagation of fire from one cell to another, in the event of a failure. Systems that meet UL 9540A, in addition to all the other requirements included in the National Fire Protection Association Standard 855 would ensure layers of protection to prevent accidents and mitigate safety risk. (*See* Technical Support Document, p. 56.)

Commenters also stated that DOE's Technical Support Document should not include information from the American Clean Power Association because a lobbyist organization is not an appropriate source for safety standards. DOE includes three reference documents from the American Clean Power Association in the Technical Support Document: a compilation of relevant codes and standards for battery energy storage systems prepared by other organizations, guidelines for first responders in the event of an accident, and a summary of information related to battery energy storage systems. DOE has reviewed these documents and finds them helpful in explaining useful information about the safe operation of battery energy storage systems.

Commenters also requested that DOE issue a new policy that addresses how the public safety risks posed by lithium-based battery energy storage systems should be accounted for in future NEPA actions. DOE will consider whether there is a need for guidance on the consideration of battery energy storage systems in NEPA reviews. However, that is outside the scope of this rulemaking.

Commenters also stated that battery energy storage systems should have sensors that provide information on the presence of flammable gases onsite and that information should be available to emergency responders. DOE has supplemented the Technical Support Document to include information that battery energy storage systems contain fire and gas detection systems. Further, DOE notes that the current National Fire Protection Association Standard 855 contains a variety of provisions related to gas detection; fire control and suppression, measures to prevent explosions and safely contain fires, hazard mitigation analysis, emergency response plans, and requirements for initial and annual training. (*See* Technical Support Document, p. 56.)

Commenters requested that DOE investigate whether these energy storage systems emit toxins or carcinogens during normal operation. DOE has supplemented the Technical Support Document with additional information explaining that energy storage systems do not leak chemicals or emit toxic or carcinogenic gases during normal operation. (*See* Technical Support Document, p. 41.)

2. Comments Regarding Siting of Battery Energy Storage Systems

Commenters stated that battery energy storage systems should not be sited near earthquake fault zones, sole-source aquifers, residential areas, densely populated areas, schools, daycare facilities, hospitals, nursing homes, threatened and endangered species, recreational areas, or transportation corridors. Commenters stated that battery energy storage systems should be sited only in desolate areas. Commenters expressed concern that battery energy storage systems would be sited in fire-prone landscapes and that sparks from a fire originating at a battery energy storage system would spread to nearby areas. Commenters stated that disruption to nearby communities should be mitigated, and expressed concern that without adequate planning and siting, important emergency routes, such as to and from hospitals and between nursing homes and hospitals, could be disrupted. Commenters requested that DOE include measures to ensure energy storage systems are not sited on areas of prime or sensitive habitat. DOE incorporates siting considerations into its decision whether to apply categorical exclusion B4.14 to any proposed action. This includes conditions within the categorical exclusion regarding the type of land on which the proposed project may be located, the requirement to be in accordance with land use and zoning requirements, and the integral elements that include the requirement not to pose a significant impact to environmentally sensitive resources. Categorical exclusion B4.14 also requires that, to apply it to a particular proposed project, the proposed action must incorporate safety standards and other specified conditions that reduce the risk of accidents. As noted in the Pacific Northwest National Laboratory's October 2023 report, *Energy Storage in Local Zoning Ordinances,* there is variation in local siting and zoning considerations for energy storage systems. This report notes that safety is frequently the most important concern expressed in local zoning proceedings for energy storage projects and identifies several case studies for how local planners have mitigated impacts from various jurisdictions. (*See* Technical Support Document, p. 59.) At any point during DOE's review of whether categorical exclusion B4.14 applies, DOE can determine that additional information is needed to make a categorical exclusion determination or decide to prepare an environmental assessment or environmental impact statement.

Commenters stated that a battery energy storage system should never be sited in an undeveloped area. Other commenters expressed concern that siting battery energy storage systems on undisturbed land could significantly impact the environment and surrounding communities and requested additional support for DOE's inclusion of undisturbed areas contiguous to previously disturbed or developed areas. Commenters stated that DOE's supporting information relied on an environmental assessment for the Vonore Project that included mitigation measures to reach a finding of no significant impact. DOE responds that, as explained in section III.C of this document, based on past experience, DOE anticipates that energy storage systems typically require 15 acres or less and would be sited close to energy, transmission, or industrial facilities. Consistent with this expectation and because contiguous land might be undisturbed and undeveloped, siting outside a previously disturbed or developed in the new categorical exclusion would be limited to a ''small'' contiguous area. DOE would consider whether a contiguous area is small, based on the criteria discussed in 10 CFR 1021.410(g)(2)). DOE has revised its Technical Support Document to clarify that there are three EAs and FONSIs that evaluate battery energy storage systems ranging in size up to 225 megawatts located on sites contiguous to previously disturbed and developed areas. (*See* Technical Support Document, p. 42.) Further, DOE reviewed the Vonore Project that the commenter suggested relied on mitigation measures in an environmental assessment to reach a finding of no significant impact and notes that the Tennessee Valley Authority indicated that two ''non-routine measures would be applied during the construction, operation, and maintenance of the proposed Vonore [battery energy storage system], transmission lines, and access roads to reduce the potential for adverse environmental effects'', not that those measures were necessary to reach a finding of no significant impact. (*See* Technical Support Document, p. 50.) Commenters stated that DOE's supporting information included an environmental assessment tiered from a programmatic environmental impact statement. DOE removed this environmental assessment from the Technical Support Document.

5. Comments Regarding Siting Contiguous to a Previously Disturbed or Developed Area

Commenters stated that DOE should not limit the categorical exclusion to a ''small'' or 15-acre area contiguous to previously disturbed or developed areas and that DOE should clarify that there would be no acreage limitation. Commenters stated that DOE's supporting information did not accurately reflect the acreage required and that 25 MW per acre is a more accurate assumption for battery energy storage systems. Commenters also stated that an acreage limitation could result in more densely packed battery energy storage systems with greater risk of thermal runaway. Similarly, other commenters recommended that DOE remove reference to specific acreages that were included in the preamble to DOE's Notice of Proposed Rulemaking and instead use the definition of ''small'' in 10 CFR 1021.410(g)(2). DOE responds that section II of this document includes discussion of DOE's definition of previously disturbed or developed area and DOE's experience referring to contiguous areas in its categorical exclusions. The total acreage used for an energy storage system will be defined by the needs of the proposed project. Based on past experience, DOE anticipates that energy storage systems typically require 15 acres or less and would be sited close to energy, transmission, or industrial facilities. However, this recognition of that past experience does not indicate an acreage limit on the scope of categorical exclusion B4.14. (*See* Technical Support Document, p. 41.) As previously explained, DOE would consider whether a contiguous area is small, based on the criteria discussed in 10 CFR 1021.410(g)(2).

Other commenters stated that 15 acres or less should be added as a numeric limit in the categorical exclusion. DOE considered this suggestion but has concluded that an acreage limit is not an appropriate method for determining whether a project normally would result in significant environmental effects. Rather, the terms of categorical exclusion B4.14, including the integral elements and need to consider extraordinary circumstances, provide a reasoned basis for the categorical exclusion.

Commenters stated that areas contiguous to previously disturbed or developed land may have particular conservation values or be more likely to be located in communities that have historically experienced disproportionate impacts. Commenters requested that DOE require that contiguous areas be evaluated separately under a land use plan, a programmatic environmental impact statement or environmental analysis, or other equivalent decisions that provide detailed analysis and opportunity for public engagement. Similarly, another commenter requested that DOE revise the categorical exclusion conditions to include limitations regarding site dimensions, land use history, and proximate uses and resources to indicate a preference for siting locations where fewer impacts would be expected to occur. Commenters requested that DOE include measures to ensure energy storage systems are not sited on areas of prime or sensitive habitat. Because contiguous land might be undisturbed and undeveloped, DOE proposes that siting outside a previously disturbed or developed area be limited to a ''small'' contiguous area. DOE would consider whether a contiguous area is small, based on the criteria discussed in 10 CFR 1021.410(g)(2)), ''in the context of the particular proposal, including its proposed location. In assessing whether a proposed action is small, in addition to the actual magnitude of the proposal, DOE considers factors such as industry norms, the relationship of the proposed action to similar types of development in the vicinity of the proposed action, and expected outputs of emissions or waste. When considering the physical size of a proposed facility, for example, DOE would review the surrounding land uses, the scale of the proposed facility relative to existing development, and the capacity of existing roads and other infrastructure to support the proposed action.'' In addition, the proposed project must be ''in accordance with applicable requirements (such as land use and zoning requirements) in the proposed project area and the integral elements listed at the start of appendix B of this part, and would incorporate appropriate safety standards (including the current National Fire Protection Association 855, Standard for the Installation of Stationary Energy Storage Systems), design and construction standards, control technologies, and best management practices.''

4. Comments Regarding Other Potential Impacts of Energy Storage Systems

Commenters stated battery energy storage systems would result in noise and light pollution and visual impacts for nearby residents. Commenters expressed concern about adverse socioeconomic impacts of battery energy storage systems, stating that the risk of fire, toxic chemical releases, and emergency lockdowns would negatively affect home values, quality of life, and the local economy. DOE has supplemented the Technical Support Document to include additional information regarding potential noise and light pollution impacts from proposed projects. (*See* Technical Support Document, p. 41).

Commenters expressed concern regarding disposal of batteries at the end of their useful life and questioned if the batteries would be recycled or taken to hazardous waste landfills. Commenters stated that battery energy storage systems should not be categorically excluded due to the associated environmental impact of rare earth mining for battery materials, as well as the transport of hazardous materials to and from the facility upon decommissioning. Commenters stated that battery energy storage systems are waste-generating facilities with large quantities of hazardous, flammable materials stored onsite. DOE has supplemented the Technical Support Document to include additional information regarding waste management and decommissioning plans for proposed projects. For example, a decommissioning plan should be prepared during project planning that details what will happen when a battery energy storage system reaches its end of life. Decommissioning plans generally should include removal of all structures; recycling of equipment to the greatest extent possible; the proper disposal of non-recyclable equipment in accordance with manufacturer specifications and applicable local, state, and Federal requirements; and re-establishment of vegetation and restoration of the project site. (*See* Technical Support Document, p. 41.) In addition, National Fire Protection Association Standard 855 mandates a decommissioning plan for removing and disposing of the system at the end of its useful life.

Commenters stated that a battery energy storage system operating as a new entrant to the electrical grid introduces security vulnerabilities that could adversely affect the electrical grid. DOE has supplemented the Technical Support Document to include additional information regarding the North American Electric Reliability Corporation Critical Infrastructure Protection security requirements for system integrators of certain battery energy storage equipment, including cyber systems, asset categorization, and security system management. DOE also notes that the use of energy storage systems has increased substantially in recent years. This has demonstrated

through real world experience that energy storage systems can be safely integrated into the electrical grid and provides experience that is used to improve related guidance and practices. (*See* Technical Support Document, p. 56.)

Commenters recommended that if categorical exclusion B4.14 is applied to a proposed project that is within or would affect a state's coastal zone, DOE continue to comply with relevant requirements of the Coastal Zone Management Act. DOE recognizes its responsibility to comply with the Coastal Zone Management Act and will continue to do so. DOE also notes that one of the conditions, or integral elements, for applying categorical exclusion B4.14 to a proposed action is that the proposed action would not ''Threaten a violation of applicable statutory, regulatory, or permit requirements for environment, safety, and health, or similar requirements of DOE or Executive Orders'' (10 CFR part 1021, subpart D, appendix B). This condition includes compliance with relevant requirements of the Coastal Zone Management Act.

5. Comments Regarding Public Scoping and Alternatives Analysis

Commenters explained that DOE's categorical exclusion for battery energy storage systems removes transparency for communities and explained that there is a lack of public outreach for proposed battery energy storage systems when applying a categorical exclusion. Some commenters specified that communities should have public review and comment for proposed battery energy storage systems, including for example, potential environmental and safety risks, evacuation plans, and mitigation strategies. DOE responds that to provide transparency in the use of categorical exclusions, DOE began posting categorical exclusion determinations online in 2009. DOE will continue to regularly post categorical exclusion determinations for B4.14 and other categorical exclusions listed in appendix B of DOE's NEPA regulations (10 CFR part 1021, subpart D) at *www.energy.gov/nepa/doe-categorical-exclusion-cx-determinations.*

Commenters further stated that an alternatives analysis should be required to compare alternatives to battery energy storage system technology, as well as alternative siting locations. DOE considers alternatives, as appropriate, in NEPA reviews and in its decision making. Whether DOE evaluates alternatives for a particular proposed action, and the nature of those alternatives, depends on several factors including the potential for significant impacts and the purpose and need for DOE's action.

6. Comments Requesting That DOE Expand Categorical Exclusion B4.14

In explaining why categorical exclusion B4.14 is limited to electrochemical-battery and flywheel energy storage systems, DOE stated in the notice of proposed rulemaking that, ''At this time, DOE has not identified sufficient information to conclude that compressed air energy storage, thermal energy storage (*e.g.,* molten salt storage), or other technologies normally do not present the potential for significant environmental impacts. DOE welcomes comments that provide analytic support for whether these other energy storage technologies meet the requirements for a categorical exclusion.'' Commenters recommended that DOE expand categorical exclusion B4.14 to include any energy storage system that is technologically feasible or was developed either by a DOE laboratory or with financial support from the Federal Government. Commenters also recommended expansion of categorical exclusion B4.14 to include specific energy storage technologies, including above-ground compressed air energy storage; thermal energy storage, including molten salt storage; solid-state thermal batteries; pumped storage hydropower; gravity storage; underground hydrogen storage. DOE appreciates these suggestions, including the rationale provided by the commenters. DOE has determined, however, that it does not currently have sufficient information to determine that these technologies normally do not pose a potential for significant impacts. DOE will retain the comments for consideration in a future rulemaking.

Commenters recommended that categorical exclusion B4.14 include the use of iron-air batteries. Iron-air batteries are a type of electrochemical battery and, therefore, included within the scope of categorical exclusion B4.14.

Commenters suggested that DOE add a new categorical exclusion for combined battery and solar projects. DOE may apply more than one categorical exclusion to a proposed action so long as the potential effects of the total project are analyzed and the proposed action fulfills all the conditions, including integral elements, of each categorical exclusion applied. For example, it could be appropriate to apply categorical exclusions B4.14, Construction and operation of electrochemical-battery or flywheel energy storage systems, and B5.16, Solar photovoltaic systems, to the same proposed action, depending on project- and site-specific conditions. Given this practice, the commenters' suggested addition is unnecessary.

7. Comments Regarding Specific Energy Storage System Projects

Commenters expressed opposition to specific battery energy storage system projects including those in Morro Bay, CA, East Hampton, NY, Warwick, NY, Holtsville, NY, Covington, WA, and in Eldorado near Santa Fe, NM. Commenters requested to be informed of all future battery energy storage systems. This rulemaking does not involve decisions or actions related to any particular proposed battery energy storage system. As described in section II of this document, before DOE may apply categorical exclusion B4.14 to a particular proposed action, DOE must conduct a project-specific environmental review to determine whether all conditions applicable to the categorical exclusion are met. DOE does not review or have a decision-making role regarding all battery energy storage systems and has no mechanism to inform local residents of all future battery energy storage systems.

D. Comments Regarding Solar Photovoltaic Systems

1. Comments Regarding the Lake Effect Hypothesis (LEH)

There is a potential that birds, particularly waterfowl, perceive large solar PV facilities as water bodies. Underlying this lake effect hypothesis is the possibility that solar panels and water polarize light in a similar way. This might cause birds to try to land or feed on solar PV panels, which could cause bird fatalities and other harms. Some commenters raised this concern and stated that birds may mistake solar panels for water bodies and be stranded, injured, or killed. Commenters requested that best management practices, such as non-reflective coating, increased panel spacing, and vertical positioning of the panels at night for panels on rotating axes, be incorporated into solar facilities to minimize this risk. Other commenters added that certain mitigation measures may depend on the species of bird and other animal being affected, and that mitigation is best addressed in an environmental impact statement. DOE is aware of this potential impact and is one of the Federal agencies sponsoring research to better understand whether birds mistake solar panels for water, whether that might affect behavior, and what effective mitigation is available. (*See* Technical Support Document, p. 103.)

Categorical exclusion B5.16 includes conditions that require that the proposed project not have significant effects on protected species. At any point in its environmental review of a particular project, DOE can decide to prepare an environmental assessment or environmental impact statement rather than relying on a categorical exclusion.

2. Comments Regarding Wildlife and Habitat

Commenters stated that insect populations may be at risk from solar PV facilities and that PV panels produce polarized light that may confuse insects seeking water for feeding or breeding purposes, potentially leading to reproductive failure and possible ecosystem effects. DOE has supplemented the Technical Support Document to include research that summarizes the potential for negative impacts, including potential light pollution that may adversely impact aquatic insect breeding, as well as the positive impacts of solar PV systems on insect populations. (*See* Technical Support Document, p. 103.) The Technical Support Document summarizes research regarding siting considerations that demonstrate that use of previously disturbed or developed lands, such as former agricultural fields, is preferable to siting on undisturbed land. In addition, use of native mixes of flowering plants and grasses during revegetation can improve the biodiversity of both plant and insect populations, including pollinators, as the habitat matures post-construction. Proper siting of proposed solar PV systems and revegetation plans that use diverse, pollinator-friendly seed mixes would ensure that adverse impacts to insect populations are not significant. Categorical exclusion B5.16 includes conditions that require that the proposed project not have significant effects on protected species. At any point in its environmental review of a particular project, DOE can decide to prepare an environmental assessment or environmental impact statement rather than relying on a categorical exclusion.

Commenters stated that habitat fragmentation and the spread of non-native, invasive species could result from building solar projects along linear corridors such as utility rights-of-way, particularly in cases where the projects are fully fenced. These commenters further stated that land and wildlife managers must assess current wildlife habitat connectivity in the proposed project area, as well as future connectivity needs in light of climate change. DOE appreciates commenters raising concerns about habitat connectivity. DOE's integral elements and consideration of extraordinary circumstances would ensure consideration of these impacts. Nonetheless, to better highlight potential effects on habitat, in this final rule, DOE added conditions to categorical exclusion B5.16 to ensure that proposed solar PV projects would be consistent with applicable plans for management of wildlife and habitat, including plans to maintain habitat connectivity.

Commenters stated that the Wild Springs Solar Project included in the Technical Support Document is not a typical design because the fencing encloses blocks of panels, rather than surrounding the entire project. These commenters stated that the project was designed and sited to avoid prairie dog colony areas. These commenters asserted that if a categorical exclusion had been applied to this project, these protective measures are unlikely to have been taken. Categorical exclusion B5.16 requires that the proposed project not have significant effects on species, habitat, and other local environmental conditions, as well as the use of best management practices. DOE disagrees with the assertion that the protective design elements would not have been included in the project if a categorical exclusion would have been used for NEPA review.

3. Comments Regarding Various Environmental Effects

Commenters expressed concerns regarding impacts from toxic dust during construction, visual impacts, lower property values, harm to tourism economies, and a heat island effect. Commenters expressed concern over water use during construction and for dust control and the cumulative impact of dust emissions, both during construction and operation. Commenters stated that categorical exclusion B5.16 must include provisions for effective dust control in desert and dry, wind-prone areas. DOE is aware of these concerns. Dust control and limitations on other effects are encompassed in the requirement that the proposed project be in ''accordance with applicable requirements (such as land use and zoning requirements) in the proposed project area and the integral elements listed at the start of appendix B of this part, and would be consistent with applicable plans for the management of wildlife and habitat, including plans to maintain habitat connectivity, and incorporate appropriate control technologies and best management practices.''

One individual expressed concern about fire risk due to electrical lines associated with solar energy systems. DOE responds that any electrical lines associated with a solar PV system would be required to meet all applicable standards for vegetation management, system design, and other conditions to prevent the lines from causing fires.

4. Comments Regarding Cumulative Effects

Commenters expressed concern over the cumulative effects of removing the 10-acre size limit for solar PV systems in categorical exclusion B5.16, suggesting that the impacts could extend to tens of thousands of acres in a concentrated area. Commenters also stated that the categorical exclusion must not apply to utility-scale solar developments larger than 500 acres because of cumulative impacts. DOE considers cumulative impacts in determining whether to apply a categorical exclusion to a proposed action. DOE's regulations list conditions that must be met before making a categorical exclusion determination. Among these conditions is a requirement to consider ''connected and cumulative actions, that is, the proposal is not connected to other actions with potentially significant impacts (40 CFR 1508.25(a)(1)), [and] is not related to other actions with individually insignificant but cumulatively significant impacts (40 CFR 1508.27(b)(7)).'' DOE might also consider cumulative impacts in the context of extraordinary circumstances, integral elements, or other conditions such as consistency with applicable plans for the management of wildlife and habitat, including plans to maintain habitat connectivity. In regard to the suggested 500-acre limit for the categorical exclusion, as explained in section II of this document, DOE does not have a basis for identifying a particular acreage limit for categorical exclusion B5.16. Local conditions are the appropriate basis for assessing the significance of environmental impacts for a particular proposed project.

5. Comments Regarding the Need for Additional Guidance and Regulation

Commenters identified a need for further guidance on responsible solar buildout, particularly regarding critical wildlife habitats and productive agricultural lands. DOE appreciates this recommendation and expects that guidance and best practices will continue to improve as the technology advances. Categorical exclusion B5.16 includes flexibility to accommodate these changes (*e.g.,* by providing for

consideration of the best practices relevant at the time the proposed action is reviewed).

Other commenters stated that categorical exclusion B5.16 requires that actions ''would be in accordance with applicable requirements (such as land use and zoning requirements)'' but noted that not all jurisdictions have current planning and zoning that expressly addresses siting of large-scale solar PV projects. Commenters asserted that a large-scale PV solar project, therefore, could be permitted in a corridor or right-of-way without meaningful NEPA review simply because it is not prohibited in those areas under the current zoning and planning requirements. DOE disagrees with this characterization. As explained in section II of this document and in response to comments, DOE must consider several conditions related to environmental impacts before deciding whether to apply categorical exclusion B5.16 to a particular proposed action. In an area without applicable land use and zoning requirements, DOE still would consider whether the proposed project location is on previously disturbed or developed land, applicable requirements and plans for the management of wildlife and habitat, including plans to maintain habitat connectivity, whether the proposed project incorporates appropriate control technologies and best management practices, the integral elements listed in DOE's regulations, and other conditions required of every categorical exclusion, such as consideration of any extraordinary circumstances.

6. Comments Regarding the Definition of Previously Disturbed or Developed Lands

Some commenters proposed edits to narrow DOE's definition of ''previously disturbed or developed lands.'' DOE considered these suggestions and concluded that the changes are unnecessary. DOE has successfully applied the current definition over more than a decade for a variety of projects involving several DOE categorical exclusions that use the phrase ''previously disturbed or developed.'' This phrase and definition are only part of the criteria that must be met to use categorical exclusion B5.16. As described in section II of this document and in response to other comments, the use of the categorical exclusion is dependent upon successfully satisfying several conditions related to environmental effects.

7. Comments Regarding Scope

Commenters suggested that DOE extend categorical exclusion B5.16 to include agricultural lands, especially where the project developers agree to follow certain practices to protect native habitats and manage stormwater. DOE considers agricultural land potentially within the scope of categorical exclusion B5.16 so long as the proposed action meets all applicable conditions. Those conditions include avoiding significant impacts on habitat and following applicable plans for the management of wildlife and habitat, including plans to maintain habitat connectivity, among others.

Commenters stated that large, solar PV power plants built on water decrease photosynthesis and primary productivity and may have adverse ecosystem effects. Categorical exclusion B5.16 does not apply to solar PV projects proposed to be located on water. In DOE's NEPA regulations, the term '' 'previously disturbed or developed' refers to land'' (10 CFR 1021.410(g)(1)).

8. Comments Regarding Solar Panel Production and Decommissioning

Commenters expressed concern about environmental impacts of solar panel production, citing the environmental effects and carbon emissions of raw material sourcing, mining, smelting, and refining. The effects of solar panel production are not within DOE's control or responsibility and are therefore outside the scope of DOE's NEPA review for solar PV systems. The scope of categorical exclusion B5.16 includes of installation, modification, and decommissioning of solar PV systems, and the related environmental effects are within the scope of DOE's NEPA review.

Commenters stated that use of the categorical exclusion would prevent public review of materials used in solar panels with potential to leach into landfills and impact water quality. Commenters stated that potential carcinogens such as PFAS (per- and polyfluoroalkyl substances) and metals such as silver, cadmium, and tellurium may be used in solar PV panels. DOE has supplemented the Technical Support Document regarding the safe operation and maintenance of solar PV panels. PV panels are sealed and do not leach chemicals during normal operation. Maintenance and repair of PV panels ensures that broken or cracked PV panels do not leach metals or other potentially hazardous contaminants. Recycling PV panels keeps PV panels out of landfills. (*See* Technical Support Document, p. 52.)

Commenters stated that consideration has not been given to the safe decommissioning and recycling of PV panels. DOE conducts research on the safe decommissioning and recycling of PV panels. Categorical exclusion B5.16 includes decommissioning of a solar PV system, and the environmental effects of decommissioning are considered as part of this rulemaking. (*See* Technical Support Document, p. 74.) DOE has supplemented the Technical Support Document to include additional information regarding waste management and decommissioning plans for proposed projects. For example, a decommissioning plan should be prepared during project planning and best practices for what will happen when the solar PV project reaches its end of life. Decommissioning plans generally should include removal of all structures, including solar panels and all related equipment; recycling of PV panels and related equipment to the greatest extent possible; the proper disposal of non-recyclable equipment in accordance with manufacturer specifications and applicable local, state, and Federal requirements; and re-establishment of vegetation and restoration of the project site. (*See* Technical Support Document, p. 74.) In addition, National Fire Protection Association Standard 855 mandates a decommissioning plan for removing and disposing of the system at the end of its useful life.

V. Procedural Issues and Regulatory Review

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

Executive Order (''E.O.'') 12866, ''Regulatory Planning and Review,'' as supplemented and reaffirmed by E.O. 13563, ''Improving Regulation and Regulatory Review,'' 76 FR 3821 (Jan. 21, 2011) and amended by E.O. 14094, ''Modernizing Regulatory Review,'' 88 FR 21879 (April 11, 2023), requires agencies, to the extent permitted by law, to (1) propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify); (2) tailor regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations; (3) select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including

potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity); (4) to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt; and (5) identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public. DOE emphasizes as well that E.O. 13563 requires agencies to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible. In its guidance, the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB) has emphasized that such techniques may include identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes. Many benefits and costs associated with this final rule are not quantifiable. The direct benefits include reduced cost and time for environmental analysis incurred by DOE, project proponents, and the public. Indirect benefits are expected to include deployment of technologies that improve the reliability and resilience of the Nation's electric grid and that expand electricity generation capacity while reducing emissions of GHGs. For the reasons stated in this preamble, this regulatory action is consistent with these principles.

This regulatory action has been determined not to be ''a significant regulatory action'' under E.O. 12866, ''Regulatory Planning and Review,'' 58 FR 51735 (October 4, 1993). Accordingly, this action is not subject to review under that Executive Order by OIRA of OMB.

B. Review Under Executive Orders 12898 and 14096

E.O. 12898, ''Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations,'' as supplemented and amended by E.O. 14096, ''Revitalizing Our Nation's Commitment to Environmental Justice for All,'' requires each Federal agency, consistent with its statutory authority, to make achieving environmental justice part of its mission. E.O. 14096 directs Federal agencies to carry out environmental reviews under NEPA in a manner that ''(A) analyzes direct, indirect, and cumulative effects of Federal actions on communities with environmental justice concerns; (B) considers best available science and information on any disparate health effects (including risks) arising from exposure to pollution and other environmental hazards, such as information related to the race, national origin, socioeconomic status, age, disability, and sex of the individuals exposed; and (C) provides opportunities for early and meaningful involvement in the environmental review process by communities with environmental justice concerns potentially affected by a proposed action, including when establishing or revising agency procedures under NEPA.'' DOE provided opportunities for public engagement in this rulemaking, including opportunities for communities with environmental justice concerns, and DOE considered and responded to comments raising environmental justice concerns (section IV of this document). Also, in determining whether the categorical exclusions apply to a future proposed action, DOE will consider whether the proposed action threatens a violation of these Executive Orders, consistent with the first integral element listed in appendix B of DOE's NEPA procedures.

C. Review Under National Environmental Policy Act

The Department's NEPA procedures assist the Department in fulfilling its responsibilities under NEPA and the CEQ regulations but are not themselves final determinations of the level of environmental review required for any proposed action. The CEQ regulations do not direct agencies to prepare an environmental assessment or environmental impact statement before establishing agency procedures that supplement the CEQ regulations to implement NEPA (40 CFR 1507.3). In establishing a new categorical exclusion and making other changes as described in this final rule, DOE followed the requirements of CEQ's procedural regulations, which include publishing the notice of proposed rulemaking in the **Federal Register** for public review and comment, considering public comments, and consulting with CEQ regarding conformity with NEPA and the CEQ regulations (40 CFR 1507.3(b)).

In this final rule, DOE finalizes amendments that establish, modify, and clarify procedures for considering the environmental effects of DOE actions within DOE's decisionmaking process, thereby enhancing compliance with the letter and spirit of NEPA. DOE has determined that this final rule qualifies for categorical exclusion under 10 CFR part 1021, subpart D, appendix A6, because it is a strictly procedural rulemaking, and no extraordinary circumstances exist that require further environmental analysis. Therefore, DOE has determined that promulgation of these amendments is not a major Federal action significantly affecting the quality of the human environment within the meaning of NEPA, and does not require an environmental assessment or an environmental impact statement.

D. Review Under Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires preparation of an initial regulatory flexibility analysis for any rule that by law must be proposed for public comment, unless the agency certifies that the rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. As required by E.O. 13272, ''Proper Consideration of Small Entities in Agency Rulemaking,'' 67 FR 53461 (Aug. 16, 2002), DOE published procedures and policies on February 19, 2003, to ensure that the potential impacts of its rules on small entities are properly considered during the rulemaking process (68 FR 7990). DOE has made its procedures and policies available on the Office of the General Counsel's website: *https://energy.gov/gc* under Resources.

DOE has reviewed this rule under the provisions of the Regulatory Flexibility Act and the procedures and policies published on February 19, 2003. The revisions to 10 CFR part 1021 streamline the environmental review for proposed actions, resulting in a decrease in burdens associated with carrying out such reviews. For example, the revisions to DOE's categorical exclusions are expected to reduce the number of environmental assessments that applicants would need to pay to have prepared for DOE's consideration. Applicants may sometimes incur costs in providing environmental information that DOE requires when making a categorical exclusion determination. The Government Accountability Office found in 2014 that there is little data available on the costs for preparing NEPA reviews and that agencies ''generally do not reports costs that are 'paid by the applicant' because these costs reflect business transactions between applicants and their contractors and are not available to agency officials.'' [16] In 2011, DOE estimated the cost of preparing

[16] GAO–14–369, NATIONAL ENVIRONMENTAL POLICY ACT: Little Information Exists on NEPA Analyses, April 2014, available at *www.gao.gov/assets/gao-14-369.pdf.*

environmental assessments over the prior decade at an average of $100,000 and a median of $65,000.[17] DOE does not have more current cost data. The costs of making a categorical exclusion determination are less than those to prepare an EA. Although DOE does not have data on what percentage of EAs were funded by applicants that qualified as small entities, a beneficial cost impact is expected to accrue to entities of all sizes.

Based on the foregoing, DOE certifies that this final rule will not have a significant economic impact on a substantial number of small entities. Accordingly, DOE has not prepared a regulatory flexibility analysis for this rulemaking. DOE's certification and supporting statement of factual basis will be provided to the Chief Counsel for Advocacy of the Small Business Administration pursuant to 5 U.S.C. 605(b).

E. Review Under Paperwork Reduction Act

This rulemaking imposes no new information or record-keeping requirements. Accordingly, OMB clearance is not required under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*) and the procedures implementing that Act (5 CFR 1320.1 *et seq*).

F. Review Under Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act (UMRA) of 1995 (Pub. L. 104–4) requires each Federal agency to assess the effects of Federal regulatory actions on state, local, and tribal governments, in the aggregate, or to the private sector, other than to the extent such actions merely incorporate requirements specifically set forth in a statute. Section 202 of UMRA requires a Federal agency to perform a detailed assessment of the anticipated costs and benefits of any rule that includes a Federal mandate which may result in costs to State, local, or Tribal governments, or to the private sector, of $100 million or more in any one year (adjusted annually for inflation) (2 U.S.C. 1532(a) and (b)). Section 204 of UMRA requires each agency that proposes a rule containing a significant Federal intergovernmental mandate to develop an effective process for obtaining meaningful and timely input from elected officers of State, local, and Tribal governments (2 U.S.C. 1534).

This final rule amends DOE's existing regulations governing compliance with NEPA to better align DOE's regulations, including its categorical exclusions, with its current activities and recent experiences. This final rule will not result in the expenditure by State, local, and Tribal governments in the aggregate, or by the private sector, of $100 million or more in any one year. Accordingly, no assessment or analysis is required under the UMRA.

G. Review Under Treasury and General Government Appropriations Act, 1999

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

H. Review Under Executive Order 13132

E.O. 13132, ''Federalism,'' 64 FR 43255 (Aug. 4, 1999), imposes certain requirements on agencies formulating and implementing policies or regulations that preempt state law or that have federalism implications. Agencies are required to examine the constitutional and statutory authority supporting any action that would limit the policymaking discretion of the states and carefully assess the necessity for such actions. DOE has examined this final rule and has determined that it will not preempt state law and will not have a substantial direct effect on the states, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. No further action is required by E.O. 13132.

I. Review Under Executive Order 12988

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

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

The Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516 note) provides for agencies to review most disseminations of information to the public under information quality guidelines established by each agency pursuant to general guidelines issued by OMB.

OMB's guidelines were published at 67 FR 8452 (Feb. 22, 2002), and DOE's guidelines were published at 67 FR 62446 (Oct. 7, 2002). DOE has reviewed this final rule under the OMB and DOE guidelines and has concluded that it is consistent with applicable policies in those guidelines.

K. Review Under Executive Order 13211

Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,'' 66 FR 28355 (May 22, 2001), requires Federal agencies to prepare and submit to OMB a Statement of Energy Effects for any proposed significant energy action. A ''significant energy action'' is defined as any action by an agency that promulgated or is expected to lead to promulgation of a final rule, and that: (1)(i) is a significant regulatory action under E.O. 12866, or any successor order, and (ii) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (2) is designated by the Administrator of OIRA as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits on energy supply, distribution, and use. This regulatory action does not have a

[17] 76 FR 237, January 3, 2011.

significant adverse effect on the supply, distribution, or use of energy, and is therefore not a significant energy action. Accordingly, DOE has not prepared a Statement of Energy Effects.

L. Review Under Executive Order 12630

DOE has determined pursuant to E.O. 12630, ''Governmental Actions and Interference with Constitutionally Protected Property Rights,'' 53 FR 8859 (Mar. 18, 1988), that this final rule would not result in any takings that might require compensation under the Fifth Amendment to the United States Constitution.

M. Congressional Notification

As required by 5 U.S.C. 801, DOE will report to Congress on the promulgation of this rule prior to its effective date. The report will state that the Office of Information and Regulatory Affairs has determined that this action meets the criteria set forth in 5 U.S.C. 804(2).

VI. Approval of the Office of the Secretary

The Secretary of Energy has approved publication of this notice of final rulemaking.

List of Subjects in 10 CFR Part 1021

Environmental impact statements.

Signing Authority

This document of the Department of Energy was signed on April 24, 2024, by Samuel T. Walsh, General Counsel, 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 24, 2024.

Treena V. Garrett,

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

For the reasons stated in the preamble, DOE amends part 1021 of chapter X of title 10, Code of Federal Regulations, as set forth below:

PART 1021—NATIONAL ENVIRONMENTAL POLICY ACT IMPLEMENTING PROCEDURES

■ 1. The authority citation for part 1021 continues to read as follows:

Authority: 42 U.S.C. 7101 *et seq.*; 42 U.S.C. 4321 *et seq.*; 50 U.S.C. *et seq.*

■ 2. Appendix B of subpart D of part 1021 is amended by:
■ a. Revising B4.4, B4.6, and B4.13;
■ b. Adding B4.14; and
■ c. Revising B5.1 and B5.16.

The revisions and addition read as follows:

Appendix B to Subpart D of Part 1021—Categorical Exclusions Applicable to Specific Agency Actions

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B4. * * *

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B4.4 Power Marketing Services and Activities

Power marketing services and power management activities (including, but not limited to, storage, load shaping and balancing, seasonal exchanges, and other similar activities), provided that the operations of generating projects would remain within normal operating limits. (*See* B4.14 of this appendix for energy storage systems.)

* * * * *

B4.6 Additions and Modifications To Transmission Facilities

Additions or modifications to electric power transmission facilities within a previously disturbed or developed facility area. Covered activities include, but are not limited to, switchyard rock grounding upgrades, secondary containment projects, paving projects, seismic upgrading, tower modifications, load shaping projects (such as reducing energy use during periods of peak demand), changing insulators, and replacement of poles, circuit breakers, conductors, transformers, and crossarms. (See B4.14 of this appendix for energy storage systems.)

* * * * *

B4.13 Upgrading and Rebuilding Existing Powerlines

Upgrading or rebuilding existing electric powerlines, which may involve relocations of small segments of the powerlines within an existing powerline right-of-way or within otherwise previously disturbed or developed lands (as discussed at 10 CFR 1021.410(g)(1)). Upgrading or rebuilding existing electric powerlines also may involve widening an existing powerline right-of-way to meet current electrical standards if the widening remains within previously disturbed or developed lands and only extends into a small area beyond such lands as needed to comply with applicable electrical standards. Covered actions would be in accordance with applicable requirements, including the integral elements listed at the start of appendix B of this part; and would incorporate appropriate design and construction standards, control technologies, and best management practices. This categorical exclusion does not apply to underwater powerlines. As used in this categorical exclusion, ''small'' has the meaning discussed at 10 CFR 1021.410(g)(2).

B4.14 Construction and Operation of Electrochemical-Battery or Flywheel Energy Storage Systems

Construction, operation, upgrade, or decommissioning of an electrochemical-battery or flywheel energy storage system within a previously disturbed or developed area or within a small (as discussed at 10 CFR 1021.410(g)(2)) area contiguous to a previously disturbed or developed area. Covered actions would be in accordance with applicable requirements (such as land use and zoning requirements) in the proposed project area and the integral elements listed at the start of appendix B of this part, and would incorporate appropriate safety standards (including the current National Fire Protection Association 855, Standard for the Installation of Stationary Energy Storage Systems), design and construction standards, control technologies, and best management practices.

* * * * *

B5. * * *

B5.1 Actions To Conserve Energy or Water

(a) Actions to conserve energy or water, demonstrate potential energy or water conservation, and promote energy efficiency that would not have the potential to cause significant changes in the indoor or outdoor concentrations of potentially harmful substances. These actions may involve financial and technical assistance to individuals (such as builders, owners, consultants, manufacturers, and designers), organizations (such as utilities), and governments (such as state, local, and tribal). Covered actions include, but are not limited to weatherization (such as insulation and replacing windows and doors); programmed lowering of thermostat settings; placement of timers on hot water heaters; installation or replacement of energy efficient lighting, low-flow plumbing fixtures (such as faucets, toilets, and showerheads), heating, ventilation, and air conditioning systems, and appliances; installation of drip-irrigation systems; improvements in generator efficiency and appliance efficiency ratings; efficiency improvements for vehicles and transportation (such as fleet changeout); transportation management systems (such as traffic signal control systems, car navigation, speed cameras, and automatic plate number recognition); development of energy-efficient manufacturing, industrial, or building practices; and small-scale energy efficiency and conservation research and development and small-scale pilot projects. Covered actions include building renovations or new structures, provided that they occur in a previously disturbed or developed area. Covered actions could involve commercial, residential, agricultural, academic, institutional, or industrial sectors. Covered

actions do not include rulemakings, standard-settings, or proposed DOE legislation, except for those actions listed in B5.1(b) of this appendix.

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B5.16 Solar Photovoltaic Systems

(a) The installation, modification, operation, or decommissioning of commercially available solar photovoltaic systems:

(1) Located on a building or other structure (such as rooftop, parking lot or facility, or mounted to signage, lighting, gates, or fences); or

(2) Located within a previously disturbed or developed area.

(b) Covered actions would be in accordance with applicable requirements (such as land use and zoning requirements) in the proposed project area and the integral elements listed at the start of appendix B of this part, and would be consistent with applicable plans for the management of wildlife and habitat, including plans to maintain habitat connectivity, and incorporate appropriate control technologies and best management practices.

■ 3. Amend Appendix C of subpart D of part 1021 by revising C4 and C7 to read as follows:

Appendix C to Subpart D of Part 1021—Classes of Actions That Normally Require EAs But Not Necessarily EISs

* * * * *

C4 Upgrading, Rebuilding, or Construction of Powerlines

(a) Upgrading or rebuilding existing powerlines when the action does not qualify for categorical exclusion B4.13; or construction of powerlines:

(1) More than approximately 10 miles in length outside previously disturbed or developed powerline or pipeline rights-of-way; or

(2) more than approximately 20 miles in length within previously disturbed or developed powerline or pipeline rights-of-way.

* * * * *

C7 Contracts, Policies, and Marketing and Allocation Plans for Electric Power

(a) Establishment and implementation of contracts, policies, and marketing and allocation plans related to electric power acquisition that involve:

(1) The interconnection of, or acquisition of power from, new generation resources that are equal to or less than 50 average megawatts, unless the generation resource is eligible for a categorical exclusion;

(2) Changes in the normal operating limits of generation resources equal to or less than 50 average megawatts; or

(3) Service to discrete new loads of less than 10 average megawatts over a 12-month period.

* * * * *

■ 4. Amend Appendix D to subpart D of part 1021 by revising D7 to read as follows:

Appendix D to Subpart D of Part 1021—Classes of Actions That Normally Require EISs

* * * * *

D7 Contracts, Policies, and Marketing and Allocation Plans for Electric Power

(a) Establishment and implementation of contracts, policies, and marketing and allocation plans related to electric power acquisition that involve:

(1) The interconnection of, or acquisition of power from, new generation resources greater than 50 average megawatts, unless the generation resource is eligible for a categorical exclusion or was evaluated in an environmental assessment resulting in a finding of no significant impact;

(2) Changes in the normal operating limits of generation resources greater than 50 average megawatts; or

(3) Service to discrete new loads of 10 average megawatts or more over a 12-month period.

* * * * *

[FR Doc. 2024–09186 Filed 4–29–24; 8:45 am]

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SMALL BUSINESS ADMINISTRATION

13 CFR Parts 109, 115, 120, and 123

RIN 3245–AI03

Criminal Justice Reviews for the SBA Business Loan Programs, Disaster Loan Programs, and Surety Bond Guaranty Program

AGENCY: U.S. Small Business Administration.

ACTION: Final rule.

SUMMARY: On September 15, 2023 the U.S. Small Business Administration (SBA or Agency) published a notice of proposed rulemaking (''NPRM'' or ''proposed rule'') to amend regulations governing SBA's business loan programs (7(a) Loan Program, 504 Loan Program, Microloan Program, Intermediary Lending Pilot Program (ILP), Surety Bond Guarantee Program, and the Disaster Loan Program (except for the COVID–19 Economic Injury Disaster Loan (EIDL) Program) for criminal background reviews. The proposed rule introduced amendments to improve equitable access based on criminal background review of applicants seeking to participate in one or more of these programs. This final rule implements proposed regulatory changes and addresses comments SBA received.

DATES: This final rule is effective May 30, 2024.

FOR FURTHER INFORMATION CONTACT: Alejandro C. Contreras, Acting Director, Office of Financial Assistance, Small Business Administration, at (202) 205–6436 or *alejandro.contreras@sba.gov.*

SUPPLEMENTARY INFORMATION:

I. Background Information

The mission of SBA is to ''aid, counsel, assist and protect'' the interests of small business concerns to ''preserve free competitive enterprise'' and ''maintain and strengthen the overall economy of our nation.'' 15 U.S.C. 631(a). SBA accomplishes this mission, in part, through Capital Access programs that bridge the financing gap in the private market and help businesses of all sizes to recover from disasters. Further, 15 U.S.C. 636(a)(1)(B) states that the Administrator may verify the criminal background of the applicant, which grants SBA the flexibility to determine whether and how to consider criminal history in the context of issuing loan guarantees, so long as the loans are of sound value. Congress provided SBA with authority to promulgate rules to carry out these provisions. See 15 U.S.C. 634(b)(6).

SBA has comprehensively reviewed its capital programs' current policies on individuals with criminal history records to ensure that the policies promote SBA's statutory mandates that recognize the importance of small business development in general as well as the responsibility to increase opportunities for certain groups that may not historically have had equitable opportunities for small business ownership. See 15 U.S.C. 631(a), 636(a)(1)(B), 636(b)(1)(A), 636(l), 636(m), 694(b), and 695. It is SBA's position that this final rule supports these Federal statutory mandates. The final rule also supports and reflects changing conditions in how State and local governments and the private sector have broadened access to business capital for qualified people with certain criminal history records and Federal laws and policies, including bipartisan legislation, such as the Second Chance Act of 2008 and the First Step Act of 2018, that have reduced barriers to successful reentry in order to reduce the risk of future criminal justice system involvement. This final rule helps facilitate employment opportunities for individuals with criminal history records and is supported by data and empirical research demonstrating the public safety and economic benefits of doing so.

Based on its review of SBA capital programs' current policies on individuals with criminal history records, SBA recognizes the need to update regulations to reduce barriers to participation in these programs for equitable support for qualified small

business owners with certain criminal history records and issued a proposed rule for public comment. As the SBA expands access to capital to more qualified entrepreneurs, it continues to implement additional reforms to mitigate the risk of fraud in its traditional capital programs, including front-end detection protocols conducted by SBA. These safeguards are in addition to ones set and implemented by lenders and local, State, and Federal laws. Currently, the ILP Intermediary Program considers as ineligible businesses with an Associate (as defined by 13 CFR 109.20) that is incarcerated, on parole or probation, or that has been indicted but not convicted for a felony or a crime of moral turpitude; for the Surety Bond Guaranty Program, SBA considers an applicant ineligible if any of the Principals (as defined by 13 CFR 115.10) are under indictment but not convicted, previously convicted of a felony or have received civil judgment regarding business transactions; for the 7(a) and 504 business loan programs, SBA considers an applicant ineligible if the business has an Associate who is incarcerated, on probation, on parole, or is under indictment for a felony or any crime involving or relating to financial misconduct or a false statement, and for Microloans, in addition to an Associate who is incarcerated, an Associate who is on probation or parole for an offense involving fraud or dishonesty; and for the Disaster Loan Program in 13 CFR 123.101(i) (adopted by reference in 13 CFR 123.201 and 123.301) and 123.502(c), SBA considers ineligible any principal owners of the damaged property that are currently incarcerated, or on probation or parole following conviction for a serious criminal offense, with additional specific restrictions for Immediate Disaster Assistance Program (IDAP) loans, that include presently being under indictment, on parole or probation; charged with, arrested for, convicted, placed on pretrial diversion, and/or placed on any form of probation (including adjudication withheld pending probation) for any criminal offense other than a minor motor vehicle violation (including offenses which have been dismissed, discharged, or not prosecuted).

Although the original intent of these restrictions was to protect the performance of SBA's capital programs against a presumed higher likelihood of default, data and research refute the concerns that may have animated SBA's initial rationale. Importantly, SBA reviewed the relevant research and found no evidence of a negative impact on repayment for qualified individuals with criminal history records in any American business loan program. This lack of data demonstrates that continuing to rely on this restriction for that purpose would contradict the available evidence and although the restrictions may have been originally put in place with the goal of protecting program performance, the lack of data suggests continuing to rely on this restriction would reflect an outdated, inaccurate regulatory barrier against individuals with criminal history records. Specifically, research demonstrates that employment increases success during reentry, decreases the risk of recidivism, and strengthens both public safety and economic opportunity. Research also demonstrates that entrepreneurship provides an important and distinct avenue for economic stability given persistent stigma from employers who may decline to hire people with criminal history records. Notably, SBA found several studies showing the difficulty of obtaining employment for formerly incarcerated people (see for example, *Investigating Prisoner Reentry: The Impact of Conviction Status on the Employment Prospects of Young Men;*[1] from the Department of Justice's National Institute of Justice Grant) and a positive link between employment and successful reentry, including preventing recidivism (see for example, *Local Labor Markets and Criminal Recidivism*[2] in the Journal of Public Economics). Moreover, because individuals with criminal history records may face barriers in obtaining employment, entrepreneurship can be a productive option, and SBA found several studies showing the potential for entrepreneurship among individuals with criminal records (see for example *From Prison to Entrepreneurship*[3] in the American Academy of Political and Social Science).

After conducting its review of SBA capital programs' current policies on people with certain criminal history records, SBA posted a proposed rule for public comment. Given the lack of data suggesting program performance issues and the breadth of research indicating the benefits, SBA is removing unnecessary restrictions that limit access to capital for qualified people with certain criminal history records. Furthermore, the proposed rule sought to provide employment opportunities for qualified people with certain criminal history records because expanding access to entrepreneurship strengthens individual and community economic opportunity and growth while also strengthening public safety by facilitating successful reentry and thereby reducing the risk of future criminal justice system involvement.

The Agency received 19 comments on all aspects of the revisions in the proposed rule and on any related issues affecting the 7(a) Loan, 504 Loan, Microloan, ILP, Surety Bond Guarantee Program, and Disaster Loan Programs. (88 FR 63534) There were 17 comments received from separate individuals or entities as follows: three Community Development Companies (CDCs), one trade association, one government entity, seven advocacy non-profit groups, six individuals, and the **Federal Register** posting itself which tallies as a comment. There was one invalid comment received which was not posted to *regulations.gov*. The comments received are tallied by each proposal in the section-by-section analysis below. SBA has reviewed and considered those comments and is now issuing a final rule to implement those changes. Throughout this final rule, ''currently incarcerated'' means ''a person who is currently serving a sentence of imprisonment imposed upon an adjudication of guilt.''

Pursuant to its statutory authority to promulgate rules to carry out its mandate, and after considering public comments, SBA is revising several regulatory provisions. See 15 U.S.C. 634(b)(6). SBA is updating the 7(a), 504, Microloan, ILP, Surety Bond Guarantee Program, and Disaster Loan Program regulations requiring criminal background reviews. Specifically, SBA is revising 13 CFR 109.400(b)(15) on ''Eligible Small Business Concerns''; 13 CFR 115.13(a)(2)(i) on ''Eligibility of Principal''; 13 CFR 120.110(n) on ''What businesses are ineligible for SBA business loans?''; 13 CFR 120.707(a) on ''What conditions apply to loans by Intermediaries to Microloan borrowers?''; 13 CFR 123.101(i) on ''When am I not eligible for a home disaster loan?''; 13 CFR 123.502(c) on ''Under what circumstances is your business ineligible to be considered for a Military Reservist Economic Injury Disaster Loan?''; and 13 CFR 123.702(c)(1) and (2) on ''Character requirements.''

[1] *Investigating Prisoner Reentry: The Impact of Conviction Status on the Employment Prospects of Young Men. Investigating Prisoner Reentry* National Institute of Justice *Grant, Final Report., October 2009.*

[2] *Local Labor Markets and Criminal Recidivism,* ScienceDirect, Journal of Public Economics, Volume 147, March 2017, Pages 16–29

[3] *From Prison to Entrepreneurship: Can Entrepreneurship be a Reentry Strategy for Justice-Impacted Individuals?, https://doi.org/10.1177/00027162221115378,* Sage Journals, Volume 701, Issue 1, September 14, 2022.

SBA is revising 13 CFR 109.400(b)(15) for ILP loans to small businesses to remove the restrictions on Associates of an applicant who are on probation or parole; 13 CFR 115.13(a)(2)(i) for surety bond applicants to remove restrictions on a Principal bidding for a contract (as defined in 13 CFR 115.10) who has been previously convicted of a felony or received civil judgment regarding business transactions; 13 CFR 120.110(n) for 7(a) and 504 loans to remove restrictions on businesses with an Associate who is on probation or on parole; 13 CFR 120.707(a) for Microloans to remove restrictions on businesses with an Associate who is currently on probation or parole for an offense involving fraud or dishonesty; and 13 CFR 123.101(i) for physical and economic injury and 13 CFR 123.502(c) for military reservist economic injury disaster loans to remove restrictions regarding principal owners of damaged property who are on probation or parole following conviction for a serious criminal offense.

Further, regarding IDAP loans, in 13 CFR 123.702(c)(1) and (2), SBA will remove restrictions for businesses with an Associate who is presently on parole or probation; that has ever been charged with, arrested for, convicted, placed on pretrial diversion, and/or placed on any form of probation (including adjudication withheld pending probation) for any criminal offense other than a minor motor vehicle violation (including offenses which have been dismissed, discharged, or not prosecuted).

SBA has determined that reducing barriers to these programs for otherwise qualified applicants where one or more of their associates has the criminal justice system involvement described above is necessary to ensure equity and expand economic opportunities. These changes will further the goals of SBA's statutory mandates. SBA believes that modernizing the character requirements regarding consideration of the criminal history records of SBA loan applicants and Associates of business loan applicants is timely and appropriate to reflect changes in the public and private sector that have reduced unnecessary barriers to access to capital and successful reentry. Doing so also promotes equitable consideration for applicants who are ineligible for Federal assistance in SBA's programs due to prior convictions that have been adjudicated and terms of incarceration that have been served. These changes create the opportunity for formerly incarcerated individuals to participate in SBA's loan and surety bond programs and engage in entrepreneurial endeavors that research shows statistically decrease recidivism based on employment and continued engagement within their communities, thereby strengthening public safety.[4] These changes will enable SBA programs to provide capital in the form of Surety Bonds, 7(a), 504, Microloan, ILP, and Disaster loans to more qualified small businesses and disaster survivors, which will strengthen our economy. SBA did not remove or change 13 CFR 120.110(q) regarding ineligibility due to prior default and loss to the Federal Government. Finally, SBA will continue the practices it recently implemented to access certain public data to perform fraud checks prior to approval of any 7(a), 504, or Disaster loans.

II. Comments That Apply to Every Section

SBA received comments requesting modifications for each section of the proposed rule. As the same modifications were repeated for each section, they are addressed in this overview rather than in the section-by-section analysis. Each of the requested modifications or requests and the reason for accepting or not accepting the modification or request is provided below:

(1) SBA should consider retaining the ability to conduct criminal background checks of program applicants and allow additional time to review the information contained therein for the expanded categories of individuals. SBA considered but did not accept the modification proposed by these comments. As SBA noted in the preamble of the final rule Lenders, CDCs, and Microlender Intermediaries may continue background checks if it is in their lending policies to do so. The final rule makes clear that, as the SBA expands access to capital to more qualified entrepreneurs, SBA continues to implement additional reforms to mitigate the risk of fraud in its traditional capital programs, including front-end detection protocols conducted by SBA, and these additional SBA front-end safeguards are in addition to ones set and implemented by lenders and local, State, and Federal laws.

(2) SBA should consider expanding access to capital to small business owners with criminal convictions only if ten years or more have elapsed since the last conviction. SBA considered but did not accept the modification suggested by these comments because (a) the comment did not provide any empirical support as to why a ten-year period (as opposed to another period of time) would strengthen either public safety or economic opportunity; (b) the comment did not provide any empirical support as to why other fact-specific and individualized indicia of rehabilitation and success during reentry in a shorter timespan after conviction should not be given more weight by SBA and the lender than an arbitrary number of years after conviction; (c) SBA determined that a categorial ten-year bar would undermine SBA's ability, through this rulemaking, to honor and incorporate the statutory mandates of 15 U.S.C. 631 that recognize the importance of small business development in general as well as the responsibility to increase opportunities for certain groups that may not historically have had equitable opportunities for small business ownership; and (d) small business applicants commented, and SBA agrees, that this ten-year categorical bar would be overburdensome for compliance. Requiring an additional waiting period for loan eligibility delays access to capital.

(3) SBA should provide additional guidance to lenders, beyond the proposed rule, on how exclusions for criminal convictions may cause a broad disparate impact for persons of color. SBA considered but did not accept this request because the research and analysis proposed by the commenter goes beyond the scope of SBA's authority in this regulatory rulemaking. This final rule is limited to improving equitable access based on criminal background review of applicants seeking to participate in one or more of the programs addressed by this rule.

(4) SBA should develop and issue guidance on this final rule in order to provide clarity to lenders to ensure that they implement its provisions with fidelity. Although enforcement goes beyond the scope of this regulatory rulemaking, SBA will provide future guidance on compliance in Standard Operating Procedures and training by specific programs.

(5) The SBA should work with lenders to reassess their underwriting standards to mirror changes to proposed rule. SBA does not accept this request because SBA does not have authority to mandate changes to lenders' safeguards and standards, and lenders are not obligated to adopt the changes SBA proposed. Lenders' authority to set and implement safeguards and standards is

[4] Providing Another Chance: Resetting Recidivism Risk in Criminal Background Checks | RAND Bushway, Shawn D., Brian G. Vegetabile, Nidhi Kalra, Lee Remi, and Greg Baumann, Providing Another Chance: Resetting Recidivism Risk in Criminal Background Checks. Santa Monica, CA: RAND Corporation, 2022.

independent, which SBA recognizes and respects.

III. Section-by-Section Analysis

Section 109.400(b)(15) Eligible Small Business Concerns

The current § 109.400(b)(15) for the ILP Program states that ineligible businesses are those with an Associate who is currently incarcerated, on probation, on parole, or has been indicted but not convicted of a felony or crime of moral turpitude. SBA is revising this regulation to remove those barriers while maintaining the prohibition against only those businesses with an Associate who is currently incarcerated or who is indicted but not convicted of a felony or crime of moral turpitude. SBA considered removing the prohibitions related to Associates under indictment in the NPRM. However, upon reconsideration based on its evaluation of public and interagency comments, SBA has decided to retain the existing language related to indictments. This revision is therefore narrowly tailored to reduce barriers to access for qualified formerly incarcerated small business owners who may be eligible to receive a loan through the ILP Program from an existing Intermediary with remaining funds to lend. The proposed rule received a total of 17 public comments of which nine or 53 percent were in support, 5 or 29 percent were in support with modifications and 3 or 18 percent were neutral and did not comment this on proposed rule specifically. The summary overview explains why the modifications were not incorporated into the final rule. SBA is finalizing the rule as proposed while retaining current prohibitions against businesses with an Associate indicted for certain crimes.

Section 115.13(a)(2)(i) Eligibility of Principal

The current § 115.13(a)(2)(i) for the Surety Bond program states that ineligible businesses are those with a Principal who is under indictment but is not convicted, or has been previously convicted of a felony, or a final civil judgment has been entered stating that such Person has committed a breach of trust or has violated a law or regulation protecting the integrity of business transactions or business relationships. Through this final rule, SBA is removing those barriers while maintaining the prohibition against only those businesses with a Principal who is currently incarcerated or who is under indictment for a felony. SBA considered removing the prohibitions related to Principals under indictment in the NPRM. However, upon reconsideration based on its evaluation of public and interagency comments, SBA has decided to retain the existing language related to indictments. This revision is narrowly tailored to reduce barriers to access for qualified small business owners with certain criminal history records to compete for Federal and other contract opportunities by obtaining guarantees for surety bid and final payment and/or performance bonds. The proposed rule change received a total of 17 public comments of which 9 or 53 percent were in support, 5 or 29 percent supported with modification and 3 or 18 percent were neutral or did not comment on the proposed rule. The summary overview explains why the modifications were not incorporated into the final rule. SBA is finalizing the rule as proposed while retaining current prohibitions against businesses with an Associate indicted for certain crimes.

Section 120.110(n) What businesses are ineligible for SBA business loans?

The current § 120.110(n) for the 7(a), 504, and Microloan programs states that ineligible businesses are those with an Associate who is currently incarcerated, on probation, on parole, or is under indictment but not convicted for a felony or any crime involving or relating to financial misconduct or a false statement. Through this final rule, SBA is revising this regulation to address the challenges people on probation or on parole have accessing capital while maintaining the prohibition against businesses with an Associate who is currently incarcerated or who is under indictment for a felony or any crime involving or relating to financial misconduct or a false statement. SBA considered removing the prohibitions related to Associates under indictment in the NPRM. However, upon reconsideration based on its evaluation of public and interagency comments, SBA has decided to retain the existing language related to indictments. This revision is narrowly tailored to reduce barriers to access for qualified small business owners with certain criminal history records. Under 15 U.S.C. 636(a)(1)(B), the SBA may verify an applicant's criminal history background, but it does not require such verification, nor does it prohibit loans for people with criminal history records. Lenders, CDCs, and Microloan Intermediaries make risk-based lending decisions. SBA's final rule revision does not impact a Lender's, a CDC's or a Microloan Intermediary's ability to conduct a criminal history background check, in accordance with their own policies, provided they do so in a manner that complies with the Equal Credit Opportunity Act and other relevant laws and does not result in an unjustified discriminatory effect on a protected class group. Lenders can continue to deny loans, for example, where criminal history, when considered along with other information, presents an unacceptable credit risk. The proposed rule received a total of 17 public comments, of which 12 or 71 percent were in support, and 5 or 29 percent support with modifications. No commenters opposed. The summary overview explains why the modifications were not incorporated into the final rule SBA is finalizing the rule as proposed.

Section 120.707(a) What conditions apply to loans by Intermediaries to Microloan borrowers?

SBA proposed to revise § 120.707(a) to increase access to capital to businesses with an Associate who is on probation or parole for an offense involving fraud or dishonesty while maintaining the prohibition against a business with an Associate who is incarcerated. For public safety reasons, however, SBA will retain the prohibition against making a loan to a childcare business, where an Associate is on probation or parole for an offense against children. This change will closely align with the revised requirements for all business loan programs regarding the determination that an applicant with a Principal or Associate that is currently incarcerated is ineligible for assistance and support the flexibility and access to capital for qualified business owners with criminal history records. The proposed rule received a total of 17 public comments, of which 9 or 53 percent were in support, 5 or 29 percent were in support with modifications, 3 or 18 percent were neutral/did not comment and none were opposed. The summary overview explains why the modifications were not incorporated into the final rule. SBA is finalizing the rule as proposed.

Section 123.101(i) When am I not eligible for a home disaster loan?

The current § 123.101(i) for the Disaster Loan Program states that SBA considers ineligible any principal owners of the damaged property that are presently incarcerated, or on probation or parole following conviction for a serious criminal offense. In this final rule, SBA revises § 123.101(i) to state that the applicant is ineligible to receive a disaster loan when any principal owner of a home that sustained damage is currently incarcerated. The eligibility requirements in § 123.101 are cross

referenced in §§ 123.201 and 123.301; therefore, this final rule change will also apply to business property loans as well as economic injury loans. Notwithstanding SBA's final rule change, in accordance with statutory provisions that bar loans to those with certain convictions, SBA will maintain its existing prohibition where such prohibition is required by law. This final rule will align the requirements for all SBA loan programs regarding currently incarcerated applicants and support the flexibility and access to capital for qualified disaster survivors with criminal history records. The proposed rule received a total of 17 public comments, of which 9 or 53 percent were in support, 5 or 29 percent were in support with modifications, and 3 or 18 percent were neutral/did not comment. The summary overview explains why the modifications were not incorporated into the final rule. SBA is finalizing the rule as proposed.

Section 123.502(c) Under what circumstances is your business ineligible to be considered for a Military Reservist Economic Injury Disaster Loan?

The current § 123.502(c) for the Disaster Loan Program states that SBA considers ineligible any principal owners of the damaged property who are presently incarcerated, or on probation or parole following conviction for a serious criminal offense. In this final rule, SBA revises § 123.502(c) to state that for Military Reservist Economic Injury Disaster loans (MREIDL), the applicant is ineligible to receive a disaster loan when an Associate of a business that sustained damage is currently incarcerated. Notwithstanding SBA's final rule changes for disaster loans, in accordance with statutory provisions that bar loans to those with certain convictions, SBA will continue to consider as ineligible applicants whose eligibility is prohibited by law. This final rule change will align the requirements proposed for all SBA loan programs regarding individuals currently incarcerated and support the flexibility and access to capital for qualified small business owners with criminal history records. The proposed rule received a total of 17 public comments, of which 9 or 53 percent were in support, 5 or 29 percent were in support with modifications, 3 or 18 percent were neutral/did not comment and none were opposed. The summary overview explains why the modifications were not incorporated into the final rule. SBA is finalizing the rule as proposed.

Section 123.702(c)(1) and (2) What are the eligibility requirements for any IDAP loan?

The current § 123.702(c)(1) and (2) for IDAP loans state that SBA considers ineligible any applicant business that has an Associate that who is presently under indictment but not convicted, on parole or probation; charged with, arrested for, convicted, placed on pretrial diversion, and/or placed on any form of probation (including adjudication withheld pending probation) for any criminal offense other than a minor motor vehicle violation (including offenses which have been dismissed, discharged, or not prosecuted). In the final rule, SBA revises § 123.702(c)(1) and (2) to state that the applicant is ineligible to receive an IDAP loan when any principal owner of a home or business that sustained damage is currently incarcerated. SBA will continue to consider as ineligible applicants who are presently under indictment or whose eligibility is prohibited by law. SBA considered removing the prohibitions related to applicants under indictment in the NPRM. However, upon reconsideration based on its evaluation of public and interagency comments, SBA has decided to retain the existing language related to indictments.

Policy Discussion

In addition to applicants in all programs certifying to having no owners or Associates that are currently incarcerated, SBA will access certain external and widely acceptable and reliable databases to verify eligibility regarding incarceration and criminal history status. While the implementation of the final rule will expand access and thereby increase loan volume, SBA believes that these changes do not compromise the credit quality and performance of the loan portfolios. For example, the Microloan and Surety Bond Guaranty programs have permitted loans to businesses with individuals on parole or probation at no negative impact to overall program performance.

As published in June 2021, The RAND Research Brief[5] estimated that over 200,000 small businesses were affected or disqualified from participating in the Paycheck Protection Program (PPP) due to SBA's rules regarding current indictments and incarceration, and prior criminal convictions and criminal justice system involvement. Predictably, the survival rate of legitimate small businesses that did not receive assistance during the pandemic is lower than those that did receive support. There are several key distinctions between the PPP program and the SBA loan and surety programs at issue here. For example, PPP loans were forgivable while loans in the other SBA loan programs are not, and SBA has developed and implemented additional front-end detection protocols to strengthen program integrity since PPP. This RAND study is useful to highlight the number of otherwise qualified applicants who were ineligible to apply but required SBA assistance in order to survive.

Due to significant barriers to employment for individuals with criminal history records, self-employment and entrepreneurship are often vital avenues to successful reentry and employment. In fact, 28 percent of individuals with criminal history records are self-employed.[6] SBA's general and targeted loan programs should be a resource that provides options that support economic success and growth for individuals and communities, from basic self-employment to becoming employers within communities, and that support successful reentry outcomes, thereby strengthening public safety. Research is clear that reducing barriers to employment reduces recidivism and supports successful reentry, leading to better outcomes for individuals and communities[7]—all of which underscore the necessity for SBA to revisit and update these regulations to remove barriers to small-business employment and business ownership.

Under the final rule, for each program, SBA, Lenders, CDCs, Microloan Intermediaries, Sureties, and ILP Intermediaries, must consider the applicant business ineligible based on criminal history record when there is an Associate or Principal who is currently incarcerated or, depending on the program, under indictment.

SBA's final rule also streamlines SBA's lending criteria by reducing the number of factors that are required to be applied in determining eligibility based on criminal history records of small business owners. Lenders, CDCs, and Microloan Intermediaries make risk-based lending decisions as part of their

[5] The Prevalence of Criminal Records Among Small Business Owners | RAND *How Many Business Owners, Businesses, and Employees Are Affected by PPP Restrictions?*

[6] *https://onlinelibrary.wiley.com/doi/10.1002/pam.22438. Criminal Justice Involvement, Self-employment, and Barriers in Recent Public Policy. Journal of Policy Analysis and Management, 42*(1),11–4.

[7] Providing Another Chance: Resetting Recidivism Risk in Criminal Background Checks | RAND.

existing and continuing protocols. Some lenders include conducting criminal history background checks and others do not. SBA's final rule revision does not impact a Lender's, CDC's or Microloan Intermediary's authority or ability to continue to do so, in accordance with their own policies, provided that they do so in a manner that complies with the Equal Credit Opportunity Act and other relevant laws. This proposed rule received a total of 17 public comments, of which 9 or 53 percent were in support, 5 or 29 percent were in support with modifications, 3 or 18 percent were neutral or did not comment on this section and none were opposed. The summary overview explains why the modifications were not incorporated into the final rule. SBA is finalizing the rule as proposed.

IV. Severability

One comment recommended that SBA include in this rule an express provision addressing the effect of a judicial declaration of invalidity as to any section or portion of this rule or to parts 109, 115, 120 and 123. The question of severability addresses whether a judicial finding of a provision's invalidity should extend to other provisions or applications or whether it should be limited to the invalid provision or application, leaving in effect the remainder of the rule.

Like the entirety of parts 109, 115, 120 and 123, this rule seeks to implement, to the maximum extent possible, the stated congressional purposes of the Small Business Act and the Small Business Investment Act—*i.e.,* ''to . . . aid, counsel, assist, and protect, insofar as is possible, the interests of the small-business concerns in order to preserve free competitive enterprise'' and ''to foster economic development and to create or preserve job opportunities in both urban and rural areas by providing long-term financing for small business concerns.'' *See* 15 U.S.C. 631 and 695.

This rule includes numerous enhancements to the ILP Program, the Surety Bond Guaranty Program the Business Loan Programs, and the Disaster Loan Programs. The individual sections added or modified in this rule, and those which remain in parts 109, 115, 120 and 123 from prior rulemakings, shall operate independently in service of the stated congressional purposes and the objectives set forth above for this rule.

Accordingly, in the event that any portion or application of the rule is declared invalid or unenforceable as applied to any person or circumstance, SBA intends for the provision to be construed so as to continue to give the maximum effect to the provision permitted by law, including as applied to persons not similarly situated or to dissimilar circumstances, unless such holding is that the provision of these paragraph is invalid and unenforceable in all circumstances. Further, SBA intends that the various other provisions and applications of parts 109, 115, 120 and 123, including those added or modified in this rule, be severable from the unlawful portion, unless such declaration of invalidity renders another section or provision meaningless or deprives that other section or provision of its functionality though only in such circumstances. Moreover, such collateral invalidity is intended only to the extent required by logic or loss of functionality.

As an illustration, if a court were to find unlawful this rule's revisions to the criminal background provisions in the Business Loan Programs (§ 120.110), such finding would have no effect upon this rule's revisions to the criminal background provisions in the Intermediary Lending Pilot (§ 109.400), the Surety Bond Guarantee (§ 115.3) and the Disaster Loan (§§ 123.101, 123.502 and 123.702) Programs, or various other provisions which in no way are dependent upon the criminal background provisions. To further this illustration, if a court were to find unlawful this rule's revisions to the criminal background provisions in the Business Loan Programs (§ 120.110), such finding would have no effect upon any of the other provisions and applications of parts 109, 115, 120 and 123 (*e.g.,* Eligible uses of proceeds as set forth in 13 CFR 120.120). The foregoing are merely examples and do not express an intent that any other provision be considered non-severable. SBA reiterates that where any provision of this part is declared invalid, any collateral invalidity is intended to the least extent necessary, in order to advance program objectives to the maximum extent possible. Such provisions would help mitigate uncertainty that may result from future court decisions if a lawsuit occurs.

Compliance With Executive Orders 12866, 12988, 13132, and 13563, the Congressional Review Act (5 U.S.C. §§ 801–808), the Paperwork Reduction Act (44 U.S.C., Ch. 35), and the Regulatory Flexibility Act (5 U.S.C. §§ 601–612)

Executive Order 12866

The Office of Management and Budget has determined that this rule is a ''significant regulatory action'' under Executive Order 12866, as amended by Executive Order 14094. SBA included in the proposed rule and presents in the final rule a Regulatory Impact Analysis for the public's information in the next section. Each section begins with a core question.

A. Regulatory Objective of the Proposal

Is there a need for this regulatory action?

In accordance with statutory mandates of 15 U.S.C. 631(a), 636(a)(1)(B), 636(b)(1)(A), 636(l), 636(m), 694(b), and 695, the Agency believes it needs to reduce regulatory restrictions for applicants with Associates or Principals based on criminal histories for the SBA Disaster, 7(a), 504, Microloan, ILP and Surety Bond Guaranty programs by reducing the requirement for criminal history records consideration to only applicants with a Principal or Associate currently incarcerated or, depending on the program, under indictment, in the manner proposed above. Many formerly incarcerated persons experience significant barriers in accessing employment and capital and credit often necessary to start a business. The revisions in SBA's final rule will remove barriers to access capital and employment for qualified applicants. SBA will reduce the administrative burden on applicants as well as the need for fingerprints by providing a single succinct directive that SBA determines any applicant with a Principal or Associate that is currently incarcerated or, depending on the program, under indictment, to be ineligible with no further requirements for disclosure of prior criminal history records.

B. Benefits and Costs of the Rule

What are the potential benefits and costs of this regulatory action?

SBA does not anticipate significant additional costs or impact on the subsidy to operate the 7(a), 504, Microloan, ILP, Surety Bond Guaranty and Disaster Loan Programs under these proposed regulations because all loans submitted must always meet Loan Program Requirements. In general, the final rule benefits otherwise qualified entrepreneurs who would not otherwise be eligible to apply for these programs due to outdated restrictions that were not evidence-informed, and therefore it strengthens our economy and our public safety.

SBA does not receive information from lenders on how many applicants they decline for 7(a), 504, and Microloans. SBA has received substantial feedback and research from

stakeholders that its current rules have presented broad barriers to otherwise qualified individuals with criminal history records that seek financing to start, run, or expand small businesses. This final rule aligns with the statutory mandates in 15 U.S.C. 631 and supports the inference that reducing or removing barriers will result in additional applications from those otherwise qualified small business owners with criminal history records who may have been deterred from applying due to the current prohibitions related to criminal history records.

In the 7(a) and 504 programs, for formerly incarcerated individuals and people not on parole or probation, out of more than 50,000 loans made annually, SBA lenders have submitted to SBA for review approximately 586 Character determination requests containing information on criminal history records involving felonies. SBA declines on average only 17–23 of the requests per year due to the nature of the offense or incomplete judicial records. SBA's Disaster Loan Program has declined 93 individuals for criminal history record background checks between 2018 and 2022, with an additional 1,026 files withdrawn by applicants prior to review during the same period. Microloan Intermediaries do not submit loans to SBA for approval, so SBA does not have data for criminal history records of Microloan applicants. SBA's final rule provides clarity for borrowers who might have otherwise withdrawn their application based on eligibility concerns. Finally, Lenders, CDCs, and Microloan Intermediaries make risk-based lending decisions. The statistics above do not account for any checks conducted by lenders or any resultant applications being withdrawn. Some lenders include conducting criminal history background checks and others do not. SBA's proposed revision does not impact a lender's ability to continue to do so, in accordance with their own policies, provided that they do so in a manner that complies with the Equal Credit Opportunity Act and other relevant laws.

C. Alternatives

What alternatives have been considered?

SBA considered the impact of maintaining the current rules that deem as ineligible businesses with Principals or Associates currently incarcerated, on parole or probation or convicted of certain financial and other crimes. This would result in continuing barriers for small businesses owned by individuals with criminal history records. Instead, SBA's final rule balances that concern against the risk to SBA of making guarantees and loans to businesses whose Principals or Associates lack the ability to manage and execute day-to-day business operations due to their current incarceration. SBA's final rule also supports disaster survivors during recovery with increased equal access to capital.

Congressional Review Act

The Office of Management and Budget's (OMB) Office of Information and Regulatory Affairs has determined that this rule is not a major rule under Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (also known as the Congressional Review Act), 5 U.S.C. 804(2). The annual effect on the economy is less than $100 million.

Executive Order 12988

This action meets applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden. The action does not have preemptive effect or retroactive effect.

Executive Order 13132

This final rule does not have federalism implications as defined in Executive Order 13132. 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, as specified in the Executive order. As such it does not warrant the preparation of a Federalism Assessment.

Executive Order 13563

A description of the need for this regulatory action and benefits and costs associated with this action, including possible distributional impacts that relate to Executive Order 13563, are included above in the Regulatory Impact Analysis under Executive Order 12866.

Paperwork Reduction Act, 44 U.S.C. Ch. 35

SBA has determined that this final rule would require that the following forms be revised: SBA Form 1919, ''Borrower Information Form,'' SBA Form 1244, ''Application for Section 504 Loans,'' SBA Form 5, ''Disaster Business Loan Application,'' SBA Form 5C, ''Disaster Home/Sole Proprietor Loan Application,'' and SBA Form 994, ''Application for Surety Bond Guarantee Assistance''.

SBA Form 1919 is approved under OMB Control number 3245–0348. SBA Form 1244 is approved under OMB Control number 3245–0071. SBA Form 5 is approved under OMB Control number 3245–0017 and SBA Form 5C is approved under OMB Control number 3245–0018. SBA Form 994 is approved under OMB Control number 3245–0007.

SBA will revise SBA Form 1919, and SBA Form 1244 to conform to the eligibility change at 13 CFR 120.110(n). When small businesses apply for 7(a) or 504 loans, the estimated hour burden for applicants and lenders will decrease because the criminal history analysis and collection of data will no longer be required.

SBA will revise SBA Form 5 and 5C to conform to the eligibility change at 13 CFR 123.101(i). When disaster survivors apply for disaster loans, the estimated hour burden for applicants will decrease because the criminal history record analysis and collection of data will be reduced.

SBA will revise SBA Form 994 to conform to the eligibility change at 13 CFR 115. 13(a)(2)(i). When small businesses apply for surety bond guarantees, the estimated hour burden for applicants will decrease because the criminal history record analysis and collection of data will no longer be required.

Regulatory Flexibility Act, 5 U.S.C. 601–612

When an agency issues a rulemaking, the Regulatory Flexibility Act (RFA), 5 U.S.C. 601–612, requires the agency to ''prepare and make available for public comment an initial regulatory analysis'' which will ''describe the impact of the proposed rule on small entities.'' Although the rulemaking may potentially impact a small percentage of loans reviewed by 7(a) Lenders, CDCs, Microloan Intermediaries, ILP Intermediaries, the 44 Sureties that participate in the Surety Bond Guaranty Program, and SBA regarding the disaster loans, SBA does not believe the impact will be significant because this rule streamlines regulatory burdens. However, there may be impacts due to increased loans for businesses with Principals or Associates that have a criminal history record but are not currently incarcerated or under indictment.

SBA reviews approximately 586 Character determination requests annually and declines 3 or 4 percent, or 17 to 23 requests, due to the nature of the offense or incomplete judicial records. The revisions to § 120.110(n) will eliminate the need for 100 percent of these character determination

reviews. SBA Form 1919, ''SBA 7a Borrower Information Form,'' is the application form for the 7(a) Loan Program. SBA Form 1244, ''Application for Section 504 Loans,'' is the application form for the 504 Loan Program. Each application includes 3 questions that Associates of the applicant must answer regarding their criminal history records. Under the final rule revisions, SBA will eliminate the three current questions and replace them with one new question regarding incarceration or being under indictment. SBA estimates that all applicants for the 7(a) Loan Program and 504 Loan Program will save 5 minutes completing the applications due to these revisions. Intermediaries for the Microloan Program use their own applications for Microloan borrowers, but it is reasonable to assume similar time savings. The 7(a) Loan Program, 504 Loan Program, and Microloan Program make approximately 68,677 loans per year. Saving 5 minutes for each application will result in total time savings of 5,723 hours annually.

List of Subjects

13 CFR Part 109

Community development, Loan programs-business, Reporting and recordkeeping requirements, Small businesses.

13 CFR Part 115

Claims, Reporting and recordkeeping requirements, Small businesses, Surety bonds.

13 CFR Part 120

Community development, Loan programs-business, Reporting and recordkeeping requirements, Small businesses.

13 CFR Part 123

Disaster assistance, Loan programs-business, Reporting and recordkeeping requirements, Small businesses.

For the reasons stated in the preamble, SBA amends 13 CFR parts 109, 115, 120 and 123 as follows:

PART 109—INTERMEDIARY LENDING PILOT PROGRAM

■ 1. The authority citation for 13 CFR part 109 continues to read as follows:

Authority: 15 U.S.C. 634(b)(6), (b)(7), and 636(l).

■ 2. Add § 109.15 to read as follows:

§ 109.15 Severability.

Any provision of this part held to be invalid or unenforceable as applied to any person, entity, or circumstance shall be construed so as to continue to give the maximum effect to such provision as permitted by law, including as applied to persons or entities not similarly situated or to dissimilar circumstances, unless such holding is that the provision of this part is invalid and unenforceable in all circumstances, in which event the provision shall be severable from the remainder of this part and shall not affect the remainder thereof.

■ 3. Amend § 109.400 by revising paragraph (b)(15) to read as follows:

§ 109.400 Eligible Small Business Concerns.

* * * * *

(b) * * *

(15) Businesses with an Associate who is currently incarcerated, serving a sentence of imprisonment imposed upon adjudication of guilty, or is under indictment for a felony or a crime of moral turpitude;

* * * * *

PART 115—SURETY BOND GUARANTEE

■ 4. The authority citation for 13 CFR part 115 continues to read as follows:

Authority: 5 U.S.C. app 3; 15 U.S.C. 636i, 687b, 687c, 694a, and 694b note.

■ 5. Add § 115.3 to read as follows:

§ 115.3 Severability.

Any provision of this part held to be invalid or unenforceable as applied to any person, entity, or circumstance shall be construed so as to continue to give the maximum effect to such provision as permitted by law, including as applied to persons or entities not similarly situated or to dissimilar circumstances, unless such holding is that the provision of this part is invalid and unenforceable in all circumstances, in which event the provision shall be severable from the remainder of this part and shall not affect the remainder thereof.

■ 6. Amend § 115.13 by revising paragraph (a)(2)(i) to read as follows:

§ 115.13 Eligibility of Principal.

(a) * * *

(2) * * *

(i) The Person is currently incarcerated, serving a sentence of imprisonment imposed upon adjudication of guilty, or under indictment for a felony; or

* * * * *

PART 120—BUSINESS LOANS

■ 7. The authority citation for 13 CFR part 120 continues to read as follows:

Authority: 15 U.S.C. 634(b)(6), (b)(7), (b)(14), (h), and note, 636(a), (h) and (m), 650, 687(f), 696(3) and (7), and 697(a) and (e); sec. 521, Pub. L. 114–113, 129 Stat. 2242; sec. 328(a), Pub. L. 116–260, 134 Stat. 1182.

■ 8. Add § 120.4 to read as follows:

§ 120.4 Severability.

Any provision of this part held to be invalid or unenforceable as applied to any person, entity, or circumstance shall be construed so as to continue to give the maximum effect to such provision as permitted by law, including as applied to persons or entities not similarly situated or to dissimilar circumstances, unless such holding is that the provision of this part is invalid and unenforceable in all circumstances, in which event the provision shall be severable from the remainder of this part and shall not affect the remainder thereof.

■ 9. Amend § 120.110 by revising paragraph (n) to read as follows:

§ 120.110 What businesses are ineligible for SBA business loans?

* * * * *

(n) Businesses with an Associate who is currently incarcerated, serving a sentence of imprisonment imposed upon adjudication of guilty, or is under indictment for a felony or any crime involving or relating to financial misconduct or a false statement;

* * * * *

■ 10. Amend § 120.707 by revising paragraph (a) to read as follows:

§ 120.707 What conditions apply to loans by Intermediaries to Microloan borrowers?

(a) *General.* Except as otherwise provided in this paragraph (a), an Intermediary may only make Microloans to small businesses eligible to receive financial assistance under this part. A borrower may also use Microloan proceeds to establish a nonprofit childcare business. An Intermediary may not make Microloans to businesses with an Associate who is currently incarcerated, serving a sentence of imprisonment imposed upon adjudication of guilty, or to childcare businesses with an Associate who is currently on probation or parole for an offense against children. Proceeds from Microloans may be used only for working capital and acquisition of materials, supplies, furniture, fixtures, and equipment. SBA does not review Microloans for creditworthiness.

* * * * *

PART 123—DISASTER LOAN PROGRAM

■ 11. The authority citation for 13 CFR part 123 continues to read as follows:

Authority: 15 U.S.C. 632, 634(b)(6), 636(b), 636(d), 657n, and 9009.

■ 12. Add § 123.22 to read as follows:

§ 123.22 Severability.

Any provision of this part held to be invalid or unenforceable as applied to any person, entity, or circumstance shall be construed so as to continue to give the maximum effect to such provision as permitted by law, including as applied to persons or entities not similarly situated or to dissimilar circumstances, unless such holding is that the provision of this part is invalid and unenforceable in all circumstances, in which event the provision shall be severable from the remainder of this part and shall not affect the remainder thereof.

■ 13. Amend § 123.101 by revising paragraph (i) to read as follows:

§ 123.101 When am I not eligible for a home disaster loan?

* * * * *

(i) You or other principal owners of the damaged property are currently incarcerated, serving a sentence of imprisonment imposed upon adjudication of guilty;

* * * * *

■ 14. Amend § 123.502 by revising paragraph (c) to read as follows:

§ 123.502 Under what circumstances is your business ineligible to be considered for a Military Reservist Economic Injury Disaster Loan?

* * * * *

(c) Any of your business' principal owners is currently incarcerated, serving a sentence of imprisonment imposed upon adjudication of guilty;

* * * * *

■ 15. Amend § 123.702 by:

■ a. Revising paragraph (c)(1);

■ b. Removing paragraph (c)(2); and

■ c. Redesignating paragraphs (c)(3) through (5) as paragraphs (c)(2) through (4).

The revision read as follows:

§ 123.702 What are the eligibility requirements for an IDAP loan?

* * * * *

(c) * * *

(1) is currently incarcerated, serving a sentence of imprisonment imposed upon adjudication of guilty, or is presently under indictment;

* * * * *

Isabella Casillas Guzman,

Administrator.

[FR Doc. 2024–09009 Filed 4–29–24; 8:45 am]

BILLING CODE 8026–09–P

CONSUMER PRODUCT SAFETY COMMISSION

16 CFR Part 1461

[Docket No. CPSC–2022–0017]

Portable Fuel Container Safety Act Regulation

AGENCY: Consumer Product Safety Commission.

ACTION: Direct final rule.

SUMMARY: In August 2023, the Consumer Product Safety Commission (CPSC or Commission) accepted ASTM F3429/F3429M–23 for prefilled portable fuel containers as the mandatory standard under the Portable Fuel Container Safety Act of 2020 (PFCSA). In January 2024, ASTM notified the Commission that ASTM F3429/F3429M–23 had been revised. The Commission has evaluated revised ASTM F3429/F3429M–24 and finds that the revisions to the standard carry out the purposes of the PFCSA. Accordingly, ASTM F3429/F3429M–24 will be incorporated into the mandatory standard for portable fuel containers.

DATES: The rule is effective on July 27, 2024, unless CPSC receives a significant adverse comment by May 30, 2024. If CPSC receives such a comment, it will publish a notice in the **Federal Register** withdrawing this direct final rule before its effective date. The incorporation by reference of the publication listed in this rule is approved by the Director of the Federal Register as of July 27, 2024.

ADDRESSES: You can submit comments, identified by Docket No. CPSC–2022–0017, by any of the following methods:

Electronic Submissions: Submit electronic comments to the Federal eRulemaking Portal at: *www.regulations.gov.* Follow the instructions for submitting comments. Do not submit through this website: confidential business information, trade secret information, or other sensitive or protected information that you do not want to be available to the public. CPSC typically does not accept comments submitted by email, except as described below.

Mail/Hand Delivery/Courier/Confidential Written Submissions: CPSC encourages you to submit electronic comments by using the Federal eRulemaking Portal. You may, however, submit comments by mail, hand delivery, or courier to: Office of the Secretary, Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814; telephone: (301) 504–7479. If you wish to submit confidential business information, trade secret information, or other sensitive or protected information that you do not want available to the public, you may submit such comments by mail, hand delivery, courier, or you may email them to: *cpsc-os@cpsc.gov.*

Instructions: All submissions must include the agency name and docket number. CPSC may post all comments without change, including any personal identifiers, contact information, or other personal information provided, to: *www.regulations.gov.* Do not submit to this website: confidential business information, trade secret information, or other sensitive or protected information that you do not want to be available to the public. If you wish to submit such information, please submit it according to the instructions for mail/hand delivery/courier/confidential written submissions.

Docket: For access to the docket to read background documents or comments received, go to: *www.regulations.gov,* and insert the docket number, CPSC–2022–0017, into the ''Search'' box, and follow the prompts.

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

SUPPLEMENTARY INFORMATION:

I. Background

The PFCSA [1] requires the Commission to promulgate a final rule to require flame mitigation devices (FMDs) in portable fuel containers that impede the propagation of flame into the container. 15 U.S.C. 2056d(b)(1)–(2). However, the Commission is not required to promulgate a final rule for a class of portable fuel containers within the scope of the PFCSA if the Commission determines that:

- there is a voluntary standard for flame mitigation devices for those containers that impedes the propagation of flame into the container;

[1] Portable Fuel Container Safety Act of 2020, codified at 15 U.S.C. 2056d, as stated Public Law 116–260, div. FF, title IX, section 901, available at: *www.govinfo.gov/content/pkg/PLAW-116publ260/pdf/PLAW-116publ260.pdf.*

• the voluntary standard is or will be in effect not later than 18 months after the date of enactment of the PFCSA; and

• the voluntary standard is developed by ASTM International or such other standard development organization that the Commission determines to have met the intent of the PFCSA.

15 U.S.C. 2056d(b)(3)(A).

If the Commission determines that any voluntary standard meets these requirements, it must publish the determination in the **Federal Register**, and the requirements of such a voluntary standard ''shall be treated as a consumer product safety rule.'' 15 U.S.C. 2056d(b)(4). Under this authority, on January 13, 2023, the Commission published a notice determining that three voluntary standards for portable fuel containers meet the requirements of the PFCSA and would be treated as consumer product safety rules: ASTM F3429/F3429M–20 (pre-filled containers); ASTM F3326–21 (containers sold empty); and section 18 of UL 30:2022 (safety cans). 88 FR 2206.

Portable fuel containers sold pre-filled are within the scope of ASTM F3429/F3429M, *Standard Specification for Performance of Flame Mitigation Devices Installed in Disposable and Pre-Filled Flammable Liquid Containers.* ASTM lists the standard as a dual standard in inch-pound units (F3429 designation) and metric units (F3429M designation). ASTM F3429/F3429M was first published in 2020. ASTM published a revised version of ASTM F3429/F3429M–23 in May 2023, as ASTM F3429/F3429M–23. On August 22, 2023, the Commission determined that the 2023 revisions met the requirements of section 2056d(b)(3)(A) of the PFCSA.[2] Accordingly, ASTM F3429/F3429M–23 is the current mandatory consumer product safety rule for pre-filled-portable fuel containers. On October 31, 2023, the Commission published a direct final rule creating 16 CFR part 1461 for portable fuel containers to incorporate by reference the revised ASTM F3429/F3429M–23, as well as ASTM F3326–21 and section 18 of UL 30:2022. 88 FR 74342.

Under section (b)(5) of the PFCSA, if the requirements of a voluntary standard that meet the requirements of section (b)(3) are subsequently revised, the organization that revised the standard shall notify the Commission after the final approval of the revision. 15 U.S.C. 2056d(b)(5)(A). Any such revision to the voluntary standard shall become enforceable as the new consumer product safety rule not later than 180 days after the Commission is notified of a revised voluntary standard that meets the conditions of section (b)(3) (or such later date as the Commission determines appropriate), unless the Commission determines, within 90 days after receiving the notification, that the revised voluntary standard does not meet the requirements described in section (b)(3) of the PFCSA. 15 U.S.C. 2056d(b)(5)(B).

On January 29, 2024, ASTM notified the Commission that it has revised ASTM F3429/F3429M–23 with the publication of ASTM F3429/F3429M–24. On February 9, 2024, the Commission published a notice of availability and request for comment regarding ASTM F3429/F3429M–24. 89 FR 9078. The Prefilled Fuel Container Industry Association and the Household & Commercial Products Association submitted comments in support of the revisions in ASTM F3429/F3429M–24. Both commenters noted that the various revisions to the standard are important revisions that will improve consumer safety, and thus they support the Commission adopting ASTM F3429/F3429M–24 as the mandatory standard for prefilled portable fuel containers.

As discussed in section II of this preamble, the Commission determines that the revisions in ASTM F3429/F3429M–24 meet the requirements of section 2056d(b)(3)(A) of the PFCSA. 15 U.S.C. 2056d(b)(3)(A). Accordingly, ASTM F3429/F3429M–24 shall be treated as a consumer product safety rule promulgated under section 9 of the Consumer Product Safety Act (CPSA) effective July 27, 2024, which is 180 days after ASTM's notification. This direct final rule[3] updates the incorporation by reference in the Commission's rule under the PFCSA to reflect ASTM F3429/F3429M–24 as the mandatory standard for prefilled portable fuel containers.

II. Revisions to ASTM F3429/F3429M

ASTM F3429/F3429M–23 is the current mandatory standard for prefilled portable fuel containers under the PFCSA and has been revised twice since the original publication in 2020. The ASTM F15.72 subcommittee for Pre-Filled Containers of Flammable and Combustible Liquids developed the standard. The standard requires two performance tests of the container's FMD. The first is an endurance test, in which the container is subjected to an external and stationary 2.5-inch flame at the mouth of the container for 30 seconds. The second test is a flashback test, in which the container is subjected to an external flash fire near the container's mouth. The container passes each test if the contents of the container do not catch fire or otherwise ignite in each of five consecutive trials. The two tests determine whether the FMD impedes the propagation of two different types of ignition sources, a stationary flame and a moving flame.

Substantive revisions in ASTM F3429/F3429M–24 are described below and include an FMD retention test, a new option for some rigid containers to test using a different test gas, clarification of the requirements for certifying a ''family of containers,'' and clarification of existing testing procedures. There are also non-substantive revisions. As discussed below, the Commission concludes that the revisions in ASTM F3429/F3429M–24 meet the requirements of section 2056d(b)(3)(A) of the PFCSA. Thus, the Commission is allowing ASTM F3429/F3429M–24 to become the mandatory consumer product safety rule for pre-filled portable fuel containers pursuant to section 2056d(b)(5) of the PFCSA.

A. Substantive Revisions to ASTM F3429/F3429M

1. New Retention Test

ASTM F3429/F3429M–24 adds a new retention requirement to section 5.6 and a new retention test method as section 11. The new retention requirement and test ensures that an FMD installed in a prefilled portable fuel container is not easily removed by the consumer. The new retention test requires the FMD to resist a 15-lb push force, a 15-lb pull force, and a 25 in-lb torque in each direction. This revision improves safety because it reduces the likelihood that consumers will remove FMDs installed in prefilled portable fuel containers. The Commission therefore concludes that these revisions to the voluntary standard satisfy the requirements of section 2056d(b)(3)(A) of the PFCSA.

2. Change to Permissible Test Gas

ASTM F3429/F3429M–24 revises requirements in section 5.2 for adjusting the gas flow calculation procedures in sections 7.3 and 7.5.2, and it adds a new squeeze test method as section 12 to the standard to permit some rigid containers to be tested with propane or ethane as acceptable test gases in addition to ethylene. Sections 5.2 and 7 detail how the gas flow is calculated; sections 5.2, 7.3, and 7.5.2 add calculation values for propane and ethylene; and section 7.5.2

[2] The Record of Commission Action is available here: *www.cpsc.gov/s3fs-public/RCAASTMsRevisedStandardforPrefilledContainersandDirectFinalRuleUnderthePortableFuelContainerSafetyActof2020.pdf?VersionId=2bvaQho_RlirJo.xyAFUZXyFS2.7Qw7R.*

[3] The Commission voted 5–0 to publish this notification.

also corrects a mathematical error with the ethylene value given.

For a container to be tested with propane or ethane, it must: (1) be determined to be rigid or not squeezable by the new squeezing test method (section 12); and (2) the liquid fuel within the container must have a Maximum Experimental Safe Gap (MESG) [4] above a prescribed value respective of the test gas MESG. This revision allows use of a larger mesh-size FMD for such rigid containers which still provides sufficient protection for these rigid containers while also preventing splashing problems and reducing the likelihood of consumers removing the FMD to achieve better fuel flow. Manufacturers reported that focus-group testing indicated that consumers were likely to try to remove or alter the FMD if the flow of liquid contents was not smooth. In non-rigid containers, consumers can squeeze the container to help dispense the liquid contents, but consumers cannot do this with rigid containers. Testing with propane or ethane results in slightly larger hole sizes in the FMD that allows the liquid contents to better pour from a container that cannot be squeezed, and therefore, reduces the likelihood of consumers trying to remove the FMD. This revision improves safety by reducing the likelihood of consumers removing safety features, while ensuring that the safety features still provide the necessary protection. The Commission therefore concludes that these revisions to the voluntary standard satisfy the requirements of section 2056d(b)(3)(A) of the PFCSA.

3. Family of Container Clarification

ASTM F3429/F3429M–24 clarifies the requirements of section 5.8 for certifying a container with the same FMD as another compliant container. ASTM F3429/F3429M–23 does not provide any requirements, guidance, or information regarding the construction of the two containers. In ASTM F3429/F3429M–24, a statement was added to section 5.8 explaining that the different containers must be ''made from similar material with a similar wall thickness.'' This revision ensures that a container using the same FMD as another but not made from the same material and similar wall thickness requires its own certification test. The change in section 5.8 allows a manufacturer to certify a family of containers with similar designs and wall thicknesses and only variations in sizes with a single certification test but does not allow a manufacturer to certify any container that shares the same FMD with another container certified to F3429–24. This change improves safety by ensuring that FMDs are not accepted when tested on dissimilar containers. The Commission therefore concludes that these changes to the voluntary standard satisfy the requirements of section 2056d(b)(3)(A) of the PFCSA.

4. Revisions to Testing Procedures

ASTM F3429/F3429M–24 revises three test procedures from the 2023 edition of the standard. The first revision applies to the procedures for sample preparation in section 6.1.1.5, clarifying that if the bottom portion of the container is removed for testing, then the FMD and the portion of the container or closure the FMD attaches to shall remain intact.

The second revision to the test procedure is found in a new section 7.5.5 for gas flow calculations under section 7 which clarifies the procedure for flowing gaseous fuel and air into the container. ASTM F3429/F3429M–23 allowed for an increased flow rate of gaseous fuel and air to establish the correct gaseous fuel and air ratio in the container before the test but did not specify when to reduce the flow. The revised standard requires the flow to be reduced 30 seconds before the test starts. This revision ensures the pilot flame outside the container mouth is not affected by an increased outflow used to prepare the container before testing and thus improves consistency in testing from one testing laboratory to another.

The third test procedure revisions are in the endurance test method in section 8 and the flashback test method in section 9, which makes the test procedures in the two test methods consistent with each other. ASTM F3429/F3429M–23 allows the flow rate to be increased in the flashback test but did not include that provision for the endurance test. This change in section 9.4.5.1 of ASTM F3429/F3429M–24 allows the flow rate of gaseous fuel and air to be increased in the endurance test too. As with the endurance test, section 9.4.7 specifies that the flow must be reduced 30 seconds prior to the start of the test. This revision improves the efficiency of the testing laboratory by removing the possibility of testing laboratories confusing inconsistent procedures for the two test methods.

The Commission concludes that these revisions improve safety by facilitating reliable compliance testing.

B. Non-Mandatory Changes to the Standard

The revised standard also made several changes to the non-mandatory sections of the standard, such as adding a reference to new appendix information in the scope, adding a discussion to the definition of FMD, indicating that a FMD may be an assembly comprised of several components, removing the term ''reserved'' from the functional test, and adding information that a functional test is not required, but best practices are included in the appendix. ASTM F3429–23 did not include a functional test but left a ''reserved'' section as a future possible requirement with non-mandatory practices in the appendix. This ''reserved'' section confused users of the standard, and this change removes the possibility for such confusion. The Commission concludes that with these non-substantive changes, the standard still satisfies the requirements of section 2056d(b)(3)(A) of the PFCSA.

Sections 1461.3(a) and 1461.4(a)(2) have been amended to incorporate by reference ASTM F3429/F3429M–24 as the new mandatory standard for prefilled portable fuel containers to reflect the Commission's acceptance of revised ASTM F3429/F3429M–24 under the PFCSA.

III. Direct Final Rule Process

The Commission is issuing this rule as a direct final rule. Although the Administrative Procedure Act (APA; 5 U.S.C. 551–559) generally requires agencies to provide notice of a rule and an opportunity for interested parties to comment on it, section 553 of the APA provides an exception when the agency ''for good cause finds'' that notice and comment are ''impracticable, unnecessary, or contrary to the public interest.'' *Id.* 553(b)(B).

The purpose of this direct final rule is to codify in the Code of Federal Regulations (CFR) revised ASTM F3429/F3429M–24 as a mandatory consumer product safety rule. Because the Commission has determined that this revision meets the requirements of the PFCSA, it becomes effective by operation of law under the PFCSA 180 days after the Commission was notified of the revision. 15 U.S.C. 2056d(b)(5). Public comments would not alter whether ASTM F3429/F3429M–24 is considered a mandatory consumer product safety rule under the PFCSA. The Commission concludes that when it merely updates the codification of the incorporation by reference for a voluntary standard that is already a

[4] MESG is a standardized measurement of how easily a gas flame will pass through a narrow gap bordered by heat-absorbing metal. MESG is used to classify gaseous in a variety of applications where explosion protection is required.

mandatory consumer product safety rule by statute under the PFCSA, notice and comment are unnecessary.

In its Recommendation 95–4, the Administrative Conference of the United States (ACUS) endorses direct final rulemaking as an appropriate procedure to expedite rules that are noncontroversial and not expected to generate significant adverse comments. *See* 60 FR 43108 (Aug. 18, 1995). ACUS recommends that agencies use the direct final rule process when they act under the ''unnecessary'' prong of the good cause exemption in 5 U.S.C. 553(b)(3)(B). Consistent with the ACUS recommendation, the Commission is publishing this rule as a direct final rule, because CPSC does not expect any significant adverse comments.

Unless CPSC receives a significant adverse comment by May 30, 2024, this rule will become effective on July 27, 2024—the end of the 180-day period specified in the PFCSA. In accordance with ACUS's recommendation, the Commission considers a significant adverse comment to be ''one where the commenter explains why the rule would be inappropriate,'' including an assertion challenging ''the rule's underlying premise or approach,'' or a claim that the rule ''would be ineffective or unacceptable without a change.'' 60 FR 43108, 43111 (Aug. 18, 1995). As noted, this rule merely codifies ASTM F3429/F3429M–24 in the CFR as the mandatory consumer product safety rule under the PFCSA; thus, public comments would not change that circumstance.

If the Commission does receive a significant adverse comment, the Commission will withdraw this direct final rule. Depending on the comment and other circumstances, the Commission may then incorporate the adverse comment into a subsequent direct final rule or publish a notice of proposed rulemaking, providing an opportunity for public comment.

IV. Incorporation by Reference

Section 1461.4(a)(2) of the direct final rule incorporates by reference ASTM F3429/F3429M–24. The Office of the Federal Register (OFR) has regulations regarding incorporation by reference. 1 CFR part 51. Under these regulations, agencies must discuss in the preamble to a final rule, ways in which the material the agency incorporates by reference is reasonably available to interested parties and how interested parties can obtain the material. In addition, the preamble to the final rule must summarize the material. 1 CFR 51.5(b).

In accordance with the OFR regulations, section II of this preamble summarizes the major provisions of ASTM F3429/F3429M–24 that the Commission incorporates by reference into 16 CFR part 1461. The standard is reasonably available to interested parties. Until the direct final rule takes effect, a read-only copy of ASTM F3429/F3429M–24 is available for viewing, at no cost, on ASTM's website at: *www.astm.org/CPSC.htm.* Once the rule takes effect, a read-only copy of ASTM F3429/F3429M–24 will be available for viewing, at no cost, on the ASTM website at: *www.astm.org/READINGLIBRARY/.* Interested parties can purchase a copy of ASTM F3429/F3429M–24 from ASTM International, 100 Barr Harbor Drive, P.O. Box C700, West Conshohocken, PA 19428–2959 USA; telephone: (610) 832–9500; *www.astm.org.*

Interested parties can also schedule an appointment to inspect a copy of ASTM F3429/F3429M–24 at CPSC's Office of the Secretary, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814, telephone: (301) 504–7479; email: *cpsc-os@cpsc.gov.*

V. Effective Date

Section 2056d(b)(5)(B) of the PFCSA provides that not later than 180 days after the Commission is notified of a revised voluntary standard (or such later date as the Commission determines appropriate), such revised voluntary standard shall become enforceable as a consumer product safety rule promulgated under 15 U.S.C. 2058, in place of the prior version, unless within 90 days after receiving the notice the Commission determines that the revised voluntary standard does not meet the requirements in section 2056d(b)(3)(A) of the PFCSA. 15 U.S.C. 2056d(b)(5)(B). Unless the Commission receives a significant adverse comment by May 30, 2024, the rule will become effective on July 27, 2024. This direct final rule's effective date of July 27, 2024, which is the effective date of the ASTM F3429/F3429M–24 revision as a mandatory safety standard, does not alter the previously established effective date of July 12, 2023, for ASTM F3326–21 and section 18 of UL 30:2022 under the PFCSA. Products subject to the requirements of those standards are already required to meet those standards.

VI. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA; 5 U.S.C. 601–612) generally requires agencies to review proposed and final rules for their potential economic impact on small entities, including small businesses, and prepare regulatory flexibility analyses. 5 U.S.C. 603, 604. The RFA applies to any rule that is subject to notice and comment procedures under section 553 of the APA. *Id.* As discussed in section III of this preamble, the Commission has determined that notice and the opportunity to comment are unnecessary for this rule. Therefore, the RFA does not apply. CPSC also notes the limited nature of this document, which merely updates the incorporation by reference for ASTM F3429/F3429M in the CFR to reflect ASTM F3429/F3429M–24 as the mandatory standard for prefilled containers under the PFCSA.

VII. Environmental Considerations

The Commission's regulations provide a categorical exclusion for the Commission's rules from any requirement to prepare an environmental assessment or an environmental impact statement where they ''have little or no potential for affecting the human environment.'' 16 CFR 1021.5(c). This rule falls within the categorical exclusion, so no environmental assessment or environmental impact statement is required.

VIII. Preemption

Section 26(a) of the CPSA provides that where a consumer product safety standard is in effect and applies to a product, no state or political subdivision of a state may either establish or continue in effect a requirement dealing with the same risk of injury unless the state requirement is identical to the federal standard. 15 U.S.C. 2075(a). Section 26(c) of the CPSA also provides that states or political subdivisions of states may apply to CPSC for an exemption from this preemption under certain circumstances. 15 U.S.C. 2075(c). The PFCSA deems rules issued under that statute to be a ''consumer product safety rule.'' Therefore, once a rule issued under the PFCSA takes effect, it will preempt in accordance with section 26(a) of the CPSA.

IX. Congressional Review Act

The Congressional Review Act (CRA; 5 U.S.C. 801–808) states that before a rule can take effect, the agency issuing the rule must submit the rule and certain related information, to each House of Congress and the Comptroller General. 5 U.S.C. 801(a)(1). The CRA submission must indicate whether the rule is a ''major rule.'' The CRA states that the Office of Information and

Regulatory Affairs (OIRA) determines whether a rule qualifies as a ''major rule.''

Pursuant to the CRA, OIRA has determined that the rule does not qualify as a ''major rule,'' as defined in 5 U.S.C. 804(2). To comply with the CRA, CPSC will submit the required information to each House of Congress and the Comptroller General.

List of Subjects in 16 CFR Part 1461

Consumer protection, Incorporation by reference, Portable Fuel Containers, Safety.

For the reasons discussed in the preamble, the Commission amends 16 CFR chapter II as follows:

PART 1461—PORTABLE FUEL CONTAINER SAFETY ACT REGULATION

■ 1. The authority citation for part 1461 continues to read as follows:

Authority: 15 U.S.C. 2056d.

■ 2. Amend § 1461.3 by revising paragraph (a) to read as follows:

§ 1461.3 Requirements for flame mitigation devices on portable fuel containers.

* * * * *

(a) * * *

Containers sold pre-filled. Portable fuel containers sold pre-filled with a flammable liquid to the consumer must comply with the requirements of ASTM F3429/F3429M–24 (incorporated by reference, see § 1461.4).

* * * * *

■ 3. Amend § 1461.4 by revising paragraph (a)(2) to read as follows:

§ 1461.4 Incorporation by reference.

* * * * *

(a) * * *

(2) ASTM F3429/F3429M–24, *Standard Specification for Performance of Flame Mitigation Devices Installed in Disposable and Pre-Filled Flammable Liquid Containers,* approved on January 15, 2024.

* * * * *

Alberta E. Mills,

Secretary, Consumer Product Safety Commission.

[FR Doc. 2024–09299 Filed 4–29–24; 8:45 am]

BILLING CODE 6355–01–P

DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2510

RIN 1210–AC16

Definition of ''Employer''—Association Health Plans

AGENCY: Employee Benefits Security Administration, Department of Labor.

ACTION: Final rule, rescission.

SUMMARY: This document rescinds the Department of Labor's (Department or DOL) 2018 rule entitled ''Definition of Employer Under Section 3(5) of ERISA—Association Health Plans'' (2018 AHP Rule). The 2018 AHP Rule established an alternative set of criteria from those set forth in the Department's pre-2018 AHP Rule (pre-rule) guidance for determining when a group or association of employers is acting ''indirectly in the interest of an employer'' under section 3(5) of the Employee Retirement Income Security Act of 1974 (ERISA) for purposes of establishing an association health plan (AHP) as a multiple employer group health plan. The 2018 AHP Rule was a significant departure from the Department's longstanding pre-rule guidance on the definition of ''employer'' under ERISA. This departure substantially weakened the Department's traditional criteria in a manner that would have enabled the creation of commercial AHPs functioning effectively as health insurance issuers. The Department now believes that the core provisions of the 2018 AHP Rule are, at a minimum, not consistent with the best reading of ERISA's statutory requirements governing group health plans.

DATES: *Effective date:* This rule is effective on July 1, 2024.

FOR FURTHER INFORMATION CONTACT: Suzanne Adelman, Office of Regulations and Interpretations, Employee Benefits Security Administration, U.S. Department of Labor, (202) 693–8500 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION:

I. Executive Summary

This document rescinds the Department's 2018 rule entitled ''Definition of Employer Under Section 3(5) of ERISA—Association Health Plans.'' The 2018 AHP Rule established an alternative set of criteria from those set forth in the Department's pre-rule guidance for determining when a group or association of employers is acting ''indirectly in the interest of an employer'' under section 3(5) of ERISA for purposes of establishing an AHP as a multiple employer group health plan. The 2018 AHP Rule was a significant departure from the Department's longstanding pre-rule guidance on the definition of ''employer'' under ERISA. This departure substantially weakened the Department's traditional criteria in a manner that would have enabled the creation of commercial AHPs functioning effectively as health insurance issuers. The 2018 AHP Rule's alternative criteria were, in large part, held invalid by the U.S. District Court for the District of Columbia in *New York* v. *United States Department of Labor.* The district court found the bona fide association and working owner provisions in the 2018 AHP Rule were based on an unreasonable interpretation of ERISA that was inconsistent with congressional intent that ERISA applies to employment-based benefit relationships. The Department, after further review of the relevant statutory language, judicial decisions, and longstanding pre-rule guidance, and further consideration of ERISA's statutory purposes and related policy goals, as well as the public comments received on the Department's proposed rule, now rescinds in full the 2018 AHP Rule in order to resolve and mitigate any uncertainty regarding the status of the criteria that were set under the 2018 AHP Rule, allow for a reexamination of the criteria for a group or association of employers to be able to sponsor an AHP, and ensure that guidance being provided to the regulated community is in alignment with ERISA's text, purposes, and policies. The Department now believes that the provisions of the 2018 AHP Rule that the district court held invalid are, at a minimum, not consistent with the best reading of ERISA's statutory requirements governing group health plans.

II. Background

A. Definition of Employer Under Section 3(5) of ERISA

ERISA regulates ''employee benefit plans'' (classified as ''employee welfare benefit plans'' and ''employee pension benefit plans''), and generally preempts State laws that relate to or have a connection with such plans, subject to certain exceptions. An ''employee welfare benefit plan'' is defined in section 3(1) of ERISA to include, among other arrangements, ''any plan, fund, or program . . . established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund or program was established or is maintained for the purpose of providing for its participants, or their beneficiaries, through the purchase of insurance or otherwise . . . medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, [or] death.'' Thus, to be an employee welfare benefit plan, the plan, fund, or program must, among other criteria, be established or maintained by an employer, an employee organization, or both an employer and an employee organization.

Section 3(5) of ERISA generally defines the term ''employer'' as ''any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan.'' Thus, ERISA defines the term ''employer'' to include the ''direct'' (or common-law) employer of the covered employees or ''any person acting . . . indirectly in the interest of'' the common-law employer, in relation to an employee benefit plan. Section 3(5) of ERISA also expressly identifies ''a group or association of employers acting for an employer in such capacity'' as falling within the definition of ''employer.'' A group or association may establish an employee welfare benefit plan only when it is acting as an ''employer'' within the meaning of section 3(5) of ERISA. The Department's regulation at 29 CFR 2510.3–5, published in its 2018 AHP Rule,[1] which is the subject of this rescission, sought to define circumstances under which a group or association of employers constitutes an ''employer'' within the meaning of section 3(5) of ERISA with respect to sponsorship of a group health plan and the provision of health benefits.

B. Historical Guidance Prior to the 2018 AHP Rule—''Bona Fide'' Group or Association of Employers

Based on definitions in Title I of ERISA, and because Title I's overall structure contemplates employment-based benefit arrangements, the Department has long recognized that, even absent the involvement of an employee organization, a group or association of employers may sponsor a single ''multiple employer'' plan if certain criteria are satisfied. If a group or association satisfies these criteria, then it is generally referred to as a ''bona fide'' employer group or association according to the Department's pre-rule guidance first issued more than forty years ago.[2] Under that pre-rule guidance, health coverage sponsored by a bona fide employer group or association can be structured as a single, multiple employer plan covered by ERISA. The criteria specified in the pre-rule guidance are intended to distinguish bona fide groups or associations of employers that provide coverage to their employees and the families of their employees from arrangements that more closely resemble State-regulated private health insurance coverage.The Department's pre-rule guidance is consistent with the criteria articulated and applied by every Federal appellate court, in addition to several Federal district courts, that have considered whether an organization was acting in the interests of employer members.[3] Moreover, to the Department's knowledge, no court has found, or even suggested, that the pre-rule guidance criteria too narrowly construed the meaning of acting ''indirectly in the interest of an employer'' under section 3(5) of ERISA.

Historically, the Department has taken a facts-and-circumstances approach to determine whether a group or association of employers is a bona fide employer group or association that may sponsor an ERISA group health plan on behalf of its employer members. The Department's longstanding pre-rule guidance, largely taking the form of a collection of advisory opinions issued over more than four decades, has expressed the Department's view regarding whether, based on individual circumstances, a particular group or association was able to sponsor a multiple employer welfare plan.[4] While the language in the Department's pre-rule advisory opinions was tailored to the issues presented in the specific arrangements involved, the Department's interpretive guidance has consistently focused on three criteria: (1) whether the group or association has business or organizational purposes and functions unrelated to the provision of benefits (the ''business purpose'' standard); (2) whether the employers share a commonality of interest and genuine organizational relationship unrelated to the provision of benefits (the ''commonality'' standard); and (3) whether the employers that participate

[1] 83 FR 28912 (June 21, 2018). The 2018 AHP Rule included an amendment to the Department's regulation at 29 CFR 2510.3–3, which excludes ''plans without employees'' from the definition of employee benefit plans covered by Title I of ERISA. Under the amendment, a working owner with no common law employees would have been treated as both an ''employer'' member of the employer group or association *and* an ''employee'' participant in the AHP, notwithstanding the lack of any employment relationship with any other person. This amendment to 29 CFR 2510.3–3 is also rescinded by this final rule.

[2] An information letter from the Employee Benefits Security Administration (EBSA)—previously known as the Pension and Welfare Benefits Administration (PWBA)—explained that ''[t]he question of whether or not an association is an employer within the meaning of section 3(5) rests upon the dual questions of whether or not a bona fide employer association exists and, if so, whether it is acting in the interest of an employer in relation to an employee benefit plan,'' and also noted that ''a number of factors must be considered'' to determine ''whether a bona fide employer association exists.'' Letter from Helene Benson, PWBA, to David Peters, 1979 WL 169912 (Aug. 22, 1979); Advisory Opinion No. 80–15A (March 14, 1980) (''The Department has taken the position that, in order for any group or association to satisfy this definition [association acting for its employer members], it must be a bona fide association of employers, subject, in both form and substance, to the control of its employer members.'')

[3] *Gruber* v. *Hubbard Bert Karle Weber, Inc.,* 159 F.3d 780, 786–87 (3d Cir. 1998) (endorsing the Department's historical approach to determining whether an organization is acting in the interests of employer members); *MDPhysicians & Assocs., Inc.* v. *State Bd. of Ins.,* 957 F.2d 178, 185–86 (5th Cir. 1992) (consistent with the Department's pre-rule guidance, requiring that, to act in the interests of employer members, an organization must not be a commercial, ''entrepreneurial venture'' but must instead represent members with ''a common economic or representation interest'' unrelated to the provision of benefits and who established or maintained the plan); *Wisconsin Educ. Ass'n Ins. Tr.* v. *Iowa State Bd. of Pub. Instruction,* 804 F.2d 1059, 1062–65 (8th Cir. 1986) (hereinafter WEAIT); *Int'l Ass'n of Entrepreneurs of Am. Ben. Tr.* v. *Foster,* 883 F. Supp. 1050, 1056–62 (E.D. Va. 1995); *Assoc. Indus. Mgmt. Servs.* v. *Moda Health Plan, Inc.,* No. 3:14–CV–01711–AA, 2015 WL 4426241, at *2–*5 (D. Or. July 16, 2015); *Smith* v. *Prudential Health Care Plan Inc.,* No. CIV. A. 97–891, 1997 WL 297096, at *3–*4 (E.D. Pa. May 27, 1997).

[4] *See, e.g.,* Advisory Opinions Nos. 94–07A (Mar. 14, 1994), 95–01A (Feb. 13, 1995), 96–25 (Oct. 31, 1996), 2001–04A (Mar. 22, 2001), 2003–13A (Sept. 30, 2003), 2003–17A (Dec. 12, 2003), 2007–06A (Aug. 16, 2007), 2012–04A (May 25, 2012), and 2019–01A (July 8. 2019). S*ee also* Department of Labor Publication, ''Multiple Employer Welfare Arrangements Under ERISA, A Guide to Federal and State Regulation,'' at *www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/publications/mewa-under-erisa-a-guide-to-federal-and-state-regulation.pdf.* Judicial decisions tended to take approaches consistent with that followed by the Department. *See also Wisconsin Educ. Assn. Ins. Trust* v. *Iowa State Bd. of Public Instruction,* 804 F.2d 1059, 1063–1064 (8th Cir. 1986); *MDPhysicians & Associates, Inc.* v. *State Bd. of Ins.,* 957 F.2d 178, 183–186 (5th Cir. 1992) [hereinafter *MDPhysicians*]; *National Business Assn. Trust* v. *Morgan,* 770 F. Supp. 1169 (W.D. Ky. 1991).

in a benefit program, either directly or indirectly, exercise control over the program, both in form and substance (the ''control'' standard).

A variety of factors were set forth in the Department's longstanding pre-rule guidance as relevant when applying these three general criteria to a particular group or association. These factors include how members are solicited; who is entitled to participate and who actually participates in the group or association; the process by which the group or association was formed; the purposes for which it was formed; the preexisting relationships, if any, of its members; the powers, rights, and privileges of employer members that exist by reason of their status as employers; who actually controls and directs the activities and operations of the benefit program; and the extent of any employment-based common nexus or other genuine organizational relationship unrelated to the provision of benefits.[5]

C. Association Coverage Under the Public Health Service Act

The Public Health Service Act (PHS Act) establishes health coverage requirements in Title XXVII that generally apply to group health plans and health insurance issuers offering group or individual health insurance coverage. The provisions of Title XXVII of the PHS Act have been amended by the Affordable Care Act (ACA)[6] and other Federal laws. These PHS Act provisions are administered by the Department of Health and Human Services (HHS), Centers for Medicare & Medicaid Services (CMS). With respect to health insurance issuers, States are the primary enforcers of these PHS Act provisions, and if a State fails to substantially enforce them, CMS enforces them.

Under Title XXVII of the PHS Act, ''individual market coverage'' is any health insurance coverage that is not offered in connection with a group health plan.[7] Conversely, the term ''group health insurance coverage'' refers to health insurance coverage offered in connection with a group health plan.[8] The PHS Act derives its definitions of ''group health plan'' and ''employer'' from the ERISA definitions of ''employee welfare benefit plan'' and ''employer.''[9] Thus, reference to ERISA is needed when determining whether a group health plan exists for PHS Act purposes and determining whether an ERISA-covered health arrangement is properly treated as a single plan operating on behalf of multiple employers or, instead, a collection of separate and discrete employer-sponsored plans.

In guidance issued in 2002 and 2011, CMS explained how the requirements of Title XXVII of the PHS Act apply to health insurance coverage sold to or through associations.[10] Specifically, as stated in the guidance, the test for determining whether association coverage[11] is individual or group market coverage for purposes of Title XXVII of the PHS Act is the same test as that applied to health insurance coverage offered directly to individuals or employers. In other words, CMS will generally ignore—''look through''—the association to determine whether each association member must receive coverage that complies with the requirements arising out of its status as an individual, small employer, or large employer.

Consequently, coverage that is issued to or through an association, but not in connection with a group health plan, is not considered group health insurance coverage for purposes of the PHS Act. Under the PHS Act, such coverage is considered coverage in the individual market, regardless of whether it is considered group coverage under State law.[12]

In situations involving employment-based association coverage where coverage is offered in connection with a group health plan, the coverage is considered group health insurance coverage under the PHS Act. In cases where an association is not considered an employer under ERISA, each employer member of the association is considered to sponsor its own group health plan under the PHS Act. In those cases where an association is determined to be an employer that is ''acting indirectly in the interest of its employer members'' and sponsors a plan under ERISA, the association coverage is considered a single group health plan under the PHS Act.

Under the PHS Act, the number of employees of the employer sponsoring the group health plan determines whether the employer is a small employer[13] or large employer[14] and thus whether health insurance coverage provided in connection with a group health plan sponsored by the employer falls into the small group market or large group market. In the situation where each employer member of the association is considered to sponsor its own group health plan, the size of each employer participating in the association determines whether that employer's coverage is subject to the small group market or large group market rules. In those instances where the group or association of employers is, in fact, sponsoring the group health plan and the association itself is deemed the ''employer,'' the number of employees employed by all the employers participating in the association determines whether the coverage is subject to the small group market or large group market rules. Accordingly, the status of an association as a single ''employer'' within the meaning of section 3(5) of ERISA, and of the AHP as a single plan has important legal consequences. As a general matter, small group and individual market coverage is subject to Federal protections not applicable to large group market coverage, such as the ACA's premium rating requirements, single risk pool, and essential health benefit (EHB) requirements. Thus, to the extent the arrangement is not a single plan, but rather an aggregation of individual plans (or individuals), the participants covered by the arrangement are subject

[5] *See Gruber,* 159 F.3d at 788 fn. 5 (listing the Department's criteria); *Int'l Ass'n of Entrepreneurs of Am. Ben. Tr.* v. *Foster,* 883 F. Supp. at 1061 (same); *Hall* v. *Maine Mun. Emps. Health Tr.,* 93 F. Supp. 2d 73, 77 (D. Me. 2000); *Assoc. Indus. Mgmt. Servs.* v. *Moda Health Plan, Inc.,* 2015 WL 4426241, at *3.

[6] The Patient Protection and Affordable Care Act, Public Law 111–148, was enacted on March 23, 2010; the Health Care and Education Reconciliation Act of 2010, Public Law 111–152, was enacted on March 30, 2010. These statutes are collectively referred to as the Affordable Care Act (ACA). The ACA reorganized, amended, and added to the provisions of part A of title XXVII of the PHS Act relating to group health plans and health insurance issuers in the group and individual markets.

[7] Section 2791(b)(5) and (e)(1)(A) of the PHS Act.

[8] Section 2791(b)(4) of the PHS Act.

[9] Section 2791(a)(1) and (d)(6) of the PHS Act.

[10] *See* Centers for Medicare & Medicaid Services, Application of Individual and Group Market Requirements under Title XXVII of the Public Health Service Act when Insurance Coverage Is Sold to, or through Associations, Insurance Standards Bulletin Series—INFORMATION (Sept. 1, 2011), available at *https://www.cms.gov/cciio/resources/files/downloads/association_coverage_9_1_2011.pdf. See also* CMS Insurance Standards Bulletin Transmittal No. 02–02 (August 2002), available at *https://www.cms.gov/regulations-and-guidance/health-insurance-reform/healthinsreformforconsume/downloads/hipaa-02-02.pdf.*

[11] For this purpose, the term ''association coverage'' means health insurance coverage offered to collections of individuals and/or employers through entities that may be called associations, trusts, multiple employer welfare arrangements, purchasing alliances, or purchasing cooperatives.

[12] *See* 45 CFR 144.102(c).

[13] The term ''small employer'' generally means an employer who employed an average of at least 1 but not more than 50 employees on business days during the preceding calendar year, and who employed at least 1 employee on the first day of the plan year. Section 2791(e)(4) of the PHS Act.

[14] The term ''large employer'' generally means an employer who employed an average of at least 51 employees on business days during the preceding calendar year and who employs at least 2 employees on the first day of the plan year. Section 2791(e)(2) of the PHS Act.

to these more robust protections applicable to plans in the small group market (or to individual coverage, when the insured parties are simply individuals purchasing insurance coverage outside the group market).[15] [16]

D. The 2018 AHP Rule

On June 21, 2018, the Department published the 2018 AHP Rule,[17] which was intended to broaden the types of employer groups and associations that may sponsor a single group health plan under ERISA. The Department issued the 2018 AHP Rule in response to a 2017 Executive Order (E.O.) that was rescinded in 2021.[18] Relative to the longstanding pre-rule guidance, the 2018 AHP Rule substantially loosened the requirements for groups or associations to be considered bona fide groups or associations that were eligible to establish employee welfare benefit plans or to otherwise meet the definition of ''employer'' under section 3(5) of ERISA.[19] As published, the 2018 AHP Rule altered many of the guardrails in pre-rule guidance, which had been intended to distinguish bona fide employer associations united by common employment-based relationships from mere commercial ventures aimed at marketing insurance to employers and individuals.

Thus, paragraph (b)(1) of the 2018 AHP Rule abandoned the requirement in pre-rule guidance that the group or association acting as an employer must *exist* for purposes *other than* providing health benefits. Instead, the 2018 AHP Rule only required that the group or association must have at least one substantial business purpose unrelated to offering and providing health coverage or other employee benefits to its employer members and their employees. In a significant departure from pre-rule guidance, the rule specifically stated that ''the primary purpose of the group or association'' could be ''to offer and provide health coverage to its employer members and their employees.'' [20]

Similarly, paragraph (c) of the 2018 AHP Rule provided for a looser commonality standard than the pre-rule guidance, which had insisted on a genuine commonality of interests between employer members. Under the 2018 AHP Rule, a group or association of employers satisfied the commonality of interest requirement if either: (1) its employer members were in the same trade or business; or (2) the principal places of business for its employer members were located within a region that did not exceed the boundaries of the same State or metropolitan area, such as the Washington Metropolitan Area of the District of Columbia (which also includes portions of Maryland and Virginia). No other common interests were required.[21] Under the pre-rule guidance, geography alone would not have been sufficient to establish commonality between businesses. For example, barbers, mechanics, and lawyers would not have been treated as having the requisite commonality of interest merely because they all have a principal place of business in the State of New York.

In a particularly striking departure from ERISA's employment-based structure, paragraph (e) of the 2018 AHP Rule specifically allowed working owners without any common-law employees to participate in AHPs, stating that the working owner would be treated as both an ''employer'' and ''employee'' for purposes of participating in, and being covered by, an AHP, notwithstanding the absence of any employment relationship with any common-law employees.[22] Under the pre-rule guidance, working owners without common-law employees generally were not permitted to be treated as employers for the purpose of participating in a bona fide employer group or association,[23] or as employees who could be participants in an ERISA-covered employee welfare benefit plan.

In part because the 2018 AHP Rule had relaxed the standards for treating arrangements as single group plans—making it easier for small employers and working owners to purchase coverage in the large group market which is not subject to all the legal protections applicable to coverage in the individual and small group markets—the 2018 AHP Rule expressly added nondiscrimination standards as an additional safeguard against abuse.[24] These standards aimed to reduce the danger that the new AHPs would abuse their status by cherry-picking groups of relatively healthy participants, such as by charging one participating business more for premiums than it charges other members because that business employs several individuals with chronic illness, and excluding others at the expense of the broader insurance market, which would cover a relatively sicker and more expensive population. In particular, the 2018 AHP Rule incorporated and adapted existing health nondiscrimination provisions already applicable to group health plans, including AHPs, under the Health Insurance Portability and Accountability Act of 1996 (HIPAA).[25]

In applying the HIPAA health nondiscrimination rules for defining similarly situated individuals under the 2018 AHP Rule, the group or association could not treat employer members as distinct groups of similarly situated individuals if it wished to qualify as a bona fide group or association for purposes of sponsoring an AHP.[26] For example, a group or association could not separately experience-rate each employer member of the association based on the health factors of their employees and meet the criteria to be a bona fide group or association of employers under the 2018 AHP Rule. The pre-rule guidance does not incorporate nondiscrimination requirements in the definition of employer, although plans must comply with all applicable laws, including the

[15] There are other provisions of the PHS Act that apply to individual but not large group market coverage. For example, section 2746 of the PHS Act requires health insurance issuers offering individual health insurance coverage or short-term limited duration insurance coverage to make disclosures to enrollees in such coverage and provide reports to the Secretary of HHS regarding direct and indirect compensation provided by the issuer to an agent or broker associated with enrolling individuals in such coverage.

[16] *See* section 2701 of the PHS Act (premium rating), section 1312(c) of the ACA (single risk pool), and section 2707(a) of the PHS Act (EHB requirements). The ACA requires non-grandfathered health plans in the individual and small group markets to cover EHBs, which include items and services in the following ten benefit categories: (1) ambulatory patient services; (2) emergency services; (3) hospitalization; (4) maternity and newborn care; (5) mental health and substance use disorder services including behavioral health treatment; (6) prescription drugs; (7) rehabilitative and habilitative services and devices; (8) laboratory services; (9) preventive and wellness services and chronic disease management; and (10) pediatric services, including oral and vision care. 42 U.S.C. 18022(b).

[17] 83 FR 28912, 28962 (June 21, 2018).

[18] E.O. 13813, 82 FR 48385 (rescinded by E.O. 14009, 86 FR 7793 (Jan. 28, 2021)).

[19] *See generally* 83 FR 28912 (June 21, 2018). But the Department expressly noted in the 2018 AHP Rule that the rule ''does not invalidate any existing advisory opinions, or preclude future advisory opinions, from the Department under section 3(5) of ERISA that address other circumstances in which the Department will view a person as able to act directly or indirectly in the interest of direct employers in sponsoring an employee welfare benefit plan that is a group health plan.'' 83 FR 28912, 28962 (June 21, 2018).

[20] 83 FR 28912, 18 (June 21, 2018).

[21] 29 CFR 2510.3–5(c); *see* 83 FR 28912, 28924 (June 21, 2018).

[22] *Id.* at 28929–33.

[23] *Id.* at 28928, n. 40.

[24] Under the 2018 AHP Rule, in addition to the bona fide group or association, the underlying health coverage offered by the bona fide group or association must also meet these requirements for the bona fide group or association to qualify as an employer under the 2018 AHP Rule. 84 FR 28912, 28926–29.

[25] *Id.* at 28926–27.

[26] *Id.* at 28927, 28929, 28955.

HIPAA nondiscrimination rules. As the Department noted in the preamble to the 2018 AHP Rule, the HIPAA nondiscrimination rules apply to group health plans, including AHPs, and therefore AHPs, like any other group health plan, cannot discriminate in eligibility, benefits, or premiums against an individual within a group of similarly situated individuals based on a health factor.

E. Decision Finding Core Provisions of the 2018 AHP Rule Invalid

In July 2018, eleven States and the District of Columbia (collectively, the States) sued the Department in the U.S. District Court for the District of Columbia. They argued that the 2018 AHP Rule violates the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.,* because it exceeds the Department's statutory authority and is arbitrary or capricious. The States moved for summary judgment, and the Department moved to dismiss the lawsuit for lack of standing and cross-moved in the alternative for summary judgment. On March 28, 2019, the Federal district court denied the Department's motions and granted the States' motion for summary judgment. In granting the States' motion, the district court held invalid the 2018 AHP Rule's definition of bona fide group or association of employers and the language permitting working owners without common-law employees to be treated as employees when participating in an AHP.[27] Specifically, the district court concluded that the 2018 AHP Rule's criteria for establishing AHPs unreasonably construed ERISA's requirement that the association act ''indirectly in the interest of an employer'' because the 2018 AHP Rule's ''substantial business purpose'' and ''geographic commonality'' requirements were not drawn narrowly enough to limit AHPs to those that act in the interest of employers, thus unreasonably expanding the definition of ''employer.''[28] In addition, the district court ruled that the 2018 AHP Rule's expansion of the term ''employer'' under ERISA to include working owners without common-law employees (when members of an association) was unreasonable because it was contrary to ERISA's text and central purpose of regulating employment-based relationships.[29] Regarding ERISA's text and purpose, the district court held that Congress did not intend for working owners without common-law employees to be included within ERISA—either as individuals or when joined in an employer association.[30] In conclusion, the district court held that the 2018 AHP Rule was inconsistent with ERISA and the APA because the provisions unlawfully failed to limit bona fide associations to those acting ''in the interest of'' their employer members, within the meaning of ERISA, thus exceeding the Department's statutory authority.[31] The district court remanded the 2018 AHP Rule to the Department to consider how the severability provision of the 2018 AHP Rule affects any of its remaining provisions.[32] The Department's longstanding pre-rule guidance was not affected by the district court's decision.

In 2019, the Department appealed the district court's decision.[33] Thereafter, the U.S. Court of Appeals for the District of Columbia Circuit granted the Department's request to stay the appeal.[34] Subsequently, the Department informed the appeals court that it would undertake notice and comment rulemaking on a proposal to rescind the 2018 AHP Rule. The appeal pending before the D.C. Circuit remains stayed.

The Department considered the severability clause issue raised by the district court and concluded that, without the core provisions that the district court found invalid, the 2018 AHP Rule could not be operationalized and would provide no meaningful guidance. To minimize consequences of the district court's decision on AHP participants, the Department announced a temporary safe harbor from enforcement on April 29, 2019.[35] Specifically, the Department announced that it would not pursue enforcement actions against parties for potential violations stemming from actions taken prior to the district court's decision and in good faith reliance on the 2018 AHP Rule, as long as parties met their responsibilities to association members and the AHP's participants and beneficiaries to pay health benefit claims as promised.[36] In addition, the Department announced that it would not take action against existing AHPs for continuing, through the remainder of the applicable plan year or contract term that was in force at the time of the district court's decision, to provide health benefits to members who enrolled in good faith reliance on the 2018 AHP Rule before the district court's order.[37] Because the 2018 AHP Rule ceased being an alternative pathway for entities to be treated as bona fide employer groups or associations after the district court's decision in 2019, the Department anticipated that parties who established AHPs in reliance on the 2018 AHP Rule would wind them down and that no new AHPs would be formed in reliance on the 2018 AHP rule until the judicial process ended. The Department's temporary safe harbor from enforcement expired long ago, and the Department is not aware of any AHPs that currently exist in reliance on the 2018 AHP Rule.[38]

III. Rescission of 2018 AHP Rule

This final rule rescinds the 2018 AHP Rule in its entirety. Accordingly, the 29 CFR 2510.3–5 regulation established by the 2018 AHP Rule and the related amendment to the 29 CFR 2510.3–3 regulation made by the 2018 AHP Rule are rescinded.

The 2018 AHP Rule reflected a substantial departure from the Department's longstanding pre-rule guidance on the definition of ''employer'' under ERISA. The 2018 AHP Rule struck the wrong balance between ensuring a sufficient

[27] *New York* v. *United States Department of Labor,* 363 F. Supp. 3d 109 (D.D.C. 2019).

[28] *Id.* at 131–34.

[29] *Id.* at 136–40.

[30] *Id.* at 137. The district court concluded that the provision was contrary to ERISA and the APA and that it relied on ''a tortured reading'' of the ACA. *Id.* at 141. The court described the defense of the working owner test as ''pure legerdemain,'' noting that ''DOL's feat of prestidigitation transforms two individuals, neither of whom works for the other, into a total of three employers and two employees.'' *Id.* at 139. The court understood ERISA to require a different approach to counting employees, noting that ''when one counts the employees employed by two self-employed persons without employees, the sum is zero.'' *Id.*

[31] *Id.* at 128.

[32] *Id.* at 141.

[33] *New York* v. *United States Department of Labor,* 363 F. Supp. 3d 109, *appeal docketed,* No. 19–5125 (D.C. Cir. May 31, 2019).

[34] *New York* v. *United States Department of Labor,* No. 19–5125 (D.C. Cir. Feb. 8, 2021) (order granting consent motion to hold case in abeyance).

[35] Press Release, Employee Benefits Security Administration, U.S. Department of Labor Statement Relating to the U.S. District Court Ruling in State of New York v. United States Department of Labor (Apr. 29, 2019), available at *https://www.dol.gov/newsroom/releases/ebsa/ebsa20190429.*

[36] *Id.*

[37] In addition, as explained in the April 29, 2019 statement, HHS had advised the Department that HHS would not pursue enforcement against nonfederal governmental plans or health insurance issuers for potential violations of Title XXVII of the PHS Act caused by actions taken before the district court's decision in good faith reliance on the rule's validity, through the remainder of the applicable plan year or contract term that was in force at the time of the district court's decision. HHS had also advised the Department that HHS would not consider States to be failing to substantially enforce applicable requirements under Title XXVII of the PHS Act in cases where the State adopted a similar approach with respect to health insurance coverage issued within the State. *Id.*

[38] The non-enforcement policy ended at the end of the plan year or contract term that was in effect at the time of the district court's decision on March 28, 2019. *Id.* at 38.

employment nexus and enabling the creation of AHPs. The employment relationship is at the heart of what makes an entity a bona fide group or association of employers capable of sponsoring an AHP, and of what separates bona fide employer associations from commercial ventures aimed at selling insurance to unrelated individuals and employers. The approach taken in the 2018 AHP Rule does not comport with the better reading of the statute because it goes too far in disregarding ERISA's focus on employment-based relationships. The pre-rule guidance rightly insisted on the existence of an employment relationship and on a common employment nexus between entities participating in a bona fide employer association. By departing from these standards, in the 2018 AHP Rule, the Department undermined ERISA's employment-based focus and wrongly treated as ''employers'' entities whose primary purpose was the marketing of health benefits to unrelated employers and individuals.

As explained in detail below, the Department is no longer of the view that the business purpose standard, geography-based commonality standard, and working owner provision in the 2018 AHP Rule, even as bolstered by the nondiscrimination standards in paragraph (d)(4), are sufficient to distinguish between meaningful employment-based relationships and commercial insurance-type arrangements whose purpose is principally to market benefits, and to identify and manage risk. The Department's rescission of the 2018 AHP Rule makes clear that this significant departure from pre-rule guidance no longer represents the Department's interpretation of when a group or association can constitute an ''employer'' for purposes of sponsoring a group health plan under ERISA. The rescission leaves in place the longstanding pre-rule guidance that has been consistently supported and relied upon in numerous judicial decisions because it fosters a sufficient employer-employee nexus and proper oversight of AHPs, while remaining consistent with ERISA's text and purpose.

A. Authority To Define ''Employer'' in Section 3(5) of ERISA

Congress tasked the Department with administering ERISA.[39] The Department has clear authority to interpret the term ''employer,'' including defining when a ''group or association of employers'' may act ''indirectly in the interest of an employer'' in establishing an employee benefit plan, and has done so in numerous advisory opinions.[40] The courts and the Department have consistently stressed that ERISA's definition of ''employee benefit plan,'' including the definition's reference to arrangements ''established or maintained by an employer or employee organization, or both,'' envisions employment-based arrangements. No court decision or guidance from the Department, including the 2018 AHP Rule, has suggested the ''employer group or association'' provision in the section 3(5) of ERISA definition of ''employer'' extends the concept of an ''employee benefit plan'' to commercial insurance-type arrangements.

As described above, the Department's longstanding pre-rule guidance, as expressed in advisory opinions, has traditionally applied a facts-and-circumstances approach to determine whether a group or association of employers is a bona fide employer group or association capable of sponsoring an ERISA plan on behalf of its employer members. This pre-rule guidance focuses on three general criteria: (1) whether the group or association has business or organizational purposes and functions unrelated to the provision of benefits; (2) whether the employers share some commonality of interest and genuine organizational relationship unrelated to the provision of benefits; and (3) whether the employers that participate in a benefit program, either directly or indirectly, exercise control over the program, both in form and substance. While there are many organizations of employers, the Department's pre-rule guidance makes clear that only certain entities consisting of more than one employer meet the definition of a bona fide group or association of employers under ERISA.

Before the 2018 AHP Rule, the Department's approach to these determinations had consistently focused on employment-based arrangements, as contemplated by ERISA, rather than commercial insurance-type arrangements that lack the requisite connection to the employment relationship.[41] The Department's longstanding pre-rule guidance had also been informed by its extensive experience with unscrupulous promoters, marketers, and operators of multiple employer welfare arrangements (MEWAs).[42] AHPs generally qualify as MEWAs under ERISA. Although MEWAs can provide valuable coverage, historically MEWAs, particularly self-funded MEWAs, have disproportionately suffered from financial mismanagement or abuse, leaving participants and providers with unpaid benefits and bills and putting small businesses at financial risk.[43] Because of this history of abuse by MEWA promoters falsely claiming ERISA coverage and protection from State regulation, Congress amended ERISA in 1983 to provide an exception to ERISA's broad preemption provisions

[39] 29 U.S.C. 1135 (delegating authority to the Secretary of Labor to ''prescribe such regulations as he finds necessary or appropriate to carry out the provisions of [ERISA]''); *see Black & Decker Disability Plan* v. *Nord,* 538 U.S. 822, 831 (2003) (deferring to the Department's interpretation of an ERISA provision).

[40] *See* Advisory Opinions Nos. 94–07A (Mar. 14, 1994), 95–01A (Feb. 13, 1995), 96–25A (Oct. 31, 1996), 2001–04A (Mar. 22, 2001), 2003–13A (Sept. 30, 2003), 2003–17A (Dec. 12, 2003), 2007–06A (Aug. 16, 2007), 2012–04A (May 25, 2012), and 2019–01A (July 8. 2019); *see also* 2018 AHP Rule, 83 FR 28912, 28914 (June 21, 2018) and *New York* v. *United States Department of Labor,* 363 F. Supp. 3d 109, 128 (D.D.C. 2019) (recognizing the Department's authority to interpret ERISA).

[41] This focus is supported by courts' interpretation of the term ''employee benefit plan.'' *See, e.g., Wisconsin Educ. Ass'n Ins. Trust* v. *Iowa State Bd. of Public Instruction,* 804 F.2d 1059, 1063–64 (8th Cir. 1986) (concluding that ''the statute and legislative history will [not] support the inclusion of what amounts to commercial products within the umbrella of the definition'' of ''employee benefit plan'' (citing H.R. Rep. No. 1785, 94th Cong., 2d Sess. 48 (1977)).

[42] Section 3(40)(A) of ERISA (defining MEWAs).

[43] For discussions of this history, *see:* (1) U.S. Gov't Accountability Office, GAO–92–40, ''States Need Labor's Help Regulating Multiple Employer Welfare Arrangements.'', March 1992, at *https://www.gao.gov/assets/220/215647.pdf;* (2) U.S. Gov't Accountability Office, GAO–04–312, ''Employers and Individuals Are Vulnerable to Unauthorized or Bogus Entities Selling Coverage.'' Feb. 2004, at *https://www.gao.gov/new.items/d04312.pdf;* and (3) Kofman, M. and Jennifer Libster, ''Turbulent Past, Uncertain Future: Is It Time to Re-evaluate Regulation of Self-Insured Multiple Employer Arrangements?'', Journal of Insurance Regulation, 2005, Vol. 23, Issue 3, pp. 17–33.

for the regulation of plan and non-plan MEWAs[44] under State insurance laws.[45]

Employees and their dependents have too often become financially responsible for medical claims they were promised would be covered by the plan after paying premiums to fraudulent or mismanaged MEWAs, which could include AHPs. Because these entities often become insolvent, individuals and families bear the risk, and the impact can be devastating as participants are left with large unpaid medical bills or even lose access to critical medical services.[46] Even when such MEWAs are not insolvent, employees and their dependents may still become financially responsible for health claims where the AHP failed to adequately disclose the benefit limitations and exclusions under the plan.[47] The Department is concerned about the potential uptake and expansion of fraudulent and mismanaged MEWAs.

ERISA's overarching purpose is to protect participants and beneficiaries. The provisions of Title I of ERISA were initially enacted primarily to address public concern that funds of private pension plans were being mismanaged and abused. Over time, however, ERISA's protections have dramatically expanded with respect to private group health plans as well. Both Federal regulators and State insurance regulators have devoted substantial resources to detecting and correcting mismanagement and abuse, and in some cases, prosecuting wrongdoers. Even the 2018 AHP Rule expressed concern about departing too dramatically from its traditional interpretation of the term ''employer.'' [48] While the Department sought to expand the scope of covered entities, it recognized the danger that too broad an expansion could result in ''associations'' masquerading as bona fide employer groups or associations merely to promote the commercial sale of insurance. For that reason, the Department in the 2018 AHP Rule adopted and clarified the pre-rule guidance condition that the employers who participate in the AHP must control the group or association and the plan and added an express nondiscrimination requirement as a counterweight to abuse.

Because oversight resources are extremely limited and fraudulent operations often resist detection until claims go unpaid, significant damage can be done before State and Federal governmental entities even receive a complaint about an arrangement, making it difficult for regulators to mitigate damage and stop bad actors. The vulnerability of the participants, beneficiaries, and employers whose employees receive benefits through an AHP is further heightened when the standard for becoming a bona fide group or association is weakened. A weakened standard also can hinder efforts by States to regulate MEWAs, including AHPs, within their borders.[49]

The preamble of the 2018 AHP Rule implies as much in explaining the importance of incorporating the nondiscrimination provision in paragraph (d)(4) of the 2018 AHP Rule. As noted above, paragraph (d)(4) of the 2018 AHP Rule sought to prohibit AHPs from treating member employers as distinct groups in an effort to distinguish AHPs from commercial insurance issuers. In discussing the importance of a requisite connection or commonality to lessen concerns about fraud, the preamble of the 2018 AHP Rule explained that because the final rule relaxed the Department's pre-rule guidance on the groups or associations that may sponsor a single ERISA-covered group health plan, paragraph (d)(4) was especially important in the context of the new, broader arrangements to distinguish a group or association-sponsored AHP from commercial insurance-type arrangements, which lack the requisite connection to the employment relationship and whose purpose was, instead, principally to sell health coverage and to identify and manage risk on a commercial basis.[50]

The Department continues to be mindful of the unique potential harms to participants, beneficiaries, small employers, and health care providers in the context of AHPs and any other form of MEWAs. These concerns underscore the need to limit ERISA-covered AHPs to true employee benefit plans that are the product of a genuine employment relationship and not artificial structures marketed as employee benefit plans, often with an objective of attempting to sidestep otherwise applicable insurance regulations or misdirect State insurance regulators. Such artificial vehicles are not ''employee benefit plans'' as defined in section 3(3) of ERISA, nor, as explained above, would it be consistent with the purpose of the statute to treat them as such. In sum, upon further evaluation and consistent with the sound administration of ERISA, the Department has concluded that it should rescind the 2018 AHP Rule from the Code of Federal Regulations (CFR). The Department now believes that the provisions of the 2018 AHP Rule that the district court found inconsistent with the APA and in excess of the Department's statutory authority under ERISA are, at a minimum, not consistent

[44] A ''MEWA'' is a ''multiple employer welfare arrangement'' as defined in ERISA section 3(40). A MEWA can be a single ERISA-covered plan (''plan MEWA''), or an arrangement comprised of multiple ERISA-covered plans, each sponsored by unrelated employer members that participate in the arrangement (''non-plan MEWA''). An AHP is a plan MEWA. If an ERISA-covered plan is a MEWA, States may apply and enforce their State insurance laws with respect to the plan to the extent provided by ERISA section 514(b)(6)(A)—the extent to which depends on whether the MEWA that is an ERISA-covered plan is fully insured. If a MEWA is determined not to be an ERISA-covered plan, the persons who operate or manage the MEWA may nonetheless be subject to ERISA's fiduciary responsibility provisions if such persons are responsible for, or exercise control over, the assets of ERISA-covered plans. In both situations, the Department would have concurrent jurisdiction with the State(s) over the MEWA. *See* Department of Labor Publication, Multiple Employer Welfare Arrangements Under ERISA, A Guide to Federal and State Regulation, *http://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/publications/mewa-under-erisa-a-guide-to-federal-and-state-regulation.pdf.*

[45] Section 514(b)(6) of ERISA, 29 U.S.C. 1144(b)(6).

[46] Based on the Department's enforcement data, since 2001, the Department has taken civil and criminal enforcement action, as reflected in criminal indictments, civil complaints, temporary restraining orders, and cease and desist orders involving 108 fraudulent and mismanaged MEWAs and their operators. Just since 2018, the Department was forced to take civil and criminal enforcement action against 21 MEWAs in order to protect participants and beneficiaries from fraud or mismanagement. Further, the Department has civilly recovered over $95 million from mismanaged or fraudulent MEWAs in the last five years alone. *See* EBSA National Enforcement Project—Health Enforcement Initiatives at *www.dol.gov/agencies/ebsa/about-ebsa/our-activities/enforcement#national-enforcement-projects;* U.S. Department of Labor Files Complaint to protect Participants and Beneficiaries of failing Medova MEWA operating in 38 states, available at *https://www.dol.gov/newsroom/releases/ebsa/ebsa20201218;* Federal Court Appoints Independent Fiduciary as Claims Administrator of Medova Arrangement, available at *https://www.dol.gov/newsroom/releases/ebsa/ebsa20210412;* Federal Court Orders Kentucky Bankers Association to Pay $1,561,818 In Losses to Benefits Plan After U.S. Department of Labor Finds Violations, available at *https://www.dol.gov/newsroom/releases/ebsa/ebsa20201015;* MEWA Enforcement Fact Sheet, available at *https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/fact-sheets/mewa-enforcement.pdf.*

[47] *See* 83 FR 28912, 28952 (June 21, 2018) (highlighting that many of the Department's civil enforcement cases involving MEWAs involved failure to follow plan terms or health care laws, failure to provide plan benefits, or reporting and disclosure deficiencies).

[48] 83 FR 28912 (''[T]he regulation continues to distinguish employment-based plans, the focal point of Title I of ERISA, from commercial insurance programs and other service provider arrangements.'').

[49] U.S. Gov't Accountability Office, GAO–92–40, ''States Need Labor's Help Regulating Multiple Employer Welfare Arrangements.'' March 1992, pg. 2–3 at *https://www.gao.gov/assets/220/215647.pdf.*

[50] 83 FR 28912, 28928–29 (June 21, 2018).

with the best reading of ERISA's statutory requirements governing group health plans.

B. Discussion of Decision To Rescind

Under Supreme Court precedent, an agency has the discretion to change a policy position provided that the agency acknowledges changing its position, the new policy is permissible under the governing statute, there are good reasons for the new position, the agency believes that the new policy is better, as evidenced by the agency's conscious action to change its policy, and the agency takes into account any serious reliance interests in the prior policy.[51]

The Department has further reviewed the relevant statutory language, judicial decisions, and pre-rule guidance, and further considered ERISA's statutory purposes and related policy goals. The Department has also closely considered the comments submitted on the proposed rescission. Based on this review, the Department has concluded it is appropriate to rescind the regulatory provisions adopted in the 2018 AHP Rule.[52] The rescission will ensure that the guidance being provided to the regulated community is in alignment with ERISA's text and purpose. In addition, the rescission aims to resolve and mitigate any uncertainty regarding the status of the standards that were set under the 2018 AHP Rule, and also to facilitate a reexamination of the criteria required for a group or association of employers to be able to sponsor an AHP. In reaching the decision to rescind the regulation, the Department has also been mindful of the fact that the 2018 AHP Rule was only briefly in effect, it represented a significant departure from longstanding guidance, which the Department is leaving in place, and that no commenter presented any claims of ongoing reliance on it. As a result, the net effect of rescission is the continued implementation of the Department's longstanding positions on the proper analysis of the status of employer associations under ERISA, which positions are also consistent with the district court's opinion in *New York* v. *United States Department of Labor.*

Part of the 2018 AHP Rule's purpose was to permit small employers and working owners to purchase health coverage that did not have to comply with the protections applicable to the small group and individual markets. In this manner, the rule aimed to promote the formation of AHPs for small employers and certain self-employed individuals. As noted in the Regulatory Impact Analysis (RIA) below, the 2018 AHP Rule hypothesized that small employers and their plan participants would potentially benefit from the ability to band together to offer less generous, and less costly, benefits. At the same time, however, many comments on the proposed recission of the 2018 AHP Rule expressed concerns that echoed public comments provided to the Department during the 2018 AHP rulemaking process, which indicated that implementation of the 2018 AHP Rule would increase adverse selection against the individual and small group markets by drawing healthier, younger people into AHPs, thus increasing premiums for those remaining in those markets.[53] The economic analysis for the 2018 AHP Rule projected that those employers and participants that remained in the small-group and individual markets could face premium increases between 0.5 and 3.5 percent, resulting in an increase in the number of uninsured individuals caused by those that exited the individual market due to higher premiums.

Concerns about such adverse impacts on the health markets were echoed in many comments submitted on the proposed rescission. As AHPs tend to be large group plans, they generally are not subject to Federal benefit mandates that apply to the individual and small group markets, such as the requirement to cover EHBs. Consequently, AHPs can potentially tailor plan benefits so that individuals with preexisting conditions, or those who are otherwise anticipated to have higher health care costs, are discouraged from joining AHPs (or are not offered AHPs), causing further adverse selection, market segmentation, and higher premiums in the individual and small group markets.[54] The Department acknowledged in the 2018 AHP Rule that the rule's ''increased regulatory flexibility'' would necessarily result in some segmentation of risk that favors AHPs over individual and small group markets and some premium increases for individuals and other small businesses remaining in the individual and small group markets. The Department concluded at that time, however, that practical considerations and Federal nondiscrimination rules would limit such segmentation, and that States could further limit risk segmentation through regulation of AHPs as MEWAs. The Department also assumed some premium protection for subsidy-eligible taxpayers with household incomes at or below 400 percent of the Federal poverty level purchasing coverage on Exchanges.

In the proposed rescission, however, the Department expressed the view that it was appropriate to give greater attention to the long-term impacts on market risk introduced by the 2018 AHP Rule, especially in the small group and individual markets. After close review of the comments, discussed below, the Department affirms its view that rescission of the 2018 AHP Rule is warranted, not only because of these market risks, but because the 2018 AHP Rule did not reflect the best interpretation of section 3(5) of ERISA.

Additionally, as commenters noted, health insurance coverage offered through AHPs in the large group markets is not subject to the requirement to offer EHBs, which means that individuals who join these AHPs may become underinsured if their AHP does not cover benefits that non-grandfathered small group and individual market health insurance coverage are required to cover, such as emergency services, prescription drug benefits, or even inpatient hospital

[51] *Encino Motorcars, LLC* v. *Navarro,* 579 U.S. 211, 220–23 (2016); *see id.* at 225 (Ginsburg, J., concurring) (restating the rule governing an agency's reversal in policy, as articulated in *F.C.C.* v. *Fox Television Stations, Inc.,* 556 U.S. 502, 515 (2009)).

[52] Section 2(c) of Executive Order 14070, ''Continuing to Strengthen Americans' Access to Affordable, Quality Health Coverage,'' provides that ''agencies . . . with responsibilities related to Americans' access to health coverage shall review agency actions to identify ways to continue to expand the availability of affordable health coverage, to improve the quality of coverage, to strengthen benefits, and to help more Americans enroll in quality health coverage. As part of this review, the heads of such agencies shall examine . . . policies or practices that improve the comprehensiveness of coverage and protect consumers from low-quality coverage.'' 87 FR at 20689, 20690. This rescission comports with E.O. 14070 because it acknowledges that health insurance coverage offered through AHPs in the large group markets, or health coverage offered through a self-insured AHP, is not subject to the ACA's EHB requirements; consequently, individuals and small employers who receive such coverage in lieu of individual and small group market coverage subject to the ACA market reforms face the risk of becoming underinsured if their AHP offers less than comprehensive coverage. In addition, the rescission also acknowledges commenters' assertions that the 2018 AHP Rule would have negatively affected the small group and individual markets.

[53] *See* 83 FR 28957 (June 21, 2018). By increasing premiums for individual coverage, the expansion of AHPs may increase federal spending on premium tax credits for coverage offered through an Exchange but may be offset by reduced federal spending through displacement of some Medicaid coverage for individuals who would have transferred into AHPs under the 2018 AHP Rule.

[54] The American Medical Association noted that AHPs could exclude benefits like coverage of insulin, maternity care, mental health services and rehabilitative services that are particularly important to certain workers in blue-collar professions. *See, e.g.,* Brief for American Medical Association and Medical Society of the State of New York as Amici Curiae in Support of Plaintiffs' Motion for Summary Judgment, at *16, *New York* v. *U.S. Department of Labor,* 363 F. Supp. 3d 109 (D.D.C. 2019) (No. 1:18–CV–01747–JDB).

coverage. Because AHPs generally can offer less than comprehensive coverage, they are cheaper to purchase, but there is a significantly greater likelihood that they will cover less than expected or needed. As discussed in this final rule, the 2018 AHP Rule made it easier for small employers, and possible for working owners, to band together to avoid the requirements on small group and individual health insurance coverage by qualifying as a single group health plan to purchase coverage in the large group market. Such an AHP could offer significantly less comprehensive plans, including ones that fail to cover EHBs, resulting in participants and beneficiaries being vulnerable to high out-of-pocket costs and potentially not having access to benefits for care when they most need it.[55]

The Department is also concerned that the 2018 AHP Rule could interfere with the goal of increasing affordable, quality coverage because the rule increases the possibility that individuals who join AHPs will be subject to mismanaged plans. As noted above, ERISA generally classifies AHPs as MEWAs. Historically, MEWAs, especially self-funded MEWAs, have disproportionately suffered from financial mismanagement or abuse, leaving participants and providers with unpaid benefits and bills.[56]

The 2018 AHP Rule reflected a significant departure from the Department's longstanding pre-rule guidance. The Department's rescission of the 2018 AHP Rule makes clear that this significant departure from pre-rule guidance no longer represents the Department's interpretation of when a group or association can constitute an ''employer'' for purposes of sponsoring a group health plan under ERISA. The rescission leaves in place the longstanding pre-rule guidance that has been consistently supported and relied upon in numerous judicial decisions because it fosters a sufficient employer-employee nexus and proper oversight of AHPs, while remaining consistent with ERISA's text and purpose.

As explained further below, the rescission also reflects a reexamination of the 2018 AHP Rule's ''business purpose'' standard and viability safe harbor,[57] the geography-based commonality alternative, and the working-owner provisions, including the potential those provisions have for encouraging abusive health care arrangements, especially self-insured programs, that sell low quality or otherwise unreliable health insurance products through MEWAs to unsuspecting employers, particularly small businesses. Further, the Department does not believe that there is a basis for reliance on the 2018 AHP Rule, given that the temporary safe harbor from enforcement announced by the Department immediately following the district court's decision has long expired.[58] The Department has thus concluded that it is appropriate to rescind the 2018 AHP Rule.

1. Business Purpose Standard

The courts of appeals have uniformly interpreted ERISA's definition of ''employer'' to require common interests other than the provision of welfare benefits, independent of any deference to the Department's historical guidance.[59] The decision of the Eighth Circuit Court of Appeals in *WEAIT* is instructive; there, the court held that ''[t]he definition of an employee welfare benefit plan is grounded on the premise that the entity that maintains the plan and the individuals that benefit from the plan are tied by a common economic or representation interest, *unrelated to the provision of benefits.*'' [60]

This requirement is reflected in longstanding pre-rule guidance focusing on whether the group or association of employers has business or organizational purposes and functions unrelated to the provision of benefits. Although neither the courts nor the Department's pre-rule guidance defined the outer limits of what could count as a sufficient purpose, the employer groups or associations that have been treated as ''employer'' sponsors have well developed business purposes that are unrelated to the provision of benefits.[61] The pre-rule guidance

[55] The Department notes concerns expressed by commenters that low barriers to entry to become an AHP could result in groups or associations with less of a connection to the member employer's community and unscrupulous operators siphoning off members by limiting their membership to healthier groups and offering lower rates for health coverage to their members. Commenters to the 2018 AHP notice of proposed rulemaking (NPRM) also expressed the concern that it could fragment the individual and small group markets, resulting in increased premiums. Commenters further communicated that organizations that form on the basis of offering health benefits could increase the prevalence of unscrupulous promoters that do not have strong incentives to maintain a credible reputation. *See* 83 FR 28912, 28917, and 28943 (June 21, 2018).

[56] The 2018 AHP Rule acknowledged this risk. *See* 83 FR 28951, 28953 (June 21, 2018) (''[T]he Department anticipates that the increased flexibility afforded AHPs under this rule will introduce increased opportunities for mismanagement or abuse, in turn increasing oversight demands on the Department and State regulators.'') *See* 83 FR 28951, 28953 (June 21, 2018).

[57] The business purpose standard of the 2018 AHP Rule required that a group or association must have at least one ''substantial'' business purpose unrelated to offering and providing health coverage or other employee benefits to its employer members and their employees, even if the primary purpose of the group or association is to offer such coverage to its members. While the 2018 AHP Rule did not include a definition of ''substantial,'' it did provide a safe harbor for an association that would be a ''viable entity'' without sponsoring a health plan (''viability safe harbor''). 83 FR 28912, 28956 (June 21, 2018).

[58] *See supra* note 31.

[59] *Wisconsin Educ. Ass'n Ins. Trust* v. *Iowa State Bd. of Pub. Instruction,* 804 F.2d 1059, 1065 (8th Cir. 1986) (''Our decision is premised on ERISA's language and Congress' intent. There is no need to resort to the Department of Labor's interpretations.''); *see MDPhysicians & Assocs., Inc.* v. *State Bd. of Ins.,* 957 F.2d 178, 186 n.9 (5th Cir. 1992) (''Although we ground our decision on the statutory language of ERISA and the intent of Congress, we recognize that [Department of Labor] opinions 'constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.' '') (citation omitted).

[60] 804 F.2d 1059, 1064 (8th Cir. 1986) (emphasis added); *accord MDPhysicians,* 957 F.2d 178, 185 (5th Cir. 1992).

[61] *Compare, e.g.,* Advisory Opinion No. 2019–01A (July 8, 2019) (''Ace is a hardware retailer cooperative and is the largest cooperative, by sales, in the hardware industry. . . . Ace facilitates access to materials, supplies and services, as well as engages in activities that support Ace retail owners' operation of their retail hardware businesses. Ace currently serves approximately 2,700 retail owners who operate approximately 4,400 Ace stores in the U.S. In addition, approximately 120 corporate stores are owned and operated as wholly-owned subsidiaries of Ace.''); Advisory Opinion 2017–02AC (May 16, 2017) (''The First District Association (FDA) has been operating as an independent dairy cooperative organized under Minnesota Chapter 308A since 1921. . . . FDA's articles of incorporation provide that, among other related purposes, FDA's purposes and activities include the purchase, sale, manufacture, promotion and marketing of its members' dairy and agricultural products and engaging in other activities in connection with manufacture, sale or supply of machineries, equipment or supplies to its members.''); Advisory Opinion 2005–24A (Dec. 30, 2005) (''WAICU's purposes and activities include representing its members at State and national forums, encouraging cooperation among its members to utilize resources effectively, and encouraging collaboration with other institutions of higher learning for the benefit of Wisconsin citizens. WAICU's services to its members include professional development for officers, research, public relations, marketing, admissions support, and managing collaborative ventures among the members (*e.g.,* WAICU Study Abroad Collaboration).''); and Advisory Opinion 2001–04A (Mar. 22, 2001) (''The Association was incorporated in Wisconsin in 1935 for the purpose of promoting automotive trade in the State of Wisconsin . . . .''), *with, e.g., MDPhysicians, supra* note 3, at 185–87 (holding that a MEWA that made health coverage available to '' 'employers at large' in the Texas panhandle'' did not have sufficient common economic or representational interest) (citation omitted); *Gruber* v. *Hubbard Bert Karle Weber, Inc.,* 159 F.3d 780, 787 (3d Cir. 1998) (endorsing district court's finding of no commonality of interest ''because 'there was no nexus among the individuals benefitted by the [p]lan and the entity providing those benefits, other than the [p]lan itself' since [the association] 'was comprised of disparate and unaffiliated businesses' who [sic] had no relationship prior to the inception of the [p]lan'') (citation omitted); *Plog* v. *Colo. Ass'n of Soil Conservation Dists.,* 841 F. Supp. 350, 353 (D. Colo. 1993) (rejecting claim that association was an ''employer'' under ERISA because the association

uniformly emphasized that a purpose unrelated to the provision of benefits is a critical factor for any group or association of employers to be treated as a bona fide group or association that can act as an ''employer'' within the meaning of section 3(5) of ERISA.

While paragraph (b) of the 2018 AHP Rule also contained a business purpose standard, it departed from the substance and intent of prior guidance by providing both that the primary purpose of the group or association could be to offer benefit coverage to the group's members,[62] and that an unrelated purpose would be sufficiently substantial ''if the group or association would be a viable entity in the absence of sponsoring an employee benefit plan.'' [63] For the reasons described in the proposal, the Department has concluded that the business purpose standard and accompanying viability safe harbor are too loose to ensure that the group or association sponsoring the AHP is actually acting in the employers' interest or to effectively differentiate an employee health benefit program offered by such an association from a commercial insurance venture.[64] Although the 2018 AHP Rule provided that the unrelated business purpose had to be ''substantial'' and that the entity should be independently viable, the preamble discussion suggested that few posited purposes would be treated as too insubstantial to pass muster. For example, the preamble suggested that merely ''offering classes or educational materials on business issues of interest to members'' was *per se* sufficient to qualify as substantial.[65]

In the preamble to the 2018 AHP rule, the Department posited that this relaxation of the standard would nonetheless work to differentiate employer groups or associations from commercial insurance ventures because the rule's control requirement and its new nondiscrimination requirement would ensure that only bona fide associations become AHPs. But even if the possibility of employer control and nondiscrimination were sufficient to warrant treating an *entity* as an employer association for purposes of section 3(5) of ERISA, the rule treated *individual working owners* as ''employers'' for this purpose even though they neither employed nor were employed by anybody else. In addition, under the rule's terms, promoters could set up arrangements with separate contribution rates for ''employer'' members (including working owners) based on a variety of non-health factors that correlate with health risks, such as industry, occupation, or geography, in ways that would make the arrangement look strikingly similar to a commercial insurance venture, looking to minimize exposure to less healthy risk pools.[66] Indeed, the economic analysis for the rule projected that, as a result of such risk selection, those employers and participants that remained in the larger small group and individual markets could face premium increases between 0.5 and 3.5 percent.[67]

The Department has concluded that the 2018 AHP Rule's test does not sufficiently ensure a business purpose that advances the interest of employer members of the group or association, nor does it prevent abuse. Part of the rationale for insisting on a common business purpose unrelated to the provision of benefits is to ensure that the entity is a bona fide association acting in the interest and on behalf of employer members, rather than merely a promoter of a commercial arrangement with competing financial interests. Bona fide associations with a common purpose and shared bonds unrelated to the provision of benefits can serve as strong advocates for their employer members and ensure that those members ultimately receive the benefits of the association's advocacy for their common interests. The 2018 AHP Rule's test falls short of providing that the employer members or their association are united by much more than a common desire to obtain health benefits and therefore does not ensure that associations act in the interest of, or as strong advocates for, employer members.

In the Department's view, based on its long and significant experience in this area as well as current concerns about abuse, the 2018 AHP Rule does not establish conditions that appropriately distinguish an employer group sponsoring an employee benefit plan from a commercial insurance venture. Under the rule's test, there is little to distinguish the association from any other commercial benefits promoter, except that, unlike commercial insurers, the AHP would be subject to less stringent state regulations and safeguards. As a result, the Department is concerned that the rule will unduly expose participants, beneficiaries, and unsuspecting small employers to unscrupulous operators looking to market health benefits without the protective structure and supports that apply to state-regulated insurance, such as funding and solvency requirements.[68] As noted elsewhere in this preamble, even under the current more stringent standards, MEWAs, especially self-funded MEWAs, have been frequent subjects of abuse, and in the worst cases have left participants and beneficiaries with large unpaid claims or denials of treatment.[69] These considerations reinforce the Department's conclusion that it should not have departed from its previous approach to interpreting the statutory text and its previous insistence on a strong common purpose unrelated to the provision of benefits.

2. Geographic Commonality

There is a substantial body of case law interpreting ERISA's definition of ''employer'' to require common interests other than the provision of welfare benefits, independent of any deference to the Department's historical pre-rule guidance. For example, in *WEAIT*, the Eighth Circuit concluded that ''[t]he definition of an employee welfare benefit plan is grounded on the premise that the entity that maintains the plan and the individuals that benefit from the plan are tied by a common economic or representation interest, *unrelated to the provision of benefits.*'' [70] The court further explained that ''[o]ur decision is premised on ERISA's language and Congress' intent'' and that ''[t]here [wa]s no need to resort to the Department of Labor's interpretations.'' [71] Like the commonality of interest requirement articulated by the Eighth Circuit in *WEAIT*—a requirement that court explained was grounded in ERISA—in *MDPhysicians,* the Fifth Circuit likewise found that ERISA required a commonality of interest among employer members.[72]

was open to any person who paid the association fee).

[62] 29 CFR 2520.3–5(b)(1).

[63] *Id.*

[64] 88 FR 87968, 87975–76 (Dec. 20, 2023).

[65] 83 FR 28912, 28918 (June 21, 2018).

[66] *Id.* at 28929.

[67] The reference to the potential premium increases of between 0.5 and 3.5 percent reflects a moderate range derived from the figures cited in the cost analysis for the 2018 AHP Rule, which referred to a 2018 report that modeled the impact on premiums and source of insurance coverage under different AHP scenarios based on initial availability of AHPs, generosity of coverage of AHP plans, and projected level of risk selection by small businesses. 83 FR 28912, 28945 fn. 95 (citing Avalere Health, Association Health Plans: Projecting the Impact of the Proposed Rule at 3, 5–7 (Feb. 28, 2018), available at *https://avalere.com/wp-content/uploads/2018/06/1519833539_Association_Health_Plans_White_Paper.pdf*).

[68] *See supra* note 39.

[69] *See supra* notes 43, 46.

[70] 804 F.2d at 1063 (emphasis added).

[71] *Id. at 1065.*

[72] *MDPhysicians,* 957 F.2d at 186 n.9 (''Although we ground our decision on the statutory language of ERISA and the intent of Congress, we recognize that [Department of Labor] opinions 'constitute a body of experience and informed judgment to

Continued

The Department's pre-rule guidance requires a genuine commonality of interests between employer members. Paragraph (c) of the 2018 AHP Rule altered this standard by setting forth alternative ways an association could be treated as having the requisite commonality of interest necessary to constitute a bona fide group or association of employers. The employers who participate in the group or association could have had ''industry commonality,'' which means they were in the same trade, industry, line of business, or profession. Alternatively, the 2018 AHP Rule provided that participating employers could have ''geographic commonality'' if each employer had a principal place of business in the same geographic region that did not exceed the boundaries of a single State or metropolitan area (even if the metropolitan area included more than one State). This represented a significant departure from the Department's longstanding pre-rule guidance because it treated otherwise unrelated employers in multiple unrelated trades, industries, lines of business, or professions as having the requisite commonality, simply because they resided within the same geographic locale.[73]

The preamble of the 2018 AHP Rule focused on the desired goal of the rule to spur AHP formation, but it did not adequately address the fundamental question of how geography alone, without any other common business nexus, could provide the requisite commonality of interest. The preamble to the 2018 AHP Rule did not dispute the importance of commonality. Indeed, the 2018 AHP Rule rejected suggestions that commonality could be established by shared ownership characteristics (all women-owned businesses; all minority-owned businesses; all veteran-owned businesses), shared business models (for example, all non-profit businesses), shared religious/moral convictions, or shared business size.[74] The Department rejected such broad categories as falling within the common nexus standard because it had concluded that a standard this lax would be ''impossible to define or limit'' and would ''eviscerate'' the commonality requirement.[75] The 2018 AHP Rule concluded that, as a policy matter, these line-drawing concerns did not apply to groups with geographic commonality. However, the discussion in the 2018 AHP Rule was, at best, incomplete because it focused mostly on the benefits of having more AHPs but did not explain how geographic commonality was an employment-based commonality that was different from the shared ownership, shared business models, shared religious/moral convictions, and shared business size criteria that the Department rejected.

As explained in the proposal, the Department is now of the view that a commonality requirement based on common geography alone (same State or multi-State area) does not adequately establish commonality.[76] The same reasons why the Department rejected other expansions of the commonality requirement militate against adopting geographic commonality as well. There is little basis for treating disparate employers engaged in disparate enterprises with disparate interests in different urban or rural settings as having a sufficient common nexus merely because they are all in the same State.[77]

While the Department acknowledges that employers within the same geographic locale can share other common interests that result in a sufficient common economic and representational interest, the Department is now concerned that the 2018 AHP Rule did not articulate an appropriate basis for treating common geography alone as a shared interest with respect to the employment relationship. Just as would be the case for associations consisting of employers whose membership is based on common business size, the Department is concerned that recognizing under section 3(5) of ERISA an association composed of unrelated employers all operating in any specific State or multi-State area with no other commonality also would not sufficiently respect the genuine commonality of interest requirement under ERISA, which is intended to ensure that AHPs are operating in the interest of employers and are not merely operating as traditional health insurance issuers in all but name.

3. Working Owners

The 2018 AHP Rule allowed certain self-employed persons without any common-law employees to participate in AHPs as ''working owners.'' [78] The 2018 AHP Rule established wage, hours of service, and other conditions for when a working owner would be treated as both an ''employer'' and ''employee'' for purposes of participating in, and being covered by, an AHP.[79] The 2018 AHP Rule treated these self-employed persons as employers even though they had no employment relationship with anybody other than themselves. Thus, a group or association could become an employer by virtue of its working owner members being classified as both an employer and an employee, even though the working owners had no employees and were not employed by another person or entity.

The Department now believes that the 2018 AHP Rule gave too little weight to ERISA's focus on the employment relationship in treating working owners as both employees and employers notwithstanding the absence of any employment relationship with anybody. While the 2018 AHP Rule's approach promoted the creation of plan MEWAs, it came at the expense of the better reading of the statute's references to employers and employees. ERISA applies when there is an employer-employee relationship. This relationship, as suggested by the very

which courts and litigants may properly resort for guidance.' '') (citation omitted); *id.* at 185–87 (holding that a MEWA that made health coverage available to '' 'employers at large' in the Texas panhandle'' did not have sufficient common economic or representational interest).

[73] *But see* Advisory Opinion No. 2008–07A (Sept. 26, 2008) (''In the Department's view, however, the Bend Chamber [of Commerce]'s structure is not the type of connection between employer members that the Department requires for a group or association of employers to sponsor a single 'multiple employer plan.' Rather, the Department would view the employers that use the Bend Chamber's arrangement as each having established separate employee benefit plans for their employees. Although we do not question the Bend Chamber's status as a genuine regional chamber of commerce with legitimate business and associational purposes, the primary economic nexus between the member employers is a commitment to private business development in a common geographic area. This would appear to open membership in the Bend Chamber, and in turn participation in the proposed health insurance arrangement, to virtually any employer in the region. The other factors the Bend Chamber cites do not directly relate to a connection between the member employers, the association, and the covered employees; instead, such factors are characteristics that evidence the reliability of the Bend Chamber's operations (*e.g.,* cash assets of $100,000 or more, physical office space, years in operation, etc.).'').

[74] 83 FR 28912, 28926 (June 21, 2018). The preamble of the 2018 AHP Rule explained that a test that would treat all nationwide franchises, all nationwide small businesses, or all nationwide minority-owned businesses, as having a common employment-based nexus—no matter the differences in their products, services, regions, or lines of work—would not be sufficient to establish commonality of interest for a national group or association because it would be impossible to define or limit (*e.g.,* business owners who support democracy) and, ''in the Department's view, would effectively eviscerate the genuine commonality of interest required under ERISA.''

[75] *Id.*

[76] 88 FR 87968, 76–77 (Dec. 20, 2023).

[77] In recent years, the case for relying on geography as a basis for commonality has likely been further reduced by the adoption of remote workplace flexibilities and virtual office technologies, which reduce the tie between the worker and any particular geographic location.

[78] 29 CFR 2510.3–5(e).

[79] *See id.* at § 2510.3–3(c).

title of the Act (the *Employee* Retirement Income Security Act), and the Act's reliance on ''employer'' and ''employee'' to define what counts as an ERISA-covered plan, is central to the statutory framework. ERISA generally regulates employment-based relationships, not the sale of insurance to individuals outside such relationships. This employer-employee nexus is the heart of what makes an entity a bona fide group or association of employers capable of sponsoring an AHP and is meant to reflect *genuine* employment relationships. The Department is now of the view that ERISA calls for a higher standard for determining what constitutes a bona fide group or association of employers than is evidenced in the 2018 AHP Rule. In the ERISA context, the bona fide group or association of employers consists of actual employers who, as of the time they join the group or association, hire, and pay wages or salaries to other people who are their common-law employees working for them. Under the 2018 AHP Rule, although working owners had to meet requirements related to the number of hours devoted to providing personal services to the trade or business or the amount of income earned from the trade or business in order to participate in an AHP, these requirements related to differentiating self-employed individuals from individuals engaged in hobbies that generate income or other de minimis commercial activities.[80] These requirements did not, however, reflect the existence of a *genuine* employer-employee relationship, as in the exchange between an employee and an employer of personal services for wages and other compensation (such as health benefits offered through a group health plan) that would be expected in a common-law employment relationship.

Upon further reflection, the Department is now concerned that, by removing the prior (and more stringent) employer-employee nexus requirement, the 2018 AHP Rule departs too far from ERISA's essential purpose and fails to take appropriate account of the underlying basis for the bona fide group or association of employers standard. As stated previously, upholding the purpose of the statute requires drawing appropriate distinctions between employers and associations acting ''in the interest of an employer'' on the one hand, and entrepreneurial insurance-type ventures on the other. A strong employer-employee nexus condition also helps reduce the vulnerability of MEWAs to fraudulent behavior and mismanagement. Routinely treating people as ''employers'' when they have no employees risks converting ERISA from an employment-based statute, as Congress intended, to one that regulates the sale of insurance to individuals, without regard to an employment relationship.

The Department, upon further review of relevant Supreme Court and circuit court judicial decisions, and consistent with the Department's reconsidered view of working owners (without common-law employees) for purposes of section 3(5) of ERISA, has concluded that the better interpretation of such case law is that a working owner may act as an employer for purposes of participating in a bona fide employer group or association under circumstances where there are also common-law employees of the working owner. In *Raymond B. Yates, M.D., P.C. Profit Sharing Plan* v. *Hendon,* the Supreme Court held that a working owner and spouse were eligible to participate in the corporation's ERISA plan, provided that at least one common-law employee of the corporation participated in its plan.[81] Several circuit court opinions also emphasize the existence of an employment relationship when determining if an owner is an employer and/or employee. As the Eleventh Circuit stated in *Donovan* v. *Dillingham,* ''[t]he gist of ERISA's definitions of employer, employee organization, participant, and beneficiary is that a plan, fund, or program falls within the ambit of ERISA only if the plan, fund, or program covers ERISA participants because of their employee status *in an employment relationship* . . . .'' [82] In *Meredith* v. *Time Insurance Company,* the Fifth Circuit held that the Department could reasonably decline to treat a sole proprietor both as an employer and employee under section 3(5) of ERISA because the ''employee-employer relationship is predicated on the relationship between two different people.'' [83] Similarly, in *Marcella* v. *Capital Districts Health Plan, Inc.,* the Second Circuit found that working owners without common-law employees are not employers.[84] Further, as indicated in *Donovan,* just as the statutory definition of ''employer'' under ERISA requires an employee, the statutory definition of ''employee'' under ERISA requires the employee to work for another.[85] These holdings are consistent with the Department's traditional interpretation of ''employee'' in 29 CFR 2510.3–3(b) and (c).[86]

C. Alternatives To Complete Rescission of the 2018 AHP Rule

As part of its deliberations as to whether to rescind the 2018 AHP Rule, the Department considered several alternatives to this rulemaking. The Department contemplated removing only certain provisions of the 2018 AHP Rule. For example, the Department considered rescinding the working owner provision, which represents a significant departure from the pre-rule guidance. Similarly, the Department considered removing the geographic commonality provision, which also represents a dramatic departure from the pre-rule guidance. However, the Department decided against a rescission of only the specific provisions invalidated by the district court. The

[80] 83 FR 28931 (June 21, 2018).

[81] *Raymond B. Yates, M.D., P.C. Profit Sharing Plan* v. *Hendon,* 541 U.S. 1, 6 (2004). *See also* Advisory Opinion 99–04A (Feb. 4, 1999) (outside of a bona fide group or association analysis under section 3(5) of ERISA, concluding that nothing in the definitions of Title I of ERISA precluded a working owner who had initially participated in a multiemployer pension plan as an employee of a contributing employer from continuing to participate in that plan) and Advisory Opinion 2006–04A (April 27, 2006) (individual who actively performed work for his own company that would otherwise be covered by a collective bargaining agreement if he were not a ''supervisor'' under federal labor law may continue to participate in multiemployer pension plan that he previously participated in as a covered employee).

[82] *Donovan* v. *Dillingham,* 688 F.2d 1367, 1371 (11th Cir. 1982) (emphasis added).

[83] *Meredith* v. *Time Ins. Co.,* 980 F.2d 352, 358 (5th Cir. 1993); *id.* (''When the employee and employer are one and the same, there is little need to regulate plan administration. . . . It would appear axiomatic that the employee-employer relationship is predicated on the relationship between two different people. . . . We conclude that the power to so define the scope of ERISA has been delegated by Congress to the Department of Labor, and find no reason to disturb the Department's conclusion that ERISA does not intend to treat the spouse of a sole proprietor as an employee.'').

[84] *Marcella* v. *Capital Dists. Health Plan, Inc.,* 293 F.3d 42, 48 (2d Cir. 2002); *id.* at 49 (holding that ''a group or association . . . that contains non-employers cannot be an 'employer' within the meaning of ERISA'').

[85] *Baucom* v. *Pilot Life Ins. Co.,* 674 F. Supp. 1175, 1180 (M.D.N.C. 1987). In *Baucom,* ''[r]eturning to ERISA's language, the court observe[d] that, despite its limitations, the statutory definition of 'employee' mandates that an employee must work for another.'' *Id.* (citation omitted).

[86] In 1996, HIPAA added provisions of ERISA and the PHS Act, which specified that for purposes of part 7 of Title I of ERISA and Title XXVII of the PHS Act ''[a]ny plan, fund, or program which would not be (but for this subsection) an employee welfare benefit plan and which is established or maintained by a partnership, to the extent that such plan, fund, or program provides medical care . . . to present or former partners in the partnership . . . shall be treated (subject to paragraph (2)) as an employee welfare benefit plan which is a group health plan.'' Section 732(d) of ERISA; Section 2722(d) of PHS Act. For a group health plan, the term employee also includes any bona fide partner. 26 CFR 54.9831–1(d)(2); 29 CFR 2590.732(d)(2); 45 CFR 146.145(c)(2).

Department is concerned that the provisions that would remain in the 2018 AHP Rule would not provide an adequate definition of ''employer'' that properly reflect the limits of ERISA's definition of ''employer'' in section 3(5) and Congress' focus on employment-based arrangements, as opposed to the ordinary commercial provision of insurance outside the employment context, and, for the reasons discussed above, would be missing key elements necessary for a comprehensive framework for a group or association to demonstrate that it is acting ''indirectly in the interest of an employer'' within the meaning of section 3(5) of ERISA.[87] Without the core provisions held invalid by the district court, the 2018 AHP Rule could not be operationalized and would provide no meaningful guidance.

The Department also considered rescinding the 2018 AHP Rule and codifying the pre-rule guidance. The Department recognizes that there could be benefits to codifying its longstanding pre-rule guidance. The pre-rule guidance is largely in the form of advisory opinions, which do not have the same authority as regulations and technically are not precedential.[88] Application of the Department's pre-rule guidance thus requires interested parties to compare their specific circumstances to various opinions the Department issued to determine whether the Department has addressed analogous facts and circumstances. Nonetheless, the Department concluded that it would be better to seek comment from interested parties on whether the Department should first propose a rule either codifying the pre-rule guidance or creating alternative criteria and then consider that input as part of a comprehensive reevaluation of the definition of ''employer'' in the AHP context. As discussed further below, the Department received comments on the proposed rescission supporting codifying the pre-rule guidance, supporting codifying the pre-rule guidance with modifications, and opposing codification of the pre-rule guidance. The Department is proceeding to fully rescind the 2018 AHP Rule without proposing any additional guidance at this time. The Department takes the comments on potential future guidance under advisement, and such comments will inform the Department's decision regarding any future efforts on this matter.

IV. Requests for Public Comments

In the proposal, the Department requested comments from interested parties on all aspects of the proposal to rescind the 2018 AHP Rule in its entirety. In the Department's view, ERISA's statutory purposes are better served by rescinding the 2018 AHP Rule and removing it from the published CFR while the Department considers alternatives and engages with interested parties. In addition to comments on rescission of the 2018 AHP Rule, the Department also asked for comments on whether the Department should propose a rule for group health plans that codifies and replaces the pre-rule guidance, issue additional guidance clarifying the application of the Department's longstanding pre-rule guidance as it relates to group health plans (including, for example, the HIPAA nondiscrimination rule's application to AHPs), propose revised alternative criteria for multiple employer association-based group health plans, or pursue some combination of those or other alternative steps. The Department received 58 comment letters, all of which are posted on the Department's website and on *Regulations.gov*.[89] An overwhelming majority of commenters support rescission of the 2018 AHP Rule in whole or in part. Comments are discussed below in Section V. Our evaluation focused on ensuring that the Department's regulatory policy and actions in this area honor the Department's long held view, reiterated in the preamble to the 2018 AHP Rule, that Congress did not intend to treat commercial health insurance products marketed by private entrepreneurs, who lack the close economic or representational ties to participating employers and employees, as ERISA-covered employee welfare benefit plans.[90]

V. Discussion of Public Comments on NPRM

A. The 2018 AHP Rule and the Affordable Care Act

Many comments focused on the impact of the 2018 AHP Rule on the ACA. These comments largely fell into two categories: (1) whether AHPs formed under the 2018 AHP Rule (which generally were not subject to the ACA's requirement to cover EHBs) would offer less comprehensive coverage[91] to working owners and small employers than coverage in the individual and small group markets; and (2) whether the 2018 AHP Rule would have affected the ACA individual and small group market risk pools through risk segmentation. Other commenters noted that the 2018 AHP Rule's working owner provision conflicted with the ACA's protections for individuals enrolling in individual market plans[92] and with the definition of ''employer'' in the ACA.[93]

With respect to comments raising the issue of AHPs offering less comprehensive coverage, commenters stated that AHPs operating under the 2018 AHP Rule, unlike individual and small group market insurance coverage that must offer certain benefits under the ACA, would not have been required to provide EHBs, including emergency services, prescription drug benefits, or

[87] *See, e.g., Gruber* v. *Hubbard Bert Karla Weber, Inc.,* 159 F.3d 780, 787 (3d Cir. 1988) (''[T]o qualify as an 'employer' for ERISA purposes, an employer group or association must satisfy both the commonality of interest and control requirements.'').

[88] Advisory opinions are issued pursuant to ERISA Procedure 76–1, which in Section 10 describes the effect of advisory opinions as follows: ''An advisory opinion is an opinion of the department as to the application of one or more sections of the Act, regulations promulgated under the Act, interpretive bulletins, or exemptions. The opinion assumes that all material facts and representations set forth in the request are accurate and applies only to the situation described therein. Only the parties described in the request for opinion may rely on the opinion, and they may rely on the opinion only to the extent that the request fully and accurately contains all the material facts and representations necessary to issuance of the opinion and the situation conforms to the situation described in the request for opinion.''

[89] To directly access the rulemaking docket, *see https://www.regulations.gov/docket/EBSA-2023-0020.*

[90] 83 FR 28912, 28928 (June 21, 2018); Advisory Opinions Nos. 94–07A (Mar. 14, 1994), available at *www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/advisory-opinions/1994-07a,* and 2001–04A (Mar. 22, 2001), available at *www.dol.gov/agencies/ebsa/employers-andadvisers/guidance/advisory-opinions/2001-04a.*

[91] Health plans that do not include benefits that non-grandfathered small group and individual market health insurance coverage are required to cover, such as emergency services or prescription drug benefits, or even inpatient hospital coverage, are sometimes referred to as ''less comprehensive coverage'' plans.

[92] *See supra* notes 15, 16.

[93] According to one commenter, under the 2018 AHP Rule, an AHP could be comprised of participants who are common-law employees, common-law employees and working owners, or comprised of only working owners. In all cases, the working owner could be treated as an employee and the business as the individual's employer for purposes of being an employer member of the association and an employee participant in the AHP which, according to the commenter, violates both the ACA and ERISA. The commenter believes that coverage offered to ''working owners'' fits squarely within the ACA's and PHS Act's definition of ''individual health insurance coverage'' and, therefore, coverage consisting of only working owners cannot be considered group health insurance coverage. *See* comment from Timothy Stoltzfus Jost (Feb. 15, 2024) last accessed at *https://www.dol.gov/sites/dolgov/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AC16/00011.pdf.*

even inpatient hospital care. Because an AHP is generally self-funded or funded through large group market insurance coverage and therefore not subject to EHB requirements, several of these commenters stated that AHPs could impose benefit design and association eligibility rules to ''cherry pick'' healthier individuals. Other commenters countered this assertion, stating that AHPs before the 2018 AHP Rule, as well as those that briefly existed under it, covered many (if not all) of the ACA's EHBs voluntarily if they were self-insured plans, or under State law insurance mandates if they were insured plans. These commenters also pointed to other Federal laws that would have restricted the ability of AHPs formed under the 2018 AHP Rule to offer less than comprehensive coverage.[94]

Many commenters stated that the 2018 AHP Rule would have negatively affected the health insurance markets. These commenters argued that AHPs, which generally—as previously noted—are self-funded or funded through large group market insurance coverage, would be permitted to use rating factors such as age, gender, and industry that are prohibited in the small group and individual markets.[95] These commenters asserted that the use of these rating factors would negatively impact the individual and small group market risk pools. They stated that AHPs formed under the 2018 AHP Rule would offer lower premiums to healthier and younger enrollees, drawing those individuals away from the small group and individual markets, thereby increasing premiums for the individuals remaining in those markets, and eventually reducing the availability of plan choices in those markets.[96]

Some commenters disputed that the 2018 AHP Rule would have resulted in adverse selection and market segmentation. These commenters stated that AHPs faced various restrictions or operated within various parameters that would have prevented them from marketing coverage only to healthier individuals, including that (1) AHP coverage is employer-based, which means that AHPs could not seek out only healthy individuals; (2) AHPs could not base plan rates on individual health status or pre-existing conditions; (3) government subsidies would have shielded most participants from any increases in individual health insurance coverage costs; and (4) AHPs would have covered new lives rather than draw individuals away from existing small group or individual market plans.

After careful consideration of public comments on the proposal, the Department acknowledges that health insurance coverage offered through AHPs in the large group markets, or health coverage offered through a self-insured AHP, is not subject to the ACA's EHB requirements; consequently, individuals and small employers who receive such coverage in lieu of individual and small group market coverage subject to the ACA market reforms face the risk of becoming underinsured if their AHP offers less than comprehensive coverage.[97] In addition, the Department also acknowledges the strength of arguments that the 2018 AHP Rule could have negatively affected the small group and individual markets.[98]

At the same time, however, this rescission is ultimately based on the Department's interpretation of ERISA, not the ACA. Also, because the district court held certain provisions of the 2018 AHP Rule invalid, the agency does not have strong data on the number and nature of AHPs formed under the 2018 AHP Rule. Irrespective of these possible negative impacts, however, the Department is rescinding the 2018 AHP Rule based on its view that the geographic commonality, business purpose and working owner provisions of the 2018 AHP Rule were inconsistent with the best interpretation of the statutory language in section 3(5) of ERISA.

B. Geographic Commonality

The 2018 AHP Rule provided that an association could be treated as having the requisite commonality of interest necessary to constitute a bona fide group or association of employers where the employers share ''geographic commonality,'' defined as each employer having a principal place of business in the same geographic region that does not exceed the boundaries of a single State or metropolitan area (even if the metropolitan area included more than one State).

One commenter disagreed with the proposal's rejection of the 2018 AHP Rule's geography-based commonality standard.[99] This commenter argued that the proposal failed to offer good reasons for rejecting this standard and that geography-based business groups have been a feature of the American economy for many generations. The commenter stated that businesses often share an interest in the existence of prosperity, safety, a thriving economy, and a skilled and abundant workforce within their shared State or urban area. While the proposal mostly critiques the reasoning of the 2018 AHP Rule, according to this commenter, in order to make this affirmative change, the Department must offer its own reasons why

[94] The Federal laws mentioned include HIPAA, the Women's Health and Cancer Rights Act of 1998, the Genetic Information Nondiscrimination Act of 2008, and Title X of the Consolidated Omnibus Budget Reconciliation Act of 1985, as amended (''COBRA'').

[95] Section 2701 of the PHS Act, as added by the ACA, implemented at 45 CFR 147.102, restricts variation in premium rates based on age to a 3:1 ratio.

[96] One commenter representing a State Exchange painted a more severe outcome. This commenter stated that the 2018 AHP Rule would have eventually caused the collapse of the private health insurance markets across the nation, leading to higher premiums for small businesses and individuals, leaving people who need comprehensive coverage with no private options, and forcing people to become uninsured. *See* comment from the District of Columbia Health Benefit Exchange Authority (Feb. 20, 2024) last accessed at *https://www.dol.gov/sites/dolgov/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AC16/00033.pdf.*

[97] The Department is also cognizant that the district court in *New York* v. *United States Department of Labor,* 363 F. Supp. 3d 109, 117–18 (D.D.C. 2019), referred to former President Trump's Executive Order 13813 and comments by then Secretary of Labor Alexander Acosta as evincing an intent—by way of the 2018 AHP Rule—to sidestep major elements of the ACA. On October 12, 2017, President Trump issued Executive Order 13813, ''Promoting Healthcare Choice and Competition Across the United States,'' stating, in relevant part, that ''[e]xpanding access to AHPs will also allow more small businesses to avoid many of the PPACA's costly requirements.'' Executive Order 13813, 82 FR 48385 (Oct. 17, 2017). In remarks to the National Federation of Independent Businesses, President Trump further stated: ''Alex [Acosta] and the Department of Labor are taking a major action that's been worked on for four months now—and now it's ready—to make it easier for small businesses to band together to negotiate lower prices for health insurance and *escape some of Obamacare's most burdensome mandates through association health plans.*'' *See* Remarks by President Trump at the National Federation of Independent Businesses 75th Anniversary Celebration, June 19, 2018 (emphasis added), available at *www.trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-national-federation-independent-businesses-75th-anniversary-celebration/.* In a Wall Street Journal op-ed, then Secretary of Labor Alex Acosta wrote: ''Companies with 50 or fewer employees are subject to the law's benefit mandates and rating restrictions, while large companies are not. This is backward. Small businesses should face the same regulatory burden as large companies, if not a lighter one. AHPs will help level the playing field.'' *See* Alexander Acosta, ''A Health Fix For Mom and Pop Shops,'' June 18, 2018, available at *www.wsj.com/articles/a-health-fix-for-mom-and-pop-shops-1529363643.*

[98] *See supra* note 52 (discussing the President's directive to Federal agencies in E.O. 14070 ''to identify ways to continue to expand the availability of affordable health coverage, to improve the quality of coverage, to strengthen benefits, and to help more Americans enroll in quality health coverage'').

[99] *See* comment from Paul J. Ray (Dec. 22, 2023) last accessed at *https://www.dol.gov/sites/dolgov/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AC16/00001.pdf.*

geographic commonality does not create the requisite commonality.

Conversely, many commenters on this issue supported the rescission of the geography-based commonality standard, with several of these commenters noting that this standard is so broad that employers with no common interests whatsoever, other than existing within the same boundaries, could participate in an AHP, making such an AHP indistinguishable from commercial insurance arrangements. These commenters, for example, argued that mere shared existence within a service area does not meaningfully correspond to a sufficient, or necessarily any, employment-based nexus of the caliber required by ERISA. In stark contrast, the commonality standards recognized in the Department's longstanding pre-rule guidance (such as commonality based on industry, trade, or occupation) effectively ensure common bonds that mitigate the danger of discriminatory (and commercial) rating practices, asserted the commenters.

Similarly, another commenter observed that the geography-based commonality standard in the 2018 AHP Rule essentially allowed an AHP to operate like an insurance company, rather than an association acting ''in the interest of'' participating employer members, except that self-funded AHPs would not be subject to the protective insurance market rules, including certain rating rules, that commercial insurance is required to comply with.[100] The commenter argued that this outcome not only may negatively impact many consumers but is also hard to square with the widely held view that ERISA requires a genuine employment relationship to sponsor an AHP. Yet another commenter observed that the 2018 AHP Rule would permit ''agglomerations of wildly dissimilar businesses with different or even potentially conflicting needs and priorities,'' whereas what is needed and required by ERISA is commonality of interest among members to assure that the association will act, employer-like, in the interest of the people whose coverage it is sponsoring.[101] Finally, many commenters expressed concern that the inclusion of the State-based geography standard for commonality would create uncertainty in enforcement for AHPs operating across State lines; more specifically, these commenters asserted that loosening the commonality standard in the way permitted by the rule (*e.g.,* permitting an AHP to establish commonality based on its employer members all operating in a common metropolitan area that crosses State lines) likely would lead to more fraud, abuse, and insolvencies.

The Department shares the concerns of these commenters that the geographic commonality test in the 2018 AHP Rule has significant shortcomings in terms of meaningfully restricting coverage to associations of employers with a sufficient employment nexus. Although the Department acknowledges that employers within the same geographic locale can share other factors that rise to the level of sufficient economic and representational interest, the Department does not believe that the 2018 AHP Rule articulated a sufficient basis for treating common geography *alone* as a shared interest with respect to the employment relationship. Just as would be the case for associations consisting of employers whose membership is based on common business size, recognizing an AHP as an association composed of unrelated employers all operating in any specific State, with no other commonality, does not go far enough in ensuring that AHPs are operating in the interest of employers and are not merely operating as traditional health insurance issuers in all but name without having to meet the state regulatory standards that traditional health issuers are subject to.[102] Plumbers, social workers, seed companies, yoga instructors, and mining companies are unlikely to share any special common interest or bond merely because they are all located in a single State like New York, California, or Pennsylvania (or in a single metropolitan multi-state area).

Accordingly, after considering all of the comments, the view of the Department in this final rule is that a commonality requirement based on common geography alone (same State or multi-State area) does not represent the best approach to interpreting the statutory definition of employer because such commonality does not ensure that the AHP is not a commercial health insurance entity in practice. Although it may be one relevant factor to consider along with other factors, the Department's reconsidered view is that geography alone should not be the sole test for commonality under section 3(5) of ERISA.

C. Business Purpose Standard

The ''business purpose'' standard of the 2018 AHP Rule provided, in relevant part, that a group or association of employers must have at least one ''substantial'' business purpose unrelated to offering and providing health coverage or other employee benefits to its employer members and their employees, even if the primary purpose of the group or association is to offer such coverage to its members. While the 2018 AHP Rule did not include a definition of ''substantial,'' it did provide a safe harbor for an association that would be a ''viable entity'' without sponsoring a health plan. Without addressing substantiality, it also clarified that ''a business purpose'' includes promoting common economic interests in a given trade or employer community and is not required to be a for-profit activity. Thus, regardless of the safe harbor, associations that merely sponsor conferences or offer classes or educational materials on business issues of interest to the association members would be deemed to pass the business purpose test.

Several commenters explicitly supported the rescission of this standard. One commenter argued that the 2018 AHP Rule's definition of ''employer'' is at odds with the text and purpose of ERISA, by ''hollowing out'' the longstanding business purpose standard under pre-rule guidance such that the business purpose standard and viability safe harbor would fail to ensure a sufficient employment nexus.[103] A State insurance regulator emphasized that an AHP rule should contain a requirement that ties employer members together for business reasons other than health care coverage, and eligibility should be legitimately employment-based.[104]

[100] *See* comment from the Center on Budget and Policy Priorities (Feb. 20, 2024) last accessed at *https://www.dol.gov/sites/dolgov/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AC16/00035.pdf.*

[101] *See* comment from the Partnership to Protect Coverage (Feb. 20, 2024) last accessed at *https://www.dol.gov/sites/dolgov/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AC16/00044.pdf.*

[102] The preamble of the 2018 AHP Rule states, ''[A] test that would treat all nationwide franchises, all nationwide small businesses, or all nationwide minority-owned businesses, as having a common employment-based nexus—no matter the differences in their products, services, regions, or lines of work—would not be sufficient to establish commonality of interest for a national group or association and AHP because it would be impossible to define or limit (*e.g.,* business owners who support democracy) and, in the Department's view, would effectively eviscerate the genuine commonality of interest required under ERISA.'' 83 FR 28912, 28926 (June 21, 2018).

[103] *See* comment from the Partnership to Protect Coverage (Feb. 20, 2024) last accessed at *https://www.dol.gov/sites/dolgov/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AC16/00044.pdf.*

[104] *See* comment from the Pennsylvania Insurance Department (Feb. 20, 2024) last accessed at *https://www.dol.gov/sites/dolgov/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AC16/00045.pdf.*

A number of commenters strongly objected to the provision in the 2018 AHP Rule explicitly allowing the primary purpose of the group or association to consist of offering health coverage to its members. According to these commenters, this provision makes AHPs functionally indistinguishable from health insurance issuers, invites unscrupulous promoters to enter the market with mismanaged and inadequately funded AHPs, and could increase the prevalence of fraudulent and abusive practices. They registered their concern that permitting an AHP to be created for the primary purpose of offering health coverage is equivalent to setting up an insurance company, but without the standards that apply to insurance issuers to ensure that promises are kept, bills are paid, and consumers are protected. One commenter [105] argued that such an outcome contradicts congressional intent articulated with the addition to ERISA of section 514(b)(6) (referred to as the ''Erlenborn amendment''): ''[C]ertain entrepreneurs have undertaken to market insurance products to employers and employees at large, claiming these products to be ERISA covered plans. For instance, persons whose primary interest is in the profiting from the provision of administrative services are establishing insurance companies and related enterprises. . . . They are no more ERISA plans than any other insurance policy sold to an employee benefit plan.'' [106]

While no commenter explicitly defended the 2018 AHP Rule's business purpose standard, one commenter suggested it could be revised to require that members have a ''shared business and economic purpose,'' provided the group or association was organized for purposes unrelated to the provision of benefits.[107] Examples provided include ''a common interest in promoting a vibrant local economy'' or having ''a common interest in local, state, and federal regulations of business practices.'' [108]

The Department shares the commenters' concerns that the business purpose standard and accompanying viability safe harbor are too loose to ensure that the group or association sponsoring the AHP is actually acting in the employers' interest or to effectively differentiate an employee health benefit program offered by such an association from a commercial insurance venture. Although the rule provided that a business purpose had to be ''substantial,'' the preamble's discussion of what counts as ''substantial'' was confusing and in some tension with the word's ordinary meaning. At one point, the preamble suggested that merely ''offering classes or educational materials on business issues of interest to members'' was *per se* sufficient to qualify as substantial.[109] In addition, a weakened business purpose standard also can hinder efforts by States to regulate MEWAs, including AHPs, within their borders. On reexamination, the Department's reconsidered view is that the 2018 AHP Rule's relaxed business purpose test, especially when combined with the rule's other loosened standards on commonality of interest and working owners, cannot be counted on to sufficiently differentiate bona fide employer groups or associations acting as an employer from commercial insurance ventures despite the rule's control and nondiscrimination standards.

D. Working Owners

The 2018 AHP Rule allowed certain self-employed persons without any common-law employees to participate in AHPs as ''working owners.'' It did this by establishing wage, hours of service, and other conditions for when a working owner would be treated as both an ''employer'' and ''employee'' for purposes of participating in, and being covered by, an AHP.[110] Commenters on the proposed recission of the 2018 AHP Rule disagreed on whether to rescind the ''working owner'' provision, with most commenters in favor of rescission.

Commenters opposing the rescission offered little reasoning as to why the working owner provision, specifically, should be retained. One commenter suggested that the provision should be retained and clarified to include interns and apprentices of trades regardless of whether such individuals work a full-time schedule or are paid for their work.[111]

Most commenters on the working owner provision, however, supported its full rescission. Several commenters, for example, pointed to the inclusion of ''working owners'' in an AHP comprised only of working owners as clearly inconsistent with ERISA. One of these commenters added that such inclusion also is inconsistent with court decisions interpreting the terms ''employer'' and ''employee'' under ERISA. Further, according to the commenter, the Department's regulation at 29 CFR 2510.3–3, which provides that an ERISA plan does not include a program under which no employees are participants covered under the plan, and the decision in *Yates* v. *Hendon,* recognize the longstanding position of Federal agencies that an ERISA plan must have at least one employee participant other than the owner to be a group health plan.[112] Indeed, a couple of commenters observed that one person cannot be in an employment relationship with themselves, and that AHPs should not include working owners that do not have common-law employees. Some commenters stated that allowing an AHP comprised only of sole proprietors will necessarily lead to more fraud and insolvencies. Acknowledging that the 2018 AHP Rule included some ''minimal standards'' for AHPs—for example, that AHPs have a formal organizational structure, and that participating employers have some level of control over the AHP—one of the commenters argued that sole proprietors are not in a position to exert meaningful control over an AHP because they are not in a position to determine whether the person setting up and running the AHP has the needed skills and

[105] *See* comment from the District of Columbia Health Benefit Exchange Authority (Feb. 20, 2024) last accessed at *https://www.dol.gov/sites/dolgov/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AC16/00033.pdf.*

[106] House Committee on Education and Labor, Activity Report of Pension Task Force (94th Congress 2d Session, 1977) quoted in Cong. Rec. (daily ed. May 21, 1982) (statement of Rep. Erlenborn). States, prior to 1983, were effectively precluded by ERISA's broad preemption provisions from regulating any employee benefit plan covered by Title I of ERISA. As a result, a State's ability to regulate MEWAs was often dependent on whether the particular MEWA was not an ERISA-covered plan. In an effort to address this problem, the U.S. Congress amended ERISA in 1983 (Sec. 302(b), Pub. L. 97–473, 96 Stat. 2611, 2613 (29 U.S.C. 1144(b)(6); ''Erlenborn-Burton Amendment'') to establish an exception to ERISA's preemption provisions for MEWAs. This exception was intended to eliminate claims of ERISA-plan status and Federal preemption as an impediment to State regulation of MEWAs by permitting States certain regulatory authority over MEWAs that are ERISA-covered employee welfare benefit plans.

[107] *See* comment from The Coalition to Protect and Promote Association Health Plans (Feb. 19, 2024) last accessed at *https://www.dol.gov/sites/dolgov/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AC16/00019.pdf.*

[108] *Id.*

[109] 83 FR 28912, 28918 (June 21, 2018).

[110] 29 CFR 2510.3–5(e).

[111] *See* comment from the National Association of Home Builders (Feb. 20, 2024) last accessed at *https://www.dol.gov/sites/dolgov/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AC16/00056.pdf.*

[112] *See* comment from Timothy Stoltzfus Jost (Feb. 15, 2024) last accessed at *https://www.dol.gov/sites/dolgov/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AC16/00011.pdf.*

experience or to provide adequate oversight of the AHP's operations.[113]

The Department has reexamined the 2018 AHP Rule's treatment of working owners and determined, as suggested by many commenters, that ERISA's text, fundamental purpose, and pre-rule guidance counsel against the appropriateness of the alternative criteria codified by the 2018 AHP Rule. In this regard, the Department has concluded that the better reading of the statute requires a consistent focus on employment-based relationships, as distinct from commercial ventures formed to market health benefits to unrelated parties, including individuals who are not even in an employment relationship. The pre-rule guidance rightly insisted on the existence of an employment relationship and on a common employment nexus between entities participating in a bona fide employer association. By departing from these standards, the 2018 AHP Rule undermined ERISA's employment-based focus and wrongly treated as ''employers'' entities whose primary purpose was the marketing of health benefits to unrelated employers and individuals.

E. Total Rescission Versus Partial Rescission

An overwhelming majority of commenters support rescission of the 2018 AHP Rule in some fashion. A few commenters discussed whether, if the Department decides to rescind the 2018 AHP Rule, the Department should rescind the rule in whole or in part. One commenter asserted that the Department should not rescind the entire 2018 AHP Rule, but instead should rescind only the provisions that the court held invalid.[114] This commenter suggested that a total rescission would provide a less comprehensive framework than a partial rescission. Further, this commenter argued that a total rescission would cause a reversion to the prior body of applicable law, composed entirely of guidance documents issued over many decades and restricted by their terms to the parties and specific factual scenarios at issue. A different commenter suggested that the rule should stand at least with respect to AHPs meeting the same trade, industry, line of business or profession test.[115] Another commenter urged the Department not to rescind the rule but rather work to improve it.[116]

By contrast, many commenters favored a total rescission of the 2018 AHP Rule. Some reasoned that the rule would be nonsensical if codified without the sections that were held invalid by the district court. Others reasoned that the remaining portions would not be sufficient to prevent mismanagement, underinsurance, and potential harm to consumers. A number of commenters argued that only a full rescission would restore the *status quo ante,* which aligns with judicial precedent, is supported by State regulatory infrastructure, respects the ACA, and has created an effective regulatory framework to support legitimate AHPs for the past 30 years.

The Department agrees that a full rescission, as proposed, is the best course of action. If the Department simply eliminated the provisions that the district court held invalid in its decision in *New York* v. *United State Department of Labor,* the provisions remaining would not provide an adequate definition of ''employer'' that properly reflects the limits of ERISA's definition of ''employer'' in section 3(5) and Congress' focus on employment-based arrangements, as opposed to the ordinary commercial provision of insurance outside the employment context. The remaining provisions also would be missing key elements necessary for a comprehensive framework for a group or association to demonstrate that it is acting ''indirectly in the interest of an employer'' within the meaning of section 3(5) of ERISA. Following the district court's decision, described above, the Department considered the severability clause issue raised by the district court and concluded that, without the core provisions that the district court held invalid, the 2018 AHP Rule could not be operationalized and would provide no meaningful guidance.

Even if considered imperfect to some commenters, the pre-rule guidance establishes criteria intended to distinguish bona fide groups or associations of employers that provide coverage to their employees and the families of their employees from arrangements that more closely resemble State-regulated private health insurance coverage. This rescission does not affect the ability to operate or form an AHP pursuant to the pre-rule guidance. The Department's pre-rule guidance is consistent with the criteria articulated and applied by every appellate court, in addition to several Federal district courts, that considered whether an organization was acting in the interests of employer members.[117] Moreover, to the Department's knowledge, no court has found, or even suggested, that its longstanding pre-rule guidance criteria too narrowly construe the meaning of acting ''indirectly in the interest of an employer'' under section 3(5) of ERISA.

F. Defense of the 2018 AHP Rule in Court

A few commenters in favor of the 2018 AHP Rule asserted that the Department should abandon or withdraw the proposed rescission, leave the 2018 AHP Rule in place, and defend the rule in the U.S. Court of Appeals for the D.C. Circuit. However, the Department is no longer of the view that the business purpose standard, geography-based commonality standard, and working owner provision in the 2018 AHP Rule, even as bolstered by the nondiscrimination standards in paragraph (d)(4) and the control requirements, are sufficient to distinguish between meaningful employment-based relationships and commercial insurance-type arrangements whose purpose is principally to market benefits and identify and manage risk. The Department continues to be mindful of the unique risks to individuals, small employers, and health care providers in the context of AHPs and any other form of MEWAs. These concerns underscore the need to limit ERISA-covered AHPs to true employee benefit plans that are the product of a genuine employment relationship and not artificial structures marketed as employee benefit plans, often with an objective of attempting to sidestep otherwise applicable insurance regulations or Federal law applicable to the individual and small group markets. Such arrangements are not ''employee benefit plans'' as defined in section 3(3) of ERISA, nor, as explained above, would it be consistent with the purpose of the statute to treat them as such.

In sum, upon further evaluation and consistent with the sound administration of ERISA, the Department has concluded that it

[113] *See* comment from the District of Columbia Health Benefits Exchange Authority (Feb. 20, 2024) last accessed at *https://www.dol.gov/sites/dolgov/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AC16/00033.pdf.*

[114] *See* comment from Paul J. Ray (Dec. 22, 2023) last accessed at *https://www.dol.gov/sites/dolgov/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AC16/00001.pdf.*

[115] *See* comment from Bernstein, Shur, Sawyer & Nelson, P.A. (Feb. 20, 2024) last accessed at *https://www.dol.gov/sites/dolgov/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AC16/00041.pdf.*

[116] *See* comment from the Council for Affordable Health Coverage and Health Benefits Institute (Feb. 20, 2024) last accessed at *https://www.dol.gov/sites/dolgov/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AC16/00037.pdf.*

[117] *See supra* note 2.

should rescind the 2018 AHP Rule in its entirety. The Department now believes that the provisions of the 2018 AHP Rule that the district court found inconsistent with the APA and in excess of the Department's statutory authority under ERISA are, at a minimum, not consistent with the best reading of section 3(5) of ERISA. As the court noted in *Wisconsin Educ. Ass'n Ins. Trust* v. *Iowa State Board of Public Instruction,* ''[t]he definition of an employee welfare benefit plan is grounded on the premise that the entity that maintains the plan and the individuals that benefit from the plan are tied by a common economic or representation interest, unrelated to the provision of benefits.'' [118]

G. Effect of Rescission on the 2019 Association Retirement Plan Rule

The proposal addressed only the 2018 AHP Rule. It did not solicit comments on whether to simultaneously rescind the Department's final rule on association retirement plans (2019 ARP Rule).[119] However, the proposal acknowledged the existence of the 2019 ARP Rule; that it was issued after the 2018 AHP Rule and after the district court decision in *New York* v. *United States Department of Labor;* and that it includes commonality, business purpose, and working owner provisions that parallel the provisions in the 2018 AHP Rule.[120] The proposal also acknowledged that ERISA has parallel language in the definitions of pension and welfare plan and does not explicitly provide a basis for distinguishing between the AHP and ARP rules.[121] However, the proposal stated that because there are specific retirement plan considerations that involve issues beyond the scope of the proposed rescission, the Department decided not to address the 2019 ARP Rule in the proposal.

A couple of commenters disagreed with this decision, asserting that it would be arbitrary and capricious not to address the 2019 ARP Rule given that the same applicable statutory text, the definition of ''employer'' in section 3(5) of ERISA, is the subject of both rules. In support of this position, one of the commenters quoted the Department's reasoning from the preamble to the 2019 ARP Rule, which stated as follows: ''It makes sense to have consistent provisions for AHPs and [ARPs], because the Department is interpreting the same definitional provisions in both contexts and because many of the same types of groups or associations of employers that sponsor AHPs for their members will also want to sponsor [ARPs].'' [122] Noting some take-up success under the 2019 ARP Rule, one of the commenters implied that the Department is being arbitrary and capricious by ignoring the possibility of a similar level of success for AHPs absent the rescission.[123]

That the Department has deliberately decided to proceed with the rescission of the 2018 AHP Rule, while reserving judgment on the 2019 ARP Rule, is neither probative nor suggestive of an arbitrary and capricious process either in the case of this final rule or with respect to future action, if any, taken on the 2019 ARP Rule. In much the same way that the Department exercised its discretion to promulgate the two rules on separate timelines, it has similar discretion to undertake additional regulatory action with respect to the 2019 ARP Rule on a different timeline. Moreover, unlike the 2018 AHP Rule, the 2019 ARP Rule extends coverage to ''bona fide professional employer organization'' arrangements in addition to association retirement plans. Given the different scope, provisions, and policy considerations associated with the two rules, and the fact that only the AHP Rule has been held invalid in judicial proceedings, the Department believes it is appropriate to initially proceed with rescission of the 2018 AHP Rule, and to reserve judgment on any additional action with respect to the 2019 ARP Rule for a separate rulemaking effort.

Also, as the Department explained in the preamble to the proposal, retirement plans raise different issues from group health plans. Retirement plans and group health plans are subject to an array of different laws, regulators, and market forces. As just one example highlighted by commenters on the proposal, group health plans generally are subject to the ACA and retirement plans are not. Additionally, multiple employer retirement plans do not have a history of financial mismanagement or abuse to the same extent as multiple employer group health plans.[124]

Although this final rule rescinds the 2018 AHP Rule, the Department has made no decision on whether to rescind or modify the 2019 ARP Rule, which was promulgated through a separate notice and comment process. However, if the Department decides to make changes to the 2019 ARP Rule, it will do so separately and through a notice-and-comment rulemaking process as was done with the final rule being adopted today.

H. Effect of Rescission on Access to Health Coverage Through Association Health Plans

Commenters are concerned that rescinding the 2018 AHP Rule will undermine the use of AHPs as a means of gaining access to health benefits. One commenter asserted that after the 2018 AHP Rule went into effect, small businesses created new associations and offered health coverage at premium rates significantly lower than previous small-group plans.[125] This commenter, however, did not address whether any of the purported savings attributed to newly formed AHPs resulted from AHPs that were formed following the 2018 AHP Rule but in accordance with pre-rule guidance, from AHPs formed pursuant to the alternative criteria under the 2018 AHP Rule, or some combination thereof, or whether any AHPs formed pursuant to the alternative criteria would have also satisfied the pre-rule criteria (and therefore could have continued to operate under the pre-rule guidance, regardless of the decision in *New York* v. *United States Department of Labor*). This commenter also asserted that newly created AHPs produced savings of nearly 30 percent for some employers. However, the Department is unable to independently validate the savings asserted by this commenter, or the extent to which those savings, if any, were attributable to less generous benefits, risk selection or other practices that were potentially harmful to the larger market for health benefits, or individuals being covered by low-quality, limited plans.[126]

[118] *Wisconsin Educ. Assn. Ins. Trust* v. *Iowa State Bd. of Public Instruction,* 804 F.2d 1059, 1063 (8th Cir. 1986)

[119] 29 CFR 2510.3–55; Definition of ''Employer'' Under Section 3(5) of ERISA—Association Retirement Plans and Other Multiple-Employer Plans, 84 FR 37508 (July 31, 2019).

[120] 88 FR 87968, 87978–79.

[121] *Id. See also* 29 U.S.C. 3(1) (defining ''welfare plan''), 3(2) (defining ''pension plan''), and 3(5) (defining ''employer'').

[122] 84 FR 37508, 37513.

[123] *See* comment from Paragon Health Institute (Feb. 17, 2024) last accessed at *https://www.dol.gov/sites/dolgov/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AC16/00015.pdf.*

[124] *Supra* note 41.

[125] *See* comment from the Opportunity Solutions Project (Feb. 2, 2024) last accessed at *https://www.dol.gov/sites/dolgov/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AC16/00003.pdf.*

[126] The savings reported by the commenter was based on a 2019 study of 28 newly formed, active AHPs established under the 2018 AHP Rule provisions. The savings claims are described as ''the maximum savings'' though the term is not defined. The study compares each business's current non-AHP plan to the business's AHP plan options (the study also reported that the average number of plan options (*e.g.* PPO, HMO, HDHP) was 11). The ''average maximum savings'' of the 4 self-funded AHPs was 29 percent, and the average maximum

Continued

The Department recognizes that a number of AHPs were established and briefly existed as a result of the 2018 AHP Rule. However, after the district court's decision holding the 2018 AHP Rule invalid, and the Department's subsequent guidance that parties should cease establishing AHPs (under the alternative criteria pursuant to the 2018 AHP Rule) and to wind down any that were in existence, commercial AHPs permitted under the 2018 AHP Rule halted by the end of 2019. Therefore, the rescission itself has no effect independent of the effects of the district court's opinion and the expiration of the winding-down period provided in the Department's long expired temporary safe harbor from enforcement.

I. Costs of Rescinding the 2018 AHP Rule

A couple of commenters discussed potential costs associated with rescinding the 2018 AHP Rule. One commenter stated that the proposal does not acknowledge certain costs that such a rescission would entail.[127] This commenter suggests that the proposal overlooks the investments made in dozens of new AHPs organized under the 2018 AHP Rule and how their rescission ''materializes losses from investments with delayed returns.'' This commenter also asserted that the rescission limits the AHP market to AHPs established pursuant to the Department's pre-rule guidance and suggested the uncertainties attendant to that guidance may discourage new investments in AHP-related technology and ventures, stifling innovations and the savings they might produce. This commenter also suggested that the rescission systemically reinforces higher than necessary health insurance costs for small businesses, money that might otherwise be spent on new hiring or raises. The commenter further suggested that higher premiums, in turn, discourage small businesses from offering coverage, increasing the Government's cost as more people must rely on ACA premium tax credits. But a different commenter was of the view that, because AHPs established under the 2018 AHP Rule had little opportunity to exist due to the district court's opinion, there is little real-world evidence of the effect the 2018 AHP Rule would have had on the market.[128] In addition, a significant number of commenters articulated a preference for the pre-rule guidance.

After the district court invalidated the 2018 AHP Rule, the Department gave AHPs established under the rule a temporary safe harbor from enforcement to allow such existing AHPs to wind down and announced that new AHPs should not be established in reliance on the rule. That temporary safe harbor from enforcement has long expired, and the Department is not aware of any AHPs that currently exist under the framework of the 2018 AHP Rule. Because the 2018 AHP Rule was never fully implemented and any AHPs established in reliance on the rule have long since terminated, the Department is unable to definitively determine any costs and benefits that would have been incurred in response to the approach taken in the 2018 AHP Rule.

J. Need for Future Rulemaking

In addition to comments on rescission of the 2018 AHP Rule, the proposal also solicited comments on whether the Department should propose a rule for group health plans that codifies and replaces the pre-rule guidance. This solicitation included a request for views on whether to issue additional guidance clarifying the application of the Department's longstanding pre-rule guidance as it relates to group health plans (including, for example, the HIPAA nondiscrimination rule application to AHPs), propose revised alternative criteria for multiple employer association-based group health plans, or pursue some combination of those or other alternative steps. The intent was that the public comments would inform the Department's decision on whether to finalize the proposal to rescind the 2018 AHP Rule and would also assist the Department in determining if it should engage in future rulemaking on AHPs under section 3(5) of ERISA. Overall, comments were mixed on whether future rulemaking is necessary or appropriate, with no clear consensus.

Many commenters expressed a preference for rescission but no future rulemaking on AHPs under section 3(5) of ERISA. These commenters suggested that the facts-and-circumstances approach of the pre-rule guidance (buttressed with State regulatory infrastructure) is adequate, has worked well to honor ERISA's employment-based nexus, and that no formal notice-and-comment rulemaking is needed.[129] Some of these commenters were concerned that a future rulemaking effort might negatively impact existing bona fide AHPs.[130] Others cautioned that the Department should not engage in rulemaking to create new and separate requirements around rating practices within the AHP market, suggesting that rulemaking of that type would be reaching beyond the Department's statutory authority.

Other commenters, however, recommended that the Department give serious consideration to codifying the core principles in the Department's pre-rule guidance into the CFR through notice-and-comment rulemaking following this rescission. These commenters focused on the benefits and efficiencies of transparency and streamlining access to these principles.

Still others suggested that future rulemaking could both incorporate and expand upon the core principles in the Department's pre-rule guidance. Ideas for expansion included provisions on more effective MEWA enforcement, mandatory benefit levels (incorporating provisions that mirror the ACA small group market requirements into any future rulemaking), enhanced financial reporting by AHPs, restrictions on alternative coverage arrangements that undermine and threaten progress under the ACA, and disclosures by AHPs to participating employers and enrollees regarding the extent to which the AHP coverage includes the ACA's essential health benefits.

savings for the 24 fully insured AHPs was 23 percent. Association Health Plans, *First Phase of New Association Health Plans Revealing Promising Trends. www.associationhealthplans.com/reports/new-ahp-study/* accessed on March 12, 2024. This finding is not the average savings across all employers in the AHPs and does not account for differences in insurance coverage richness.

[127] *See* comment from Paragon Health Institute (Feb. 17, 2024) last accessed at *https://www.dol.gov/sites/dolgov/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AC16/00015.pdf.*

[128] *See* comment from AHIP (Feb. 20, 2024) last accessed at *https://www.dol.gov/sites/dolgov/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AC16/00043.pdf.*

[129] New rulemaking could, according to these commenters, undermine the best practices built by employers over decades under the pre-rule guidance and disrupt the balance upon which bona fide associations, employers, and insurers rely. Some of these commenters noted that attempting to codify pre-rule guidance issued over several decades would likely result in gaps and ambiguities, creating more confusion for small employers. One of these commenters further asserted that the lengthy, formal rulemaking process would hinder the Department from contemporaneously responding to industry trends while also restricting industry exploration of new arrangements that could pool employers' resources more efficiently to maximize the healthcare benefits available to employees and their dependents.

[130] Several commenters argued that any future codification of the pre-rule guidance must preserve the structure of existing MEWAs that were set up in good faith in accordance with pre-rule guidance, including the ability to use experience ratings of their employer members consistent with State insurance law (which they say is essential for them to offer affordable and comprehensive coverage), without adding any new requirements that would necessitate expensive restructuring of these MEWAs.

Other ideas for regulatory expansions in a future rulemaking project under section 3(5) of ERISA included strong nondiscrimination protections, provisions on working owners (some commenters recommended prohibitions on working owners being able to join AHPs, but others recommended including them), provisions requiring associations to disclose compensation they receive from the AHPs they sponsor or from the participating employers or enrollees obtaining coverage, provisions delineating concurrent State and Federal enforcement roles, and provisions codifying and enforcing the CMS ''look-through rule.'' [131]

The commenters' ideas and suggestions on a potential future rulemaking project involving AHPs are not directly relevant to the Department's rescission of the 2018 AHP Rule. Moreover, some of their ideas for expansion are beyond the scope of a rulemaking project defining ''employer'' under section 3(5) of ERISA. However, the Department will take the recommendations for future rulemaking under advisement.

VI. Regulatory Impact Analysis

A. Relevant Executive Orders for Regulatory Impact Analyses

Executive Orders (E.O.s) 12866 [132] and 13563 [133] 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 costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. E.O. 13563 directs agencies to propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; tailor their regulations to impose the least burden on society, consistent with obtaining regulatory objectives; and select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits. E.O. 13563 recognizes that some benefits are difficult to quantify and provides that, where appropriate and permitted by law, agencies may consider and discuss qualitatively values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.

Under E.O. 12866 (as amended by E.O. 14094), the Office of Management and Budget's (OMB) Office of Information and Regulatory Affairs determines whether a regulatory action is significant and, therefore, subject to the requirements of the E.O. and review by OMB. As amended by E.O. 14094, section 3(f) of E.O. 12866 defines a ''significant regulatory action'' as a regulatory action that is likely to result in a rule that may: (1) have an annual effect on the economy of $200 million or more; or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, Territorial, or Tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees or loan programs or the rights and obligations of recipients thereof; or (4) raise legal or policy issues for which centralized review would meaningfully further the President's priorities or the principles set forth in the Executive order.

OMB has designated this action a ''significant regulatory action'' within the meaning of section 3(f)(1) of E.O. 12866, as amended, and reviewed the final rule in accordance with E.O. 12866. Key to this designation is that the Department is rescinding a rule that was itself significant under section 3(f)(1).

It should be noted that the 2018 AHP Rule was never fully implemented.[134] While the Department gave AHPs established under the 2018 AHP Rule a temporary safe harbor from enforcement after the district court's March 28, 2019 decision holding invalid the core provisions of the 2018 AHP Rule, that time has long expired, and the Department is not aware of any AHPs that currently exist under the framework of the 2018 AHP Rule.

Consequently, any costs and benefits that would have been anticipated in response to the approach taken in the 2018 AHP Rule were never fully experienced and have long since lapsed for those plans that formed and briefly existed pursuant to the 2018 AHP Rule. The 2018 AHP Rule hypothesized that plans serving small employers and their participants potentially would have benefitted from the ability to band together to offer tailored plans that omit certain benefits, and thus reduce their costs. At the same time, however, other plans and participants were assumed to bear the costs, with the 2018 AHP Rule's economic analysis projecting that those employers and participants that remained in the small-group and individual markets could face premium increases between 0.5 and 3.5 percent, resulting in an increase in the number of uninsured individuals caused by those that exited the individual market due to higher premiums.

The Department's regulatory impact analysis accompanying the 2018 AHP Rule did not encompass the litigation or the district court's decision, which largely nullified the assumed costs and benefits. Accordingly, the Department assumes that the costs of this rulemaking, the rescission of the 2018 AHP Rule, would effectively be zero, while the benefits would be limited to settling any uncertainty caused by the litigation surrounding the regulation and the Department's reexamination of the appropriate criteria for a group or association of employers to sponsor an AHP.

The Department, in response to the proposal, received a comment arguing that in assessing the cost of the rulemaking, the Department should have used partial implementation of the 2018 AHP Rule as its baseline.[135] The commenter argued that the Department should have implemented those parts of the 2018 AHP Rule that the district court did not hold invalid. The cost of rescinding the 2018 AHP Rule would then be the foregone benefits for individuals who would have relied on a scaled-down version of the 2018 AHP Rule.

The Department has explained why it determined that full rescission of the 2018 AHP Rule was appropriate, as discussed above in Section V.E. Because of the district court's decision, and the fact that parties are not relying on the 2018 AHP Rule to operate AHPs, the costs and benefits of the 2018 AHP Rule assessed against the baseline suggested by the commenter would be especially uncertain. Accordingly, the Department's analysis mostly reflects the fact that the 2018 AHP Rule was

[131] *Supra* note 9.

[132] 58 FR 51735 (Oct. 4, 1993).

[133] 76 FR 3821 (Jan. 21, 2011).

[134] Consistent with the applicability date provision in the 2018 AHP Rule, fully insured plans could begin operating under the rule on September 1, 2018, existing self-insured AHPs could begin operating under the rule on January 1, 2019, and new self-insured AHPs could begin operating under the rule on April 1, 2019. The preamble explained that this phased approach was intended to allot some additional time for the Department and State authorities to address concerns about self-insured AHPs' vulnerability to financial mismanagement and abuse. *See* 83 FR 28912, 28953 (June 21, 2018).

[135] *See* comment from Paul J. Ray (Dec. 22, 2023) last accessed at *https://www.dol.gov/sites/dolgov/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AC16/00001.pdf.*

never fully implemented and the Department, therefore, reiterates that the costs of this rulemaking, the rescission of the 2018 AHP Rule, would effectively be zero relative to the baseline projected from current prevailing conditions, while the benefits would be limited to settling any uncertainty caused by the litigation surrounding the 2018 AHP Rule and the Department's reexamination of the appropriate criteria for a group or association of employers to sponsor an AHP. Additionally, as observed in Section II.E. above, the district court held invalid the core provisions of the 2018 AHP Rule. Without the stricken provisions, the 2018 AHP Rule could not be operationalized and would provide no meaningful guidance.

B. Background

An AHP is a health plan formed by a group or association of employers to provide health care coverage for their employees. AHPs have been in existence for some time and are a subset of MEWAs. Under the pre-rule guidance, to qualify as a bona fide employer group or association capable of establishing a single group health plan under ERISA, the group or association had to satisfy the business purpose standard, commonality standard, and control standard, which, along with factors that may be considered in applying these standards, are described above in Section II.B. of this preamble. If these standards are not satisfied, a health care arrangement offered by the group or association is not treated as a single group health plan, and the group or association is disregarded in determining whether health insurance coverage offered to an individual or employer member of the association is individual, small group, or large group market coverage for purposes of Title XXVII of the PHS Act. The scope of these standards, additional nondiscrimination and working owner provisions, and how treatment of AHPs is different under the 2018 AHP Rule are discussed in Section II.D. of the preamble.

As noted in Section II.E. of this preamble, on March 28, 2019, the U.S. District Court for the District of Columbia held invalid the 2018 AHP Rule's definition of bona fide employer groups or associations and the working owner provisions. In response, the Department announced its temporary enforcement policy designed to minimize undue consequences of the district court's decision on AHP participants.[136]

C. Need for Regulatory Action

As discussed in Section II.E. of this preamble, the district court held invalid the 2018 AHP Rule as inconsistent with ERISA's definition of persons ''acting indirectly in the interest of an employer.'' The district court concluded that the 2018 AHP Rule's standards for determining ''employer'' status were overbroad and inconsistent with Congress' intent to draw a distinction between employment-based arrangements, on the one hand, and commercial entities marketing benefits to unrelated employers, on the other.[137] After further consideration, the Department has concluded that the 2018 AHP Rule does not comport with the best interpretation of ERISA's text and animating purposes and should be rescinded while the Department reconsiders its specific provisions and possible different regulatory approaches. The Department's rescission of the 2018 AHP Rule in its entirety also provides clarity to entities that wish to sponsor an AHP with respect to the need to rely upon the criteria in the Department's longstanding pre-rule guidance and court decisions on the ERISA section 3(5) definition, as opposed to the terms of the 2018 AHP Rule.

D. Affected Entities

The Department does not believe that any entities currently rely upon the 2018 AHP Rule, given that the district court has held invalid most of the 2018 AHP Rule and the temporary enforcement policy period has long expired. Rescinding the 2018 AHP Rule simply maintains the status quo. At the time the Department first promulgated the 2018 AHP Rule, the Department identified 153 entities as potential ''early adopters'' that had signaled their intent to form an AHP under the 2018 AHP Rule. Of these early adopters, 112 of these entities ultimately submitted the required Form M–1,[138] one other entity advised the Department that it intended to file a Form M–1, two indicated they were not required to file a Form M–1, 15 told the Department that they were not pursuing an AHP, one was under investigation for reasons unrelated to the early adopter program, and the remainder were unresponsive to further Department outreach.

E. Benefits

The final rule rescinds the 2018 AHP Rule and provides clarity to parties about the continuing unavailability of the 2018 AHP Rule as an alternative to the Department's longstanding pre-rule guidance. At the time the 2018 AHP Rule was finalized, the Department also anticipated that it would have to increase dramatically its MEWA enforcement efforts and enhance its coordination with State regulators because of the anticipated increase in the number of AHPs attributable to the new 2018 AHP Rule. Because the 2018 AHP Rule was held invalid by the district court, the Department has not had to address a dramatic increase in the number of insolvent MEWAs, although existing fraudulent and mismanaged MEWAs remain a significant challenge to the agency.

F. Costs

Although the 2018 AHP Rule was finalized, it was never fully implemented, and no parties appear to currently rely on the 2018 AHP Rule, given the district court's decision and the expiration of the Department's temporary enforcement policy. As a result, the Department does not believe that rescinding the 2018 AHP Rule would result in any costs.

VII. Paperwork Reduction Act

The 2018 AHP Rule was not subject to the requirements of the Paperwork Reduction Act of 1995 [139] because it did not contain a collection of information as defined in 44 U.S.C. 3502(3). Accordingly, this final rule to rescind the 2018 AHP Rule also does not contain an information collection as defined in 44 U.S.C. 3502(3).

VIII. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) [140] imposes certain requirements on rules subject to the notice and comment requirements of section 553(b)

[136] *See supra* note 31.

[137] *See supra* at Section II.E. of this preamble for a discussion of the decision in *New York* v. *United States Department of Labor.*

[138] The Form M–1 is a report for MEWAs and Certain Entities Claiming Exception (ECEs) that offer medical benefits, including AHPs. MEWAs are required to file annual reports with the Department, as well as special filings associated with certain events. In particular, all MEWAs that provide medical benefits, including AHPs that intend to begin operating, are required to file an initial registration Form M–1 at least 30 days before engaging in any activity. Such activities include, but are not limited to, marketing, soliciting, providing, or offering to provide medical care benefits to employers or employees who may participate in the AHP. This filing alerts the Department and State insurance regulators to new entrants into insurance markets, which can give States and regulators time to communicate with these new entities before they begin operation. For additional information on the Form M–1 *see https://www.dol.gov/sites/dolgov/files/EBSA/employers-and-advisers/plan-administration-and-compliance/reporting-and-filing/forms/m1-2023.pdf.*

[139] 44 U.S.C. 3501 *et seq.*

[140] 5 U.S.C. 601 *et seq.*

of the APA or any other law.[141] Under section 604 of the RFA, agencies must submit a final regulatory flexibility analysis (FRFA) of a final rule that is likely to have a significant economic impact on a substantial number of small entities, such as small businesses, organizations, and governmental jurisdictions. However, because the 2018 AHP Rule was never fully implemented and the Department is not aware of any existing AHP that was formed in reliance on the rule, this rescission of the 2018 AHP Rule will not have a significant economic impact on a substantial number of small entities.

Pursuant to section 605(b) of the RFA, the Assistant Secretary of the Employee Benefits Security Administration hereby certifies that the final rule will not have a significant economic impact on a substantial number of small entities. As discussed above, at the time the Department first promulgated the 2018 AHP Rule, the Department identified only 153 entities as potential ''early adopters'' that had signaled their intent to form an AHP under the 2018 AHP Rule. Ultimately, 112 of these entities submitted the required Form M–1, one other entity advised the Department that it intended to file a Form M–1, two indicated they were not required to file a Form M–1, 15 told the Department that they were not pursuing an AHP, one was under investigation for reasons unrelated to the early adopter program, and the remainder were unresponsive to further Department outreach. Since the district court held invalid the 2018 AHP Rule and the temporary enforcement policy period has expired, any AHPs that formed before the decision in reliance on the 2018 AHP Rule should have wound down, and the Department is not aware of any new AHPs that have formed in reliance on the 2018 AHP Rule. Accordingly, rescission of the 2018 AHP Rule will not have an impact on existing AHPs formed in accordance with the pre-rule guidance.

IX. Unfunded Mandates

Title II of the Unfunded Mandates Reform Act of 1995 requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency 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.[142] In 2024, that threshold is approximately $183 million. For purposes of the Unfunded Mandates Reform Act, this final rule does not include any Federal mandate that the Department expects would result in such expenditures by State, local, or Tribal governments, or the private sector.[143]

X. Federalism

E.O. 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 and describe the extent of their consultation and the nature of the concerns of State and local officials in the preamble to the proposal. The preamble to the 2018 AHP Rule included a discussion of federalism implications of the rule, which largely focused on and confirmed that the 2018 AHP Rule did not modify State authority under section 514(b)(6) of ERISA, which gives the Department and State insurance regulators joint authority over MEWAs, including AHPs, to ensure appropriate regulatory and consumer protections for employers and employees relying on an AHP for health care coverage. Because the 2018 AHP Rule was never fully implemented and the Department is not aware of any entities currently relying on the 2018 AHP Rule, the Department does not believe its rescission will 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 that were discussed in the 2018 AHP Rule. Nonetheless, the Department notes that the level and type of State regulation of MEWAs vary widely. The Department is aware that some States have enacted or are considering State laws modeled on the 2018 AHP Rule that are intended to recognize AHPs as employee benefit plans for purposes of State regulation.[144]

XI. Congressional Review Act

Pursuant to Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (also known as the Congressional Review Act, 5 U.S.C. 801 *et seq.*) OIRA has determined that this rule meets the criteria set forth in 5 U.S.C. 804(2). Accordingly, this rule has been transmitted to the Congress and the Comptroller General for review.

List of Subjects in 29 CFR Part 2510

Employee benefit plans, Pensions.

For the reasons stated in the preamble, the Department of Labor amends 29 CFR part 2510 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), 1002(2), 1002(3), 1002(5), 1002(16), 1002(21), 1002(37), 1002(38), 1002(40), 1002(42), 1002(43), 1002(44), 1031, and 1135; and Secretary of Labor's Order No. 1–2011, 77 FR 1088. Secs. 2510.3–101 and 2510.3–102 also issued under sec. 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. (E.O. 12108, 44 FR 1065, 3 CFR, 1978 Comp., p. 275) and 29 U.S.C. 1135 note.

■ 2. Section 2510.3–3 is amended by revising paragraph (c) introductory text to read as follows:

§ 2510.3–3 Employee benefit plan.

* * * * *

(c) *Employees.* For purposes of this section and except as provided in § 2510.3–55(d):

* * * * *

§ 2510.3–5 [Removed and Reserved]

■ 3. Remove and reserve § 2510.3–5.

Signed at Washington, DC, this 22nd day of April, 2024.

Lisa M. Gomez,

Assistant Secretary, Employee Benefits Security Administration, U.S. Department of Labor.

[FR Doc. 2024–08985 Filed 4–29–24; 8:45 am]

BILLING CODE 4510–29–P

[141] 5 U.S.C. 551 *et seq.*

[142] 2 U.S.C. 1501 *et seq.* (1995).

[143] 58 FR 58093 (Oct. 28, 1993).

[144] For example, CMS, on behalf of HHS, issued a final determination pursuant to section 2723(a)(2) of the PHS Act, section 1321(c)(2) of the ACA, and 45 CFR 150.219 that the Commonwealth of Virginia has not corrected the failure to substantially enforce certain Federal market reforms with respect to issuers offering health insurance coverage through an association of real estate salespersons under Virginia State law, specifically section 38.2–3521.1 G of the Code of Virginia, as enacted by HB 768/SB 335 (2022). The CMS letter, dated September 6, 2023, is available at *www.cms.gov/files/document/letter-virginia-governor-and-insurnace-commissioner-hb-768sb-335-2022-final-determination.pdf.*

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 100

[Docket No. USCG–2024–0347]

Special Local Regulations; Marine Events Within the Fifth Coast Guard District

AGENCY: Coast Guard, DHS.

ACTION: Notification of enforcement of regulation.

SUMMARY: The Coast Guard will enforce special local regulations for certain waters of the Choptank River. This action is necessary to provide for the safety of life on these navigable waters located at Cambridge, MD, during a high-speed power boat demonstration event on May 18, 2024, and May 19, 2024. This regulation prohibits persons and vessels from entering the regulated area unless authorized by the Captain of the Port, Sector Maryland-National Capital Region or the Coast Guard Event Patrol Commander.

DATES: The regulations for the Cambridge Classic Powerboat Race, in Table 2 to paragraph (i))(2) to 33 CFR 100.501, will be enforced from 10 a.m. until 6:30 p.m., each day from May 18, 2024, through May 19, 2024.

FOR FURTHER INFORMATION CONTACT: If you have questions about this notification of enforcement, call or email MST2 Hollie Givens, U.S. Coast Guard Sector Maryland—National Capital Region; telephone 410–576–2596, email *MDNCRMarineEvents@uscg.mil.*

SUPPLEMENTARY INFORMATION: The Coast Guard will enforce special local regulations in Table 2 to paragraph (i)(2) of 33 CFR 100.501 for the Cambridge Classic Powerboat Race regulated area from 10 a.m. to 6:30 p.m. on May 18 and for the same hours on May 19, 2024. This action is being taken to provide for the safety of life on navigable waterways during this 2-day event. Our regulation for marine events within the Fifth Coast Guard District, § 100.501, specifies the location of the regulated area for the Cambridge Classic Powerboat Race which encompasses portions of the Choptank River and its branches. During the enforcement periods, as reflected in § 100.501(c), if you are the operator of a vessel in the regulated area you must comply with directions from the Patrol Commander or any Official Patrol displaying a Coast Guard ensign.

In addition to this notification of enforcement in the **Federal Register**, the Coast Guard plans to provide notification of this enforcement period via the Local Notice to Mariners and Broadcast Notice to Mariners over VHF–FM marine band radio.

Dated: April 24, 2024.

David E. O'Connell,

Captain, U.S. Coast Guard, Captain of the Port, Sector Maryland-National Capital Region.

[FR Doc. 2024–09182 Filed 4–29–24; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 100

[Docket No. USCG–2024–0246]

Special Local Regulations; Annual Marine Events Within the Eighth Coast Guard District; Riverfest Power Boat Races

AGENCY: Coast Guard, DHS.

ACTION: Notification of enforcement of regulation.

SUMMARY: The Coast Guard will enforce special local regulations for the RiverFest Power Boat Races on the Neches River in Port Neches, TX, from May 3, 2024 through May 5, 2024, to provide for the safety of life on navigable waterways during this event. Our regulation for annual marine events within the Eighth Coast Guard District identifies the regulated area for this event in Port Neches, TX. During the enforcement periods, the operator of any vessel in the regulated area must comply with directions from the Patrol Commander.

DATES: The regulations in 33 CFR 100.801, Table 3, Line 4 will be enforced from 2 through 6 p.m. on May 3, 2024, and from 8:30 a.m. through 6 p.m. on May 4 and 5, 2024.

FOR FURTHER INFORMATION CONTACT: If you have questions about this notification of enforcement, call or email LCDR Kimberly Gates, Marine Safety Unit Port Arthur, U.S. Coast Guard; 571–610–1924, email *Kimberly.M.Gates@uscg.mil.*

SUPPLEMENTARY INFORMATION: The Coast Guard will enforce special local regulations in 33 CFR 100.801 Table 3, Line 4, for the RiverFest Power Boat Races from 2 through 6 p.m. on May 3, 2024, and from 8:30 a.m. through 6 p.m. on May 4 and May 5, 2024. This action is being taken to provide for the safety of life on navigable waterways during this three-day event. Our regulations for marine events within the Eighth Coast Guard District, § 100.801, specifies the location of the regulated areas for the RiverFest Power Boat Races which encompasses portions of the Neches River adjacent to Port Neches Park. During the enforcement period, as reflected in § 100.80,1 if you are the operator of a vessel in the regulated area you must comply with directions from the designated Patrol Commander.

In addition to this notice of enforcement in the **Federal Register,** the Coast Guard plans to provide notification of the enforcement periods via Local Notice to Mariners, Marine Safety Information Bulletin, and Vessel Traffic Service Advisory.

Dated: April 24, 2024.

Anthony R. Migliorini,

Captain, U.S. Coast Guard, Captain of the Port Marine Safety Zone Port Arthur.

[FR Doc. 2024–09253 Filed 4–29–24; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2024–0343]

RIN 1625–AA11

Safety Zone; Lower Mississippi River, Natchez, MS

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone for navigable waters on the Lower Mississippi River from mile marker 364.5 to mile marker 365.5. The safety zone is needed to protect personnel, vessels, and the marine environment from potential hazards created by waterborne fireworks display with a fallout zone of approximately 560 feet around the barge. Entry of vessels or persons into this zone is prohibited unless specifically authorized by the Captain of the Port, Sector Lower Mississippi River.

DATES: This rule is effective on June 15, 2024, from 8:30 p.m. to 9:15 p.m.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *https://www.regulations.gov,* type USCG–2024–0343 in the search box and click ''Search.'' Next, in the Document Type column, select ''Supporting & Related Material.''

FOR FURTHER INFORMATION CONTACT: If you have questions about this rule, call

or email MST1 Peter Buczakowski, U.S. Coast Guard; telephone 206–820–5297, email *Peter.L.Buczakowski@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR Code of Federal Regulations
DHS Department of Homeland Security
FR Federal Register
NPRM Notice of proposed rulemaking
§ Section
U.S.C. United States Code

II. Background Information and Regulatory History

The Coast Guard is issuing this temporary rule under authority in 5 U.S.C. 553(b)(B). This statutory provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' The Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because it's impracticable. The NPRM process would delay the establishment of the safety zone until after the date of the event and compromise public safety. We must establish this temporary safety zone by June 15, 2024, and lack of sufficient time to provide reasonable comment period and then consider those comments before issuing the rule.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority in 46 U.S.C. 70034. The Captain of the Port Sector Lower Mississippi River (COTP) has determined that potential hazards associated with waterborne fireworks display will be a safety concern for anyone located on the Lower Mississippi River mile marker 364.5 to mile marker 365.5. This rule is needed to protect personnel, vessels, and the marine environment in the navigable waters within the temporary safety zone during the operation of the waterborne fireworks display.

IV. Discussion of the Rule

This rule establishes a safety zone from 8:30 p.m. until 9:15 p.m. on June 15, 2024. The safety zone will cover all navigable waters on the Lower Mississippi River from mile marker 364.5 to mile marker 365.5. The duration of the zone is intended to protect personnel, vessels, and the marine environment in these navigable waters during the operations of the waterborne fireworks display. No vessel or person will be permitted to enter the safety zone without obtaining permission from the COTP or a designated representative.

V. Regulatory Analyses

We developed this rule after considering numerous statutes and Executive orders related to rulemaking. Below we summarize our analyses based on a number of these statutes and Executive orders, and we discuss First Amendment rights of protestors.

A. Regulatory Planning and Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. This rule has not been designated a ''significant regulatory action,'' under section 3(f) of Executive Order 12866, as amended by Executive Order 14094 (Modernizing Regulatory Review). Accordingly, this rule has not been reviewed by the Office of Management and Budget (OMB).

This regulatory action determination is based on the size, location, and duration of the temporary safety zone. This temporary safety zone will temporarily restrict navigation on the Lower Mississippi River from mile marker 364.5 to mile marker 365.5 in the vicinity of Natchez, MS, on June 15, 2024, from 8:30 p.m. until 9:15 p.m. Moreover, the Coast Guard will issue a Broadcast Notice to Mariners, Local Notice to Mariners, and/or Marine Safety Information Bulletins, as appropriate.

B. Impact on Small Entities

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

While some owners or operators of vessels intending to transit the temporary safety zone may be small entities, for the reasons stated in section V.A above, this rule will not have a significant economic impact on any vessel owner or operator.

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this rule. If the rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please call or email the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247). The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

C. Collection of Information

This rule will not call for a new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

D. Federalism and Indian Tribal Governments

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. We have analyzed this rule under that Order and have determined that it is consistent with the fundamental federalism principles and preemption requirements described in Executive Order 13132.

Also, this rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

E. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of

$100,000,000 (adjusted for inflation) or more in any one year. Though this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

F. Environment

We have analyzed this rule under Department of Homeland Security Directive 023–01, Rev. 1, associated implementing instructions, and Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves a temporary safety zone lasting approximately one hour that will prohibit entry on the Lower Mississippi River from mile marker 364.5 to mile marker 365.5. It is categorically excluded from further review under paragraph L60(a) of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 1. A Record of Environmental Consideration supporting this determination is available in the docket. For instructions on locating the docket, see the **ADDRESSES** section of this preamble.

G. Protest Activities

The Coast Guard respects the First Amendment rights of protesters. Protesters are asked to call or email the person listed in the **FOR FURTHER INFORMATION CONTACT** section to coordinate protest activities so that your message can be received without jeopardizing the safety or security of people, places, or vessels.

List of Subjects in 33 CFR Part 165

Harbors, Marine Safety, Navigation, Reporting and recordkeeping requirements, Security measures, Waterways.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 1. The authority citation for part 165 continues to read as follows:

Authority: 46 U.S.C. 70034, 70051, 70124; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Department of Homeland Security Delegation No. 00170.1, Revision No. 01.3.

■ 2. Add § 165.T08–0343 to read as follows:

§ 165.T08–0343 Safety Zone; Lower Mississippi River, Natchez, MS

(a) *Location.* The following area is a safety zone: All navigable waters on the Lower Mississippi River from mile marker 364.5 to mile marker 365.5 in the vicinity of Natchez, MS.

(b) *Definitions.* As used in this section, *designated representative* means a Coast Guard Patrol Commander, including a Coast Guard coxswain, petty officer, or other officer operating a Coast Guard vessel and a Federal, State, and local officer designated by or assisting the Captain of the Port Sector Lower Mississippi River (COTP) in the enforcement of the safety zone.

(c) *Regulations.* (1) Under the general safety zone regulations in subpart C of this part, you may not enter the temporary safety zone described in paragraph (a) of this section unless authorized by the COTP or the COTP's designated representative.

(2) To seek permission to enter, contact the COTP or the COTP's representative by VHF–FM channel 16 or by telephone at 314–269–2332. Those in the temporary safety zone must comply with all lawful orders or directions given to them by the COTP or the COTP's designated representative.

(d) *Enforcement period.* This section will be subject to enforcement from 8:30 p.m. to 9:15 p.m. on June 15, 2024.

Dated: April 24, 2024.

Kristi L. Bernstein,

Captain, U.S. Coast Guard, Captain of the Port Sector Lower Mississippi River.

[FR Doc. 2024–09266 Filed 4–29–24; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2024–0247]

Annual Fireworks Displays and Other Events in the Eighth Coast Guard District Requiring Safety Zones; Riverfest Fireworks Display

AGENCY: Coast Guard, DHS.

ACTION: Notification of enforcement of regulation.

SUMMARY: The Coast Guard will enforce a safety zone for the Riverfest Fireworks display on the Neches River in Port Neches, TX from 8:30 through 10 p.m. on May 4, 2024, to provide for the safety of life on navigable waterways during this event. Our regulation for fireworks displays and other events within the Eighth Coast Guard District identifies the regulated area for this event in Port Neches, TX. During the enforcement period, the operator of any vessel in the regulated area must comply with directions from the Captain of the Port or designated representative.

DATES: The regulations in 33 CFR 165.801, Table 3, Line 1 will be enforced from 8:30 through 10 p.m. on May 4, 2024, or in the event of postponement due to rain, 8:30 through 10 p.m. on May 5, 2024.

FOR FURTHER INFORMATION CONTACT: If you have questions about this notification of enforcement, call or email LCDR Kimberly Gates, Marine Safety Unit Port Arthur, U.S. Coast Guard; 571–610–1924, email *Kimberly.M.Gates@uscg.mil.*

SUPPLEMENTARY INFORMATION: The Coast Guard will enforce safety zone regulations in 33 CFR 165.801 Table 3, Line 1, for the Port Neches Riverfest fireworks display from 8:30 through 10 p.m. on May 4, 2024, or in the event of rain, on May 5, 2024 for the same time period. This action is being taken to provide for the safety of life on navigable waterways before, during, and after a pyrotechnics display. Our annual fireworks displays and other events in the Eighth Coast Guard District requiring safety zones, § 165.801, specifies the location of the safety zone for the Riverfest fireworks display which encompasses a 500-yard radius around the fireworks barge anchored on the Neches River in approximate position 29°59′51″ N 093°57′06″ W (NAD83). During the enforcement period, as reflected in § 165.801, if you are the operator of a vessel in the regulated area you must comply with directions from the Captain of the Port or designated representative.

In addition to this notice of enforcement in the **Federal Register**, the Coast Guard plans to provide notification of the enforcement periods via Local Notice to Mariners, Marine Safety Information Bulletin and Vessel Traffic Service Advisory.

Dated: April 24, 2024.

Anthony R. Migliorini,

Captain, U.S. Coast Guard, Captain of the Port Marine Safety Zone Port Arthur.

[FR Doc. 2024–09254 Filed 4–29–24; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2024–0224]

RIN 1625–AA00

Safety Zone; Sabine River, Orange, TX

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone for certain navigable waters of the Sabine River, extending the entire width of the river adjacent to the public boat ramp located in Orange, TX. The safety zone is necessary to protect persons and vessels from hazards associated with a high-speed drag boat race competition in Orange, TX. Entry of vessels or persons into this zone is prohibited unless authorized by the Captain of the Port Marine Safety Unit Port Arthur or a designated representative.

DATES: This rule is effective from 9 a.m. on May 4, 2024, through 6 p.m. on May 5, 2024.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *https://www.regulations.gov,* type USCG–2024–0224 in the search box, and click ''Search.'' Next, in the Document Type column, select ''Supporting & Related Material.''

FOR FURTHER INFORMATION CONTACT: If you have questions about this rule, call or email Lieutenant Sean Yanez, Marine Safety Unit Port Arthur, U.S. Coast Guard; telephone 409–723–5027, email *Sean.P.Yanez@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

BNM Broadcast Notice to Mariners
CFR Code of Federal Regulations
COTP Captain of the Port Marine Safety Unit Port Arthur
DHS Department of Homeland Security
FR Federal Register
NPRM Notice of proposed rulemaking
§ Section
U.S.C. United States Code

II. Background Information and Regulatory History

The Coast Guard is issuing this temporary rule under authority in 5 U.S.C. 553(b)(B). This statutory provision authorizes an agency to issue a rule without prior notice and opportunity to comment when the agency for good cause finds that those procedures are ''impracticable, unnecessary, or contrary to the public interest.'' The Coast Guard finds that good cause exists for not publishing a notice of proposed rulemaking (NPRM) with respect to this rule because it is impracticable. It is impracticable to publish an NPRM because we must establish this temporary safety zone by May 4, 2024 and lack sufficient time to provide a reasonable comment period and consider those comments before issuing the rule.

Also, under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. Delaying the effective date of this rule would be impracticable because establishing the safety zone by May 4, 2024, is necessary to protect all waterway users during scheduled race events.

III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority in 46 U.S.C. 70034. The Captain of the Port Marine Safety Unit Port Arthur (COTP) has determined that the potential hazards associated with high-speed drag boat races are a safety concern for persons and vessels operating on the Sabine River. Possible hazards include risks of injury or death from near or actual contact among participant vessels and spectators or mariners traversing through the safety zone. This rule is needed to protect all waterway users, including event participants and spectators, before, during, and after the scheduled event.

IV. Discussion of the Rule

This rule establishes a temporary safety zone from 9 a.m. on May 4, 2024, through 6 p.m. on May 5, 2024, and will be enforced each day from 9 a.m. through 6 p.m.. The safety zone covers all navigable waters of the Sabine River, extending the entire width of the river, adjacent to the public boat ramp located in Orange, TX, bounded on the north by the Orange Municipal Wharf at latitude 30°05′50″ N and to the south at latitude 30°05′33″ N. The duration of the safety zone is intended to protect participants, spectators, and other persons and vessels in the navigable waters of the Sabine River during high-speed drag boat races and will include breaks and opportunities for vessels to transit through the regulated area. No vessel or person will be permitted to enter the safety zone without obtaining permission from the COTP or a designated representative.

V. Regulatory Analyses

We developed this rule after considering numerous statutes and Executive orders related to rulemaking. Below, we summarize our analyses based on a number of these statutes and Executive orders, and we discuss First Amendment rights of protestors.

A. Regulatory Planning and Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. This rule has not been designated a ''significant regulatory action,'' under section 3(f) of Executive Order 12866, as amended by Executive Order 14094 (Modernizing Regulatory Review). Accordingly, this rule has not been reviewed by the Office of Management and Budget (OMB).

This regulatory action determination is based on the size, location, and duration of the safety zone. This safety zone encompasses a less than half-mile stretch of the Sabine River that will be enforced for eight hours on two consecutive days. Moreover, the Coast Guard will issue Broadcast Notice to Mariners (BNMs) via VHF–FM marine channel 16 about the zone. Daily enforcement periods will include breaks that will provide an opportunity for vessels to transit through the regulated area, and the rule allows vessels to seek permission to enter the zone.

B. Impact on Small Entities

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

While some owners or operators of vessels intending to transit the safety zone may be small entities, for the reasons stated in section V.A above, this rule will not have a significant economic impact on any vessel owner or operator.

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this rule. If the rule may affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance,

please call or email the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small businesses. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247). The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

C. Collection of Information

This rule will not call for a new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

D. Federalism and Indian Tribal Governments

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. We have analyzed this rule under that Order and have determined that it is consistent with the fundamental federalism principles and preemption requirements described in Executive Order 13132.

Also, this rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

E. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 (adjusted for inflation) or more in any one year. Though this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

F. Environment

We have analyzed this rule under Department of Homeland Security Directive 023–01, Rev. 1, associated implementing instructions, and Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves a safety zone that is effective for eight hours on each of two days that will prohibit entry on less than a one-half-mile stretch of the Sabine River. It is categorically excluded from further review under paragraph L60(a) of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 1. A Record of Environmental Consideration supporting this determination is available in the docket. For instructions on locating the docket, see the **ADDRESSES** section of this preamble.

G. Protest Activities

The Coast Guard respects the First Amendment rights of protesters. Protesters are asked to call or email the person listed in the **FOR FURTHER INFORMATION CONTACT** section to coordinate protest activities so that your message can be received without jeopardizing the safety or security of people, places, or vessels.

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, Waterways.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREA AND LIMITED ACCESS AREAS

■ 1. The authority citation for part 165 continues to read as follows:

Authority: 46 U.S.C. 70034, 70051, 70124; 33 CFR 1.05–1, 6.04–1, 6.04–6, and 160.5; Department of Homeland Security Delegation No. 00170.1, Revision No. 01.3.

■ 2. Add § 165.T08–0224 to read as follows:

§ 165.T08–0224 Safety Zone; Sabine River, Orange, Texas.

(a) *Location.* The following area is a safety zone: All navigable waters of the Sabine River, extending the entire width of the river, adjacent to the public boat ramp located in Orange, TX, bounded on the north by the Orange Municipal Wharf at latitude 30°05′50″ N and to the south at latitude 30°05′33″ N.

(b) *Definition.* As used in this section, designated representative means a Coast Guard Patrol Commander, including a Coast Guard coxswain, petty officer, or other officer operating a Coast Guard vessel and a Federal, State, and local officer designated by or assisting the Captain of the Port Marine Safety Unit Port Arthur (COTP) in the enforcement of the safety zone. Furthermore, ''official patrol vessel'' means a vessel, including any Coast Guard, state, or local law enforcement and sponsor provided vessels assigned or approved by the COTP or a designated representative, that is designated to patrol the regulated area.

(c) *Regulations.* (1) In accordance with the general regulations in § 165.23 of this part, all persons and vessels, including spectator vessels, are prohibited from entering, transiting through, anchoring in, or remaining with the regulated area during the effective dates and times, unless authorized by the COTP or a designated representative. The COTP or their designated representative may be contacted on VHF–FM channel 13 or 16 or by telephone at 409–719–5070.

(2) All persons and vessels not registered with the sponsor as participants or official patrol vessels are considered spectators or spectator vessels.

(3) Spectator vessels desiring to transit the regulated area may do so only with approval from the COTP or a designated representative, and when so directed by that officer, will be operated at a minimum safe navigation speed in a manner that will not endanger participants in the regulated area or any other vessels.

(4) Any spectator vessel may anchor outside the regulated area but may not anchor in, block, or loiter in a navigable channel. Spectator vessels may be moored to a waterfront facility within the regulated area in such a way that they shall not interfere with the progress of the event. Such mooring must be complete at least 30 minutes prior to the establishment of the regulated area and remain moored through the duration of the event.

(5) The COTP or a designated representative may forbid and control the movement of all vessels in the regulated area. When hailed or signaled by an official patrol vessel, a vessel shall come to an immediate stop and comply with the directions given. Failure to do so may result in expulsion from the area, citation for failure to comply, or both.

(6) The COTP or a designated representative may terminate the event or the operation of any vessel at any time it is deemed necessary for the protection of life or property.

(d) *Enforcement periods.* This section will be enforced from 9 a.m. through 6 p.m. on May 4, 2024, and May 5, 2024. Breaks in the racing will occur during the enforcement periods, which will allow for vessels to pass through the safety zone. The COTP or a designated representative will provide notice of enforcement appropriate per paragraph.

(e) *Informational broadcasts.* The COTP or a designated representative will inform the public of the effective period for the safety zone as well as any changes in the dates and times of enforcement through Local Notice to Mariners (LNMs), Broadcast Notices to Mariners (BNMs), and/or Marine Safety Information Bulletins (MSIBs) as appropriate.

Dated: April 24, 2024.

Anthony R. Migliorini,

Captain, U.S. Coast Guard, Captain of the Port, Marine Safety Unit Port Arthur.

[FR Doc. 2024–09259 Filed 4–29–24; 8:45 am]

BILLING CODE 9110–04–P

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 17

RIN 2900–AR55

CHAMPVA Coverage of Audio-Only Telehealth, Mental Health Services, and Cost Sharing for Certain Contraceptive Services and Contraceptive Products Approved, Cleared, or Granted by FDA

AGENCY: Department of Veterans Affairs.

ACTION: Final rule.

SUMMARY: The Department of Veterans Affairs (VA) adopts as final, with changes, a proposed rule to amend its medical regulations regarding Civilian Health and Medical Program of the Department of Veterans Affairs (CHAMPVA) coverage to remove the exclusion for audio-only telehealth, remove current quantitative limitations on mental health/substance use disorder coverage, remove the current requirement for pre-authorization for outpatient mental health visits in excess of 23 per calendar year and/or more than two (2) sessions per week, and exempt certain contraceptive services and prescription and nonprescription contraceptive products that are approved, cleared, or granted by the U.S. Food and Drug Administration (FDA) from cost sharing requirements.

DATES: This rule is effective May 30, 2024.

FOR FURTHER INFORMATION CONTACT: Joseph Duran, Director, Policy, Office of Integrated Veteran Care (OIVC), Veterans Health Administration (VHA), Department of Veterans Affairs, Ptarmigan at Cherry Creek, Denver, CO 80209; 303–370–1637 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION: On October 24, 2022, VA published a proposed rule in the **Federal Register** (87 FR 64190) that would amend CHAMPVA exclusions to allow coverage of telephonic (audio-only) medical visits. VA also proposed removing specified quantitative limits on coverage for inpatient and outpatient mental health/substance use disorder (SUD) care appointments, *i.e.,* inpatient and outpatient mental health services, residential treatment, institutional services for partial hospitalization, substance withdrawal management in a hospital setting or rehabilitation facility, outpatient SUD services, and family therapy for SUD. This would align the delivery of CHAMPVA mental health/SUD care with the Department of Defense (DoD) TRICARE program, current standards of practice in mental health and SUD care, and the goals of the Mental Health Parity and Addiction Equity Act of 2008. 87 FR at 64193. VA also proposed removing the current preauthorization requirement for outpatient mental health visits in excess of 23 per calendar year and/or more than two (2) sessions per week. In addition, VA proposed removing cost sharing requirements for certain contraceptive services and prescription or nonprescription contraceptive products that are approved, cleared, or granted by the FDA.

VA provided a 30-day comment period, which ended on November 23, 2022. VA received 14 comments on the proposed rule, of which 7 comments were supportive and did not suggest changes or clarifications from the proposed rule. Commenters generally expressed support for all the proposed changes, but we received substantive comments with recommendations for change on audio telehealth coverage as well as the cost sharing exemption for contraceptives. We address these substantive comments below. Based on these comments, VA adopts the proposed rule as final, with changes.

Audio-Only Telehealth

VA proposed amending its regulations to remove the exclusion of audio-only telehealth for CHAMPVA beneficiaries for services provided on or after May 12, 2020. As proposed, the amendment would apply retroactively and allow reimbursement of medically necessary audio-only telehealth services for CHAMPVA beneficiaries dating back to the date TRICARE published a similar interim final rulemaking (85 FR 27927 May 12, 2020). CHAMPVA beneficiaries would be required to file a claim for reimbursement within 180 days of the effective date of a final rulemaking.

One commenter suggested VA publish guidance to providers and patients related to the retroactive reimbursement period notice. The commenter suggested VA send text alerts notifying beneficiaries on how to file a claim for reimbursement. VA thanks the commenter for the suggestion and VA will take it into consideration, but utilization of specific communication methods for outreach is outside the scope of this rulemaking. However, we note that VA does have a communications plan in place to alert potential beneficiaries as well as providers of this retroactive change in audio-only telehealth coverage. We make no changes based on this comment.

The remaining six comments suggested changes to the proposed rule. All of the comments recommended changes related to the coverage and cost sharing requirements for contraceptive services and products.

Before addressing these comments, we first correct an erroneous statement we made at the proposed rule stage. When we proposed amending § 17.272(a)(28) to provide for CHAMPVA coverage of nonprescription contraceptives used as emergency contraceptives we incorrectly indicated in the proposed rule that TRICARE does not provide coverage for nonprescription contraceptives used as emergency contraception. In accordance with 10 U.S.C. 1074g(a)(2)(F), as implemented by 32 CFR 199.21(h)(5), the TRICARE Pharmacy Benefits Program covers over the counter Levonorgestrel 1.5 mg tablet (*e.g.,* Plan B One-Step) as emergency contraception at no cost if obtained at a military medical treatment facility or retail pharmacy (not home delivery).

Comments That Suggested That CHAMPVA Should Expand Coverage for Nonprescription Contraceptives and Exempt Nonprescription Contraceptives From Cost Sharing Requirements

VA proposed amending § 17.274 to exempt contraceptive services, and contraceptive products approved, cleared, or granted by FDA from cost

sharing requirements. We proposed amending § 17.274 by adding a new paragraph (f) to state that cost sharing and annual deductible requirements under 38 CFR 17.274(a) and (b) do not apply to: (1) surgical insertion, removal, and replacement of intrauterine systems and contraceptive implants; (2) measurement for, and purchase of, contraceptive diaphragms or similar FDA approved, cleared, or granted medical devices, including remeasurement and replacement; (3) prescription contraceptives, and prescription or nonprescription contraceptives used as emergency contraceptives; (4) surgical sterilization; and (5) outpatient care or evaluation associated with provision of services listed in proposed paragraph (f)(1) through (4). We also proposed amending § 17.272(a)(28) to state that nonprescription contraceptives are excluded from CHAMPVA coverage, except those non-prescription contraceptives used as emergency contraceptives.

All six substantive comments suggested that CHAMPVA coverage of contraceptives should include all nonprescription contraceptives. Most of these comments generally suggested that VA should expand coverage to all nonprescription contraceptives. We note that the Department of Health and Human Services (HHS), the Department of the Treasury, and the Department of Labor have historically interpreted the ACA as not requiring coverage of contraceptives without cost-sharing unless the individual has a prescription for the preventive product.

Other commenters provided additional reasons for providing coverage for the additional nonprescription contraceptives. For instance, one commenter explained that nonprescription contraceptives are an important option, especially for those who face barriers to care such as living in rural areas or are without reliable transportation. Another commenter explained that it was critical to provide nonprescription contraceptives because there are barriers to obtaining prescription-only contraception and the FDA is considering allowing certain prescription daily birth control pills to become over the counter instead of prescription-based. Another commenter stated that every individual is different and has different contraceptive needs and therefore all options should be covered without cost sharing.

One commenter noted that any cost associated with contraception, even a small amount, could be a barrier for individuals to access needed contraception. This commenter suggested specific changes to the regulatory text to reflect their suggested changes. The commenter suggested that VA: remove that language in proposed § 17.272(a)(28) that would have excluded coverage of nonprescription contraceptives; revise the language in § 17.272(a)(75) to include coverage for nonprescription contraceptives; and revise § 17.274(f)(3) to exempt all nonprescription contraceptives from cost sharing requirements. The commenter stated that these changes would effectively allow CHAMPVA coverage for both prescription and nonprescription contraceptives and exempt them all from cost sharing requirements.

We make no changes based on comments suggesting that VA should expand coverage to all nonprescription contraceptives. TRICARE does not cover over the counter contraceptives such as condoms, nonprescription spermicidal foams, jellies or sprays. CHAMPVA similarly excludes these items from plan coverage. We note that the ACA does not currently require private health insurers or Medicaid plans to cover these items without cost sharing and without a prescription. We also note that VA is required under 38 U.S.C. 1781(b) to provide CHAMPVA care in the same or similar manner to TRICARE, not the ACA.

We agree with commenters that any cost associated with contraception could be a barrier for individuals to access contraception. Similar concerns are seen with copayment obligations for health care and medication. The issue is not exclusive to CHAMPVA beneficiaries. As noted, TRICARE excludes coverage for prophylactics (condoms), spermicidal foams, jellies, and sprays not requiring a prescription.

In addition, we note here that in July 2023 the FDA has approved an oral contraceptive Opill (norgestrel) for nonprescription use to prevent pregnancy—the first daily oral contraceptive approved for use in the U.S. without a prescription. Opill is now commercially available for purchase without a prescription at pharmacies, convenience stores and grocery stores, as well as online. While VA makes no changes in this rulemaking regarding cost sharing for non-emergency contraceptives not requiring a prescription, VA will consider further amendments to facilitate access to certain family planning options including daily oral contraceptives approved, granted, or cleared by the FDA not requiring a prescription, such as Opill.

We stated in the proposed rule that TRICARE currently requires cost sharing for certain family planning care and services not provided by a military medical treatment facility (87 FR 64194), but did not specify how the proposed rule differed from TRICARE relative to cost sharing for contraceptives and family planning. Currently TRICARE covers reversible medical contraceptives with no cost-share as a preventive health benefit. TRICARE is also covering tubal sterilization procedures with no cost-shares for certain TRICARE-enrolled beneficiaries when the care is sought and delivered by a network provider as a clinical preventive service. By law, applicable cost sharing still applies to oral contraceptives and other prescription pharmaceutical agents dispensed through the TRICARE Pharmacy Benefit Program.

As background, the law directs VA to provide CHAMPVA beneficiaries with medical care ''in the same *or similar* manner and subject to the same *or similar* limitations as medical care'' furnished to DoD TRICARE Select beneficiaries. 38 U.S.C. 1781(b) (emphases added). That text recognizes differences may exist between the two programs' respective beneficiary populations and their needs. Further, CHAMPVA beneficiaries (unlike TRICARE beneficiaries) include family caregivers of veterans, not just eligible dependents. 38 U.S.C. 1720G(a)(3)(A)(ii)(IV). Congress did not require that CHAMPVA coverage be identical to that provided under TRICARE. VA has previously regulated to provide CHAMPVA benefits beyond those benefits offered by TRICARE if providing such health care would better promote the long-term health of CHAMPVA beneficiaries. Thus, consistent with the statute's plain meaning, VA provides CHAMPVA beneficiaries certain care that is ''similar,'' but not necessarily identical, to care provided to beneficiaries of TRICARE.

The distinctions made by TRICARE relative to copayment obligations are based on whether the service is prescribed or provided by a military medical treatment facility or a network provider, and in a few cases, the TRICARE plan in which the sponsor is enrolled. Several factors are weighed by VA when determining if a specific type of CHAMPVA benefit coverage should differ from that under TRICARE, including the makeup of the beneficiary population eligible for CHAMPVA (see 38 CFR 17.271(a), as well as agency priorities and policy considerations.

Eligibility for TRICARE is broader than that for CHAMPVA. CHAMPVA eligibility categories include the spouse

or child of a veteran who has been adjudicated by VA as having a permanent and total service-connected disability; the surviving spouse or child of a veteran who died as a result of an adjudicated service-connected condition(s); or who at the time of death was adjudicated permanently and totally disabled from a service-connected condition(s); the surviving spouse or child of a person who died on active military service and in the line of duty and not due to such person's own misconduct; certain individuals designated as a Primary Family Caregiver; and, an eligible child who is pursuing a course of instruction approved under 38 U.S.C. chapter 36, and who incurs a disabling illness or injury while pursuing such course of instruction. By contrast, TRICARE eligibility categories include active duty service members and their family members; retirees and their families; family members of activated Guard/Reserve members; non-activated Guard/Reserve members and their families who qualify for care under the Transitional Assistance Management Program; retired Guard/Reserve members at age 60 and their families; certain survivors; Medal of Honor recipients and their families; and, qualified former spouses. As noted, cost sharing obligations for certain types of contraceptive care or services under TRICARE is dependent on whether the patient is active duty or whether the care or service is prescribed by a network provider.

VA's motto is ''to fulfill President Lincoln's promise to care for those who have served in our nation's military and for their families, caregivers, and survivors.'' We do not believe TRICARE's statutorily required copayment obligations for these listed contraceptive and family planning services and products compels VA to follow suit. As explained above, those eligible for CHAMPVA are the spouse, surviving spouse, child, and caregiver of a qualifying veteran sponsor which in most cases is either a VA rated permanently and totally disabled veteran or a veteran that died of a VA rated service-connected condition, and not otherwise eligible for TRICARE. We note that removing the cost sharing obligation alleviates any further financial burden on such households. VA believes that exempting the services and products listed in § 17.274(f) from cost sharing will benefit CHAMPVA beneficiaries and will retain that exemption in the final rule, with changes as explained below.

Comments That Requested Other Changes From the Proposed Rule

In addition to the issues above related to coverage and cost sharing for nonprescription contraceptives, two of the six commenters raised other issues. One of the commenters also suggested that language in proposed § 17.274(f) was not clear as to whether CHAMPVA coverage of contraceptives would include only those contraceptive methods and services expressly listed in paragraph (f), or also include ''similar'' contraceptive methods and services and FDA-approved, cleared, or granted products. This commenter stated that, without clarification, § 17.274(f) as proposed could be read to not cover those products that might be approved, cleared, or granted by the FDA in the future, and specifically stated that VA should ensure the inclusion of injectable contraceptives as an express type of contraceptive to be covered. The commenter suggested revising § 17.274(f)(1) as proposed to remove the word ''[S]urgical'' at the beginning of paragraph (f)(1) and adding at the end of the paragraph language that reads ''or similar FDA approved, granted, or cleared contraceptives that require insertion, removal, and replacement by a health care provider.'' This commenter also suggested adding a new paragraph (f)(3) to ensure explicit coverage of injectable contraceptives or similar FDA approved, granted, or cleared contraceptives that require administration by a health care provider. In adding a new paragraph (f)(3), the commenter lastly suggested that a renumbered paragraph (f)(4) (pertaining to exempting prescription contraceptives, and nonprescription contraceptives used as emergency contraceptives) should include at the end language that qualifies such contraceptives be those ''approved, granted, or cleared by the FDA.''

VA agrees with the commenter's suggestions and makes the following changes accordingly. VA revises § 17.274(f)(1) as proposed to remove the word ''[S]urgical'' from the beginning of the paragraph and, at the end of the paragraph, add language to ensure that similar FDA approved, granted, or cleared contraceptives requiring insertion, removal and replacement by a health care provider would be covered. VA will also add a new § 17.274(f)(3) to ensure that injectable contraceptives or similar FDA approved, granted, or cleared contraceptives that require administration by a health care provider would be covered. By adding a new § 17.274(f)(3), we will renumber paragraphs (f)(3) through (f)(5) as proposed to be paragraphs (f)(4) through (f)(6), respectively, and will revise renumbered paragraph (f)(4) to add language that clarifies all prescription, or nonprescription contraceptives used as emergency contraceptives, must otherwise be ''approved, granted, or cleared by the FDA.''

Finally, another commenter suggested that VA policy be amended to allow a prescription for up to 13-month supply of combined hormonal methods of contraceptives to improve contraceptive continuation. We do not make changes from the proposed rule based on this comment as it relates to a clinical practice matter beyond the scope of the proposed rule. We note that a patient's condition may change over time, requiring an adjustment of medication. In addition, a 12-month duration of a prescription corresponds to the scheduling of annual comprehensive care visits. VA policy permits a 12-month supply of combined hormonal methods of contraceptives, and a VA medical facility may have standard operating procedures in place allowing extension of fills greater than 12 months in certain circumstances.

Current VHA Directive 1108.07(1), General Pharmacy Service Requirements, establishes that prescriptions must generally be filled for no more than a maximum three-month (90-day) supply of medication at a time, although exceptions can be made for non-controlled medications and supplies and for oral contraceptives. Therefore, VA pharmacies are already authorized to fill a longer term of this medication when requested by the CHAMPVA beneficiary and the health care provider under the CHAMPVA In-house Treatment Initiative (CITI) program. For CHAMPVA services furnished by non-VA providers, VA does cover such prescriptions for a maximum 90-day supply of medication per fill with three refills if prescribed by the non-VA health care provider and filled by the non-VA pharmacy. See CHAMPVA Operational Policy Manual chapter 2, section 22.1. VA intends to amend this section of the operational manual to allow for an exception for oral contraceptives.

Based on the rationale set forth here and in the supplementary information to the proposed rule, VA adopts the proposed rule as final, with changes.

Executive Orders 12866, 13563, and 14094

Executive Order 12866 (Regulatory Planning and Review) directs agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select

regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Executive Order 14094 (Executive Order on Modernizing Regulatory Review) supplements and reaffirms the principles, structures, and definitions governing contemporary regulatory review established in Executive Order 12866 of September 30, 1993 (Regulatory Planning and Review), and Executive Order 13563 of January 18, 2011 (Improving Regulation and Regulatory Review). The Office of Information and Regulatory Affairs has determined that this rulemaking is a significant regulatory action under Executive Order 12866, as amended by Executive Order 14094. The Regulatory Impact Analysis associated with this rulemaking can be found as a supporting document at *www.regulations.gov.*

Regulatory Flexibility Act

The Secretary hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act (5 U.S.C. 601–612). The factual basis for this certification is that this regulation updates CHAMPVA coverage to remove the exclusion for audio-only telehealth, removes limitations on outpatient mental health visits, and exempts certain contraceptive services and contraceptive products that are approved, cleared, or granted by the FDA from cost sharing requirements. It also removes the exclusion of CHAMPVA coverage for nonprescription contraception used in an emergency. The changes to the regulation only affect individuals who are CHAMPVA beneficiaries. Absent this rulemaking, health care providers who may be small entities would still receive payment for services, the payment would be from the CHAMPVA beneficiary and not from VA. Therefore, pursuant to 5 U.S.C. 605(b), the initial and final regulatory flexibility analysis requirements of 5 U.S.C. 603 and 604 do not apply.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in the expenditure by State, local, or Tribal governments, in the aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation) in any one year. This rule will have no such effect on State, local, or Tribal governments, or on the private sector.

Paperwork Reduction Act

This rule includes provisions constituting a revision to a collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3521) that require approval by OMB. Accordingly, under 44 U.S.C. 3507(d), VA has submitted a copy of this rulemaking action to OMB for review and approval.

OMB assigns control numbers to collections of information it approves. VA 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. In this case, OMB previously assigned OMB Control Number 2900–0219 to an information collection that will be revised through this regulation. The information collection under 2900–0219 has a current Paperwork Reduction Act (PRA) clearance that expires on October 31, 2024. If OMB does not approve the revision to this collection of information, as requested, VA will immediately remove the provisions containing the collection of information or take such other action as is directed by OMB.

The collection of information associated with this rulemaking contained in 38 CFR 17.272 addresses only the revised number of respondents attributable to this rulemaking. OMB previously approved the part of the information collection under 2900–0219 related to filing of CHAMPVA health benefits claims using VA Form 10–7959a for a total of 9,167 burden hours, based on an estimate of 55,000 respondents annually. Section 17.272(a)(44) would remove the exclusion of CHAMPVA benefits coverage for audio-only telehealth. Previously denied claims for audio-only telehealth would have to be resubmitted by the provider, or by the CHAMPVA beneficiary if the beneficiary has already paid for that medical service, using VA Form 10–7959a with supporting evidence. VA anticipates that the number of respondents submitting claims will increase as a result of this rulemaking. Applying the anticipated increase to 74,914 annual respondents, at 10 minutes per response, VA estimates an increase in the annual burden to 12,486 hours for respondents submitting claims using VA Form 10–7959a.

Estimated cost to respondents per year: VA estimates the annual cost to respondents to be $371,583.36. This is based on Bureau of Labor Statistics mean hourly wage data for BLS wage code ''00–0000 All Occupations'' of $29.76 per hour × 12,486 hours.

A notice of this revision to the information collection under 2900–0219 was published in the proposed rule on October 24, 2022, at 87 FR pages 64190–64196. VA did not receive any public comments related to the increase in the burden hours for the revised information collection.

Congressional Review Act

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

List of Subjects in 38 CFR Part 17

Administrative practice and procedure, Claims, Health care, Health facilities, Health professions, Health records, Medical devices, Mental health programs, Veterans.

Signing Authority

Denis McDonough, Secretary of Veterans Affairs, approved this document on April 17, 2024, and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs.

Consuela Benjamin,

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

For the reasons stated in the preamble, the Department of Veterans Affairs (VA) amends 38 CFR part 17 as follows:

PART 17—MEDICAL

■ 1. The general authority citation for part 17 continues to read as follows:

Authority: 38 U.S.C. 501, and as noted in specific sections.

* * * * *

■ 2. Amend § 17.272 by:
■ a. Revising paragraphs (a)(28) and (a)(44);
■ b. Removing paragraphs (a)(57) through (62);
■ c. Redesignating paragraphs (a)(63) through (83) as paragraphs (a)(57) through (77), respectively.

The revisions read as follows:

§ 17.272 Benefits limitations/exclusions.

(a) * * *

(28) Nonprescription contraceptives, except those non-prescription contraceptives used as emergency contraceptives.

* * * * *

(44) Telephone Services, with the following exceptions:

(i) Services or advice rendered by telephone (audio only) on or after May 12, 2020, are not excluded when the services are otherwise covered CHAMPVA services provided through this modality and are medically necessary and appropriate.

(ii) A diagnostic or monitoring procedure which incorporates electronic transmission of data or remote detection and measurement of a condition, activity, or function (biotelemetry) is covered when:

(A) The procedure, without electronic data transmission, is a covered benefit;

(B) The addition of electronic data transmission or biotelemetry improves the management of a clinical condition in defined circumstances; and

(C) The electronic data or biotelemetry device has been classified by the U.S. Food and Drug Administration, either separately or as part of a system, for use consistent with the medical condition and clinical management of such condition.

* * * * *

§ 17.273 [Amended]

■ 3. Amend § 17.273 by removing paragraph (c), and redesignating paragraphs (d) through (f) as paragraphs (c) through (e), respectively.

■ 4. Amend § 17.274 by adding paragraph (f) to read as follows:

§ 17.274 Cost sharing.

* * * * *

(f) Cost sharing and annual deductible requirements under paragraphs (a) and (b) of this section do not apply to:

(1) Insertion, removal, and replacement of intrauterine systems, contraceptive implants, or similar FDA approved, granted, or cleared contraceptives that require insertion, removal, and replacement by a health care provider;

(2) Measurement for, and purchase of, contraceptive diaphragms or similar FDA approved, cleared, or granted medical devices, including remeasurement and replacement;

(3) Administration of injectable contraceptives or similar FDA approved, granted, or cleared contraceptives that require administration by a health care provider;

(4) Prescription contraceptives, and prescription or nonprescription contraceptives used as emergency contraceptives, approved, granted, or cleared by the FDA;

(5) Surgical sterilization; and

(6) Outpatient care or evaluation associated with provision of family planning services listed in paragraphs (f)(1) through (5) of this section.

[FR Doc. 2024–09072 Filed 4–29–24; 8:45 am]

BILLING CODE 8320–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R01–OAR–2023–0188; FRL–11025–03–R1]

Air Plan Approval; New Hampshire; Reasonable Available Control Technology for the 2008 and 2015 Ozone Standards

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving State Implementation Plan (SIP) revisions submitted by the State of New Hampshire. The revisions establish NO_X reasonably available control technology (RACT) requirements for coal-fired cyclone boilers located in the state, portions of New Hampshire's NO_X RACT certifications for the 2008 and 2015 ozone standards that pertain to requirements for coal-fired cyclone boilers, and withdrawal from the SIP of two previously issued RACT orders. This action is being taken in accordance with the Clean Air Act (CAA).

DATES: This rule is effective on May 30, 2024.

ADDRESSES: EPA has established a docket for this action under Docket Identification No. EPA–R01–OAR–2023–0188. All documents in the docket are listed on the *https://www.regulations.gov* website. Although listed in the index, some information is not publicly available, *i.e.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form. Publicly available docket materials are available at *https://www.regulations.gov* or at the U.S. Environmental Protection Agency, EPA Region 1 Regional Office, Air and Radiation Division, 5 Post Office Square—Suite 100, Boston, MA. EPA requests that if at all possible, you contact the contact listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday, 8:30 a.m. to 4:30 p.m., excluding legal holidays and facility closures due to COVID–19.

FOR FURTHER INFORMATION CONTACT: Bob McConnell, Environmental Engineer, Air and Radiation Division (Mail Code 5–MD), U.S. Environmental Protection Agency, Region 1, 5 Post Office Square, Suite 100, Boston, Massachusetts, 02109–3912; (617) 918–1046; *mcconnell.robert@epa.gov*.

SUPPLEMENTARY INFORMATION:

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

Table of Contents

I. Background and Purpose

On July 10, 2023 (88 FR 43483), EPA published a Notice of Proposed Rulemaking (NPRM) for the State of New Hampshire. The NPRM proposed to determine that the State has adopted regulations meeting the requirements for reasonably available control technology (RACT) for the 2008 and 2015 ozone national ambient air quality standards (NAAQS), to approve amendments to a related regulation that New Hampshire revised as part of its RACT certifications for these two NAAQS, to approve a revision to the State's definition of emergency generator, and removal from the SIP of two previously issued RACT orders affecting coal-fired cyclone boilers operated by Merrimack Station located in Bow, New Hampshire. EPA received a comment letter from the Sierra Club dated August 9, 2023, that opposed New Hampshire's NO_X RACT limits applicable to coal-fired cyclone boilers. We approved the portions of the proposal unaffected by this comment letter in a final rule published on September 6, 2023 (88 FR 60893). In this final rule, we are approving the remaining portions of these SIP revisions, which include requirements within New Hampshire's Env-A 1300 establishing RACT requirements for coal-fired electrical cyclone boilers, the portions of New Hampshire's NO_X RACT certifications for the 2008 and 2015 ozone standards that pertain to requirements for coal-fired cyclone boilers, and we are taking final action to withdraw from the New Hampshire SIP two RACT orders that contain less stringent requirements for cyclone boilers. Please see our July 10, 2023 proposed rule for additional background

and a more detailed explanation of our proposed action.

II. Response to Comments

As mentioned, we received one comment letter on our July 10, 2023 proposed approval, which was from the Sierra Club and expressed opposition to the proposed approval of New Hampshire's (NH's) NO_X RACT requirements applicable to the coal-fired cyclone boilers operated by Granite Shore Power at its Merrimack Station electrical generating facility located in Bow. Our responses to the comments raised by Sierra Club appear below.

Comment: Sierra Club commented that the emission rate of 0.22 lbs/MMBtu for two coal-fired cyclone boilers at Merrimack Station, herein referred to as units MK1 and MK2, is inadequate as RACT. Sierra Club commented that, since 2018, MK1 and MK2 consistently demonstrated the ability to meet a 24-hour average emission rate at or below 0.20 lbs/MMBtu, which is 10% lower than NH's emissions limit of 0.22 lbs/MMBtu, and thereby asserted that the state's limit is too lenient.

Response: New Hampshire developed its NO_X RACT emissions limits for MK1 and MK2 in consideration of a number of factors. One such factor was the observation that the selected emissions limit of 0.22 lbs NO_X/MMBtu represented emission reductions of 83% and 91% from uncontrolled levels for MK1 and MK2, respectively,[1] which is a high level of control. Given MK2's larger size and emissions, the emissions weighted average reduction from uncontrolled levels for both units combined is 88% based on emissions data for 2022. This level of control is near the upper end of the emission reduction capability of selective catalytic reduction (SCR) control systems as noted within EPA control technology explanatory materials, such as the agency's fact sheet on SCR NO_X control technology, which indicates a control range of between 70–90% is achievable from such systems.[2] Additionally, correspondence dated May 25, 2018 from the facility owner, Granite Shore Power, to the New Hampshire DES indicated that a more restrictive normal operating mode emission rate of 0.20 lbs/MMBtu on a 24-hr basis that was originally considered by NH DES was beyond the original emission reduction control capability of the units when they were newly installed. Granite Shore Power reiterated this point in a January 17, 2020 correspondence to the New Hampshire DES concerning regional haze requirements in which they note that the revised NO_X RACT limits ''represent the most effective use of the SCR, given that the system must be operated year round at or above its design capacity to demonstrate compliance.''

In 2018 as New Hampshire was developing its NO_X RACT emissions limit for MK1 and MK2, the state reviewed the emissions data from the continuous emissions monitoring systems (CEMS) on the units collected in 2000, when the equipment was newly installed, through 2007. Merrimack Station installed a second SCR control unit in 1999 due to the Ozone Transport Region (OTC) NO_X budget program. Previously only one of the Merrimack Station units had SCR, installed circa 1995. This period of time coincides with the period of time that Electric Generating Units (EGUs) in New Hampshire had new emission control obligations under the OTC's NO_X Budget program.[3] This program began in 1999 and continued through 2002, at which point most of the EGUs transitioned to the EPA's first ozone season NO_X control program, that being the NO_X SIP Call.[4] Although EGUs in New Hampshire were not required to participate in the EPA's NO_X SIP Call program, New Hampshire maintained, as an anti-backsliding measure, the OTC NO_X Budget program's ozone season cap for sources located in the state, including MK1 and MK2, beyond 2002. EPA facilitated oversight of New Hampshire's post-2002 NO_X Budget program by creating a separate account referred to as the ''NH NO_X Program'' on its Clean Air Markets Program Data (CAMPD) website.[5]

New Hampshire's selection of 0.22 lbs NO_X/MMBtu, to be met on a 24-hour averaging time basis, is reasonable from a statistical perspective. The emissions limit New Hampshire chose corresponds to the emissions rate representative of the 95th percentile emissions rate for days of operation without a startup or shutdown event. In other words, MK1 and MK2 operated at or below an emission rate of 0.22 lbs NO_X/MMBtu 95 percent of the time between 2000 and 2007, which as mentioned above coincided with the time period when the SCR controls were newly installed and MK1 and MK2 were subject to the requirements of the OTC's NO_X budget program that began in 1999.

The data Sierra Club show in Table 2 of their comment letter are based on monthly averages, whereas the limits being approved herein for Merrimack Station are short term, 24-hour averages. Shorter term limits are harder to meet and require that the control system be consistently and effectively run. Conversely, a 30-day average can be met despite days on which the controls are not run effectively, or perhaps not run at all, as long as there are enough days of operation below the emission limit to average this out. If the short-term emissions limit NH requires for MK1 and MK2 were set at a lower rate, such as 0.20 or below as Sierra Club suggests, there would be many days with violations due to minor fluctuations in the rate of the chemical reaction that occurs between the catalyst system, ammonia, and oxygen, which accomplishes the reduction in NO_X emissions in the effluent from the equipment. NH reviewed historic data and identified periods of time when the facility's controls produced low daily emissions rates. Importantly, during those past time periods, the facility was not required to meet a 24-hour emissions rate. By imposing a new, 24-hour emissions limit, NH had to choose an emissions rate that was feasible, given the normal fluctuations in the boiler and control system operations, that the facility could reasonably be expected to meet every day. Although historic data showed the facility could meet a 0.22 rate 95% of the time, that also means that it did not meet that rate 5% of the time. It now will be required to meet that rate 100% of the time. A description of how SCR control systems operate and the various aspects of the induced chemical reaction that occurs to change the nitrogen oxides released from the combustion process to elemental nitrogen and water vapor is contained within the SCR Air Pollution Control Fact Sheet included in the docket for this final rule.

New Hampshire also considered limits adopted by other states for similar equipment in making its NO_X RACT determination, but could not find reasonable comparisons based on coal type, boiler design type, boiler age, and control technology. This point is discussed in further detail below. Lastly, we note that the SCR control systems operated by Merrimack Station

[1] NH based its emission reduction calculations on the uncontrolled levels observed during stack tests for MK1 and MK2.

[2] Air Pollution Control Technology Fact Sheet: Selective Catalytic Reduction (SCR); EPA–452/F–03–032.

[3] EPA approved the program New Hampshire developed to comply with the OTC's NO_X Budget program into the NH SIP on November 14, 2000 (see 65 FR 68078).

[4] See EPA's October 27, 1998, (63 FR 57356) final rulemaking action known as the NO_X SIP Call.

[5] The NO_X emissions data for the New Hampshire's EGU's, including MK1 and MK2, are still maintained on the CAMPD website by retrieving data under the program name ''NH NO_X Program''.

were amongst the first such units installed on coal-fired electric utility boilers in the U.S., with MK2's SCR being installed in 1995, and MK1's in 1999. Despite the age of the control equipment, the overall NO_X control efficiency as noted above remains at a high level. Additionally, as explained further in the TSD accompanying this final action, by observing the hourly emissions rate data available from EPA's Clean Air Markets Program Database (CAMPD) website it can be clearly seen that achievement of this rate on a 24-hour averaging time basis requires the continuous operation of the SCR controls, as even one or two hours of operation without the controls engaged while heat input is high would jeopardize achievement of the short term, 0.22 lbs/MMBtu emission limit.

Comment: Sierra Club commented that other coal-fired cyclone boilers are required to meet lower emissions limits and included data for other cyclone boilers to support its claim. Sierra Club also provided data on NO_X emission rates at Merrimack Station and asserted that lower NO_X emission rates are achievable and should be required by RACT.

Response: EPA agrees that there are other coal-fired cyclone boilers that are required to meet lower emissions limits. However, EPA's review of the characteristics of the coal-fired cyclone boilers identified as such within its Clean Air Markets and National Electric Energy Data System (NEEDS) databases and operating since 2009 indicates that only two units, the now closed Dallman units 31 and 32 in Illinois, have technical specifications similar to the Merrimack units in that they were bituminous coal fired cyclone boilers whose NO_X emissions were controlled solely by SCR. However, those units are not directly comparable to MK1 and MK2 for a number of reasons, including their smaller size, newer age of the SCR control equipment, and for comparison to MK2, that unit's inordinately high uncontrolled emission rate of 2.4 lbs. NO_X/MMBtu, which is considerably higher than the average emission rate for bituminous coal-fired cyclone boilers of 1.3 lbs/MMBtu as documented within Table 1.1–3 of section 1.1 of EPA's emissions factors reference document, AP–42. Although we did identify several other bituminous coal-fired cyclone boilers within EPA databases, those boilers operated additional NO_X control equipment not used by MK1 and MK2, most often overfire air (OFA) systems. The boilers located at the New Madrid and Thomas Hill facilities in Missouri noted by Sierra Club also operate OFA systems in addition to the SCR control system. Granite Shore Power (GSP), Merrimack Station's owner, recently evaluated the feasibility of retrofitting its cyclone boilers with additional NO_X emission control equipment including an overfire air system as part of a technical analysis it performed at the request of the New Hampshire Air Resources Division (NH–ARD). The state made this request as it developed its SIP revision for the Regional Haze program. As New Hampshire notes within its May 5, 2022, Regional Haze Plan, GSP concludes that retrofitting MK1 and MK2 was not feasible for the following reason:

''*OFA would result in reduced boiler performance, potential boiler modifications to boiler surface areas, increased fouling, boiler tube erosion, and cyclone wear. Any installation is complicated by, if not impossible, due to the engineering and design challenges of the windbox configuration and screen tubes at Merrimack. In addition, the installation of an OFA system after the installation of an SCR is likely to produce little to no improvement in NO_X reductions. Any of these changes would also have the potential to negatively impact the removal capability of the FGD (flue gas desulfurization)*[6] *and the collection capability of the ESPs (electrostatic precipitators*[7]*).*'' As documented within section 4.2.9 of its May 5, 2022, Regional Haze Plan Periodic Comprehensive Revision, New Hampshire reviewed and agreed with Granite Shore Power's assessment that NO_X emissions from the coal-fired boilers at Merrimack Station are well controlled and subject to appropriate NO_X emissions limits. Large boilers like these vary considerably in their design and operational characteristics, and so retrofits possible for some equipment may not be possible elsewhere.

EPA has reviewed New Hampshire's assessment of the information provided by GSP and agrees with the state's conclusion that requiring installation of new equipment at the Merrimack units, such as OFA, is not economically feasible for purposes of RACT. The facility is scheduled to permanently cease coal-fired boiler operations no later than June 1, 2028 as indicated by a recent agreement between Granite Shore Power, the EPA, the Sierra Club, and the Conservation Law Foundation.[8] Leading up to this cessation in operations, there is a declining need for output from the facility by the region's electrical grid operator, ISO-New England; there has been limited or non-acceptance of offers to produce electricity from this facility in the forward capacity auctions conducted by ISO-New England.[9] Given this limited remaining use of these units, combined with the fact that the facility's current SCR NO_X control systems already achieve a high level of control, the cost of new controls per ton of emission reduction achieved is not economically feasible for purposes of RACT.

Comment: Sierra Club commented that other states require lower emissions limits for coal-fired power plants. In its comments, Sierra Club asserted that several other states, including Pennsylvania, New Jersey, Maryland, and Delaware, impose lower emission limits at coal-fired power plants.

Response: EPA agrees that other states require lower emissions limits for coal-fired cyclone boilers. However, as noted above, New Hampshire and EPA have not identified coal-fired boilers that offer an appropriate or equivalent comparison to the units at Merrimack Station. Sierra Club points to lower short-term emission limits adopted by other states for coal-fired boilers, such as Delaware's 0.125 lbs/MMBtu limit based on a 24-hour averaging time, and Maryland's 0.10 lbs/MMBtu limit which is also based on a 24-hour averaging time and includes all modes of operation. However, none of the coal-fired boilers in these states match the type of boiler and fuel type of Merrimack Station's boilers, which as mentioned are bituminous fueled cyclone boilers operating only SCR controls that were installed many years ago. The only coal-fired electric utility boiler in Delaware is located at the Indian River Generating Station in Dagsboro and is a dry-bottom, turbo-fired boiler. Regarding Maryland, the coal-fired boiler located at the AES Warrior Run Cogeneration facility in Cumberland is an atmospheric circulating fluidized bed boiler, the two coal boilers at Brandon Shores are both dry bottom boilers with circular wall burners, and the coal boiler at Wagner Station is a supercritical steam boiler. Therefore, EPA concludes from a technical perspective that limits deemed RACT for these specific units in New

[6] FGD systems are used to reduce emissions of sulfur dioxide and mercury.

[7] ESP systems are used to reduce emissions of particulate matter.

[8] A copy of the press releases from Conservation Law Foundation, Sierra Club, and Granite Shore Power announcing the closure agreement is included in the docket for the rule.

[9] The results of ISO New England's 17th Forward Capacity Auction, which is for the time period June 1, 2026 through May 31, 2027, indicates that bids to offer power to the New England grid from MK1 and MK2 were not accepted for this time period. See: *https://www.iso-ne.com/static-assets/documents/2023/03/fca_17_results_filing.pdf.*

Hampshire [10] should be higher than limits in Delaware and Maryland.

Sierra Club also points to RACT limits for coal-fired boilers located in Pennsylvania that EPA recently finalized with a Federal Implementation Plan published in the **Federal Register** on August 31, 2022,[11] as an example of more restrictive emissions limits in other states relative to what New Hampshire has required for the coal units at Merrimack Station. A number of factors differentiate the units at Merrimack Station compared with those located in Pennsylvania. For example, none of the Pennsylvania units are of the high-emitting, cyclone boiler configuration as both units at Merrimack Station. Additionally, the Merrimack Station boilers are much smaller than the Pennsylvania units. Most of the units addressed in the Pennsylvania RACT FIP are between 600 and 900 MW, whereas the Merrimack units are around 100 MW and 300 MW. As a result of their smaller size, the Merrimack units have considerably lower annual emissions. Over the past five years (2019 through 2023), the total annual NO_X emissions from both Merrimack units ranges from 175 to 500 tons/year. As a point of comparison, the Keystone and Conemaugh facilities in Pennsylvania each had average annual NO_X emissions over 4500 tpy since 2019. The low annual emissions at Merrimack combined with their very low utilization and required stop of use in 2028 leads to any additional controls at Merrimack being not economically feasible for purposes of RACT.

Comment: Sierra Club commented that recent air pollution transport rules such as the Revised Cross-State Air Pollution Rule Update (RCU) for the 2008 ozone NAAQS and the Good Neighbor Plan (GNP) for the 2015 ozone standard contain more restrictive emission rates than what New Hampshire requires for NO_X limits for MK1 and MK2.

Response: The requirements within EPA's transport rules do not offer legitimate comparisons to the emission limits New Hampshire has set as RACT limits for Merrimack Station's coal-fired cyclone boilers for a number of reasons. First, regarding the RCU, EPA did not establish short term emission limits for coal-fired EGU boilers within that rule, but rather only imposed ozone season,[12] mass-based emissions budgets. These budgets were based in part on a statistical analysis showing that coal-fired EGUs equipped with existing SCR are capable of achieving an emissions rate of 0.08 lbs/MMBtu *on a fleetwide average and over an entire ozone season.* Additionally, the RCU allows a facility to remain in compliance if the facility holds sufficient emissions allowances to cover the amount of emissions produced. *See* 86 FR 23056, 23090 (April 30, 2021). New Hampshire's RACT emissions limits are structured much differently, requiring that the facility meet a NO_X emissions rate of 0.22 lbs/MMBtu on a short-term, 24-hour averaging time basis. Additionally, the historical data New Hampshire analyzed for these particular units indicate that this is near the limit of what SCR at these units is capable of achieving. As explained elsewhere in this notice, emissions limits with short averaging times are more difficult to meet because there is less time to offset emissions that occur while operating above the emissions limit with emissions produced during times of operation below the limit.

Regarding comparisons to the NO_X reductions required of electric utility boilers subject to the GNP, a statistical analysis similar to the RCU of fleetwide emissions performance over an entire ozone season informed the identification of emissions rates used to set state-level EGU budgets. Thus, similar to the RCU as mentioned above, these rates do not offer a good comparison to the short-term limits New Hampshire requires for MK1 and MK2. Although the GNP, unlike the RCU, adds an additional, short term, 24-hour average backstop daily rate of 0.14 lbs NO_X/MMBtu for coal-fired boilers with SCR,[13] there are substantial differences in how EPA established and will implement that backstop rate within the trading program versus how New Hampshire established and implements its NO_X RACT limits for Merrimack Station's coal-fired boilers. First, we note that the GNP's 24-hour backstop rate will only apply to emissions during the ozone season that exceed by more than 50 tons a daily average NO_X emissions rate of 0.14 lb/MMBtu. New Hampshire's limits apply year-round and do not excuse the first 50 tons, or any amount of emissions, that exceed its emissions limits.[14] Furthermore, the GNP's 24-hour backstop rate, if exceeded beyond the 50 ton exemption mentioned above, can be complied with via the surrender of emissions allowances at a 3 for 1 surrender ratio; New Hampshire's limits do not offer this type of compliance option. Additionally, we note that EPA determined its 24-hour backstop daily rate based on a review of the average emitting characteristics of most coal fired boilers in operation during 2021. New Hampshire determined the NO_X RACT emission rates for the Merrimack Station boilers based on the emitting and operational characteristics of these specific units. In the GNP, the EPA observed that even units considered to be running their controls optimally had some days (most often less than 5% of days) where the rates were higher. However, the emission increases on these days were minimal. EPA used a similar methodology in employing the 95th percentile of observed daily operating emissions rates in selecting the backstop daily emissions rate for SCR-controlled coal boilers in the GNP.[15] As an example, for a unit with a seasonal rate of 0.08 lbs NO_X/MMBtu, EPA determined that it would be expected that, on average, about 4.7% of the daily rate values would be higher than 0.14 lb/MMBtu.

Comment: Sierra Club commented that NH's emissions limits for a different coal-fired electrical generating facility in the state, Schiller Station, are only slightly higher than those for Merrimack Station, despite the fact that the Schiller Station units controlled by SNCR, a less effective control strategy, inferring that Merrimack Station's more capable SCR controls are not being as effectively run as they should be.

Response: EPA agrees that New Hampshire has imposed NO_X emissions limits on the coal-fired boilers at Schiller Station of 0.25 lbs/MMBtu that are only slightly higher than the limits imposed on the Merrimack Station units, despite the latter operating SCR controls, and the former operating less effective SNCR controls. However, this is not indicative of unduly lax

[10] RACT is defined, in part, as ''the lowest emissions limitation a particular source is capable of meeting by the application of control technology that is reasonably available considering technological and economic feasibility'' (44 FR 53762; September 17, 1979).

[11] See 87 FR 53381.

[12] The ozone season encompasses the 153-day period from May 1 to September 30.

[13] See footnote 3.

[14] As will be discussed later in this document, New Hampshire imposed separate, mass-based emissions limits for days with a startup or shutdown event.

[15] See 88 FR 36654, 36792 (June 5, 2023). We note that in contrast to the derivation of the GNP's daily limits, wherein EPA concluded that SCR optimized units (*i.e.,* units that were running their SCR controls effectively) were those able to achieve a 0.08 lbs/MMBtu ozone season emission rate, NH's NO_X RACT evaluation points to the high percent reduction from uncontrolled levels as an indicator of effective operation of SCR controls. Using a 0.08 ozone season emission rate as a basis for setting emissions limits for MK1 and MK2 would have been inappropriate because of their much higher uncontrolled emission levels relative to the units governed by the GNP.

requirements for units MK1 and MK2 relative to the Schiller units, but rather, points to the higher uncontrolled NO_X emission rates for the Merrimack Station units relative to the Schiller units. According to Table 1.1–3 of AP–42, the uncontrolled NO_X emissions rate for Merrimack Station's bituminous fueled cyclone boilers is 33 lbs of NO_X per ton of coal burned, which is the highest emission rate for any type of coal fired boiler listed within the table.[16] Schiller Station operates two dry-bottom, wall-fired coal boilers, which AP–42 indicates have an uncontrolled emissions rate of 22 lbs of NO_X per ton of coal burned, and a fluidized bed boiler, which AP–42 indicates has an uncontrolled emissions rate of between 5.0 to 15.2 lbs of NO_X per ton of coal burned. Given the differences in uncontrolled emission rates and NO_X control technology of the coal-fired boilers at these facilities, comparisons of the NO_X emissions rates do not offer an effective means of gauging the stringencies of the applicable emissions rates. The Merrimack Station units operate the more costly, more effective NO_X control equipment compared to what the Schiller Station units run; technical resources that describe the control effectiveness of various NO_X emission reduction control techniques rank SCR control systems higher than SNCR control systems.[17]

Comment: Sierra Club commented that in light of recent information showing that SCR control systems can be operated at low-temperature levels that occur during periods of startup and shutdown with no detriment to control efficacy or longevity, New Hampshire does not need to allow the units to emit more on days when these operating modes occur by providing daily emission limits of 4.0 and 11.5 tons per day for MK1 and MK2, respectively.

Response: In the aforementioned response to comments received on its proposed Regional Haze SIP, New Hampshire notes that approximately one fourth of the operating hours in the year prior to the establishment of the NO_X RACT emission rates in question were hours spent in startup or shutdown modes when operating conditions, in particular temperature, did not permit the operation of the SCR control systems. The state therefore concluded that setting one overall emissions limit that combined the hours spent in startup and shutdown mode, during which the SCR controls would not operate, with the hours spent in steady state operation, during which the SCR controls would operate, would have necessitated issuance of an all-encompassing emissions limit higher than the limit New Hampshire ultimately decided upon for times of steady state operation. By choosing to adopt separate limits for these operating modes, New Hampshire's emissions rate structure requires that MK1 and MK2 meet a lower emissions rate for the majority of the time it is operating, that being operation under steady state conditions with the SCR control equipment functioning. A separate alternate emission limit (AEL) applicable during startup and shutdown modes ensures that the emissions that occur during those times are also subject to an emissions cap as well as recordkeeping requirements to document the dates and time spent in startup or shutdown mode. As noted within the update to section 2 of the technical support document included within the docket for this action, the AEL in conjunction with requirements contained within Env-A 1300 and the facility's Title V operating permit mean that the SCRs must be turned on expeditiously once high levels of coal loading begin in order to avoid exceeding the tons/calendar day limit of the AEL.

Sierra Club refers to a sorbent injection technology that can reduce the operating temperature range of the SCR and potentially reduce NO_X emissions at low loads. NHDES reviewed the provided references, which describe the technology as allowing the coal-fired boilers operated by Duke Power's Gibson facility to operate its SCRs at a lower temperature than would otherwise be possible, and also enable the coal boilers to run at low loads while still minimizing emissions. NHDES notes, however, that MK1 and MK2 SCRs are not designed to operate at lower temperatures, nor are the boilers intended to operate at low electrical output loads, and so even if modifications were made such that the SCR control equipment could function at lower temperature there would be little benefit, from an emissions reduction perspective, to installing additional controls to enable this. The small benefit in emissions reductions for operating the SCR at lower temperatures is partially due to the level and averaging period of the AEL, which significantly limits the time that these boilers can operate with high fuel input without the SCRs, and therefore limits the amount of total emissions because the units would exceed the 4 tons per day emission limit if they operated with high fuel input without the SCRs in operation.[18] Therefore, NHDES concluded that a lowering of the temperature at which the SCR controls could operate during startup and shutdown would not justify the significant capital costs it would take to install the new control technology Sierra Club mentions. New Hampshire notes that in 2021, MK1 and MK2 operated for approximately 2,155 hours and were started up approximately 26 times. Assuming that the sorbent injection technology mentioned in Sierra Club's comments could lower the temperature at which MK1 and MK2 could operate their SCR controls such that they could be used for an additional hour during startup, this would have resulted in a relatively minor, incremental emission reductions[19] by allowing 26 additional hours of SCR operating time out of 2,155 overall boiler operating hours.

We have reviewed Sierra Club's comment that additional emissions control technology be required for startup and shutdown operations, and New Hampshire's rationale for not requiring it, and agree with the state's conclusion that the additional cost of evaluating, installing, and operating control technology to limit emissions during startup and shutdown is unlikely to be economically feasible given the minimal amount of emissions it would curtail. Furthermore, the recordkeeping and reporting requirements of New Hampshire's NO_X RACT regulation enable the state to effectively oversee operations at the facility, including operations during startup and shutdown. For example, the state's oversight requirements recently led to the issuance of an August 23, 2023 letter requesting more information regarding four exceedances of the startup emissions limit that occurred between December 8, 2021, and July 7, 2023.[20] A

[16] See Table 1.1–3, Emission Factors for SO_X, NO_X, and CO From Bituminous and Subbituminous Coal Combustion, within section 1.1 of AP–42: *https://www.epa.gov/sites/default/files/2020-09/documents/1.1_bituminous_and_subbituminous_coal_combustion.pdf.*

[17] See, for example, Table 1.1–2, NO_X Control Options for Coal-fired Boilers within Section 1.1, Bituminous and Subbituminous Coal Combustion, of AP–42, and EPA's Air Pollution Control Technology Fact Sheets for SNCR and SCR control systems, included within the docket for this action.

[18] For a further explanation and example of this behavior, see the TSD that accompanies this final action.

[19] EPA reviewed the difference in emissions between the last hour of non-SCR operation and the first hour of SCR operation and found that if MK1 could have begun SCR controls 1 hour earlier during each startup in 2021, 3.4 tons of NO_X would have been prevented, and for MK2, 8.6 tons would have been prevented.

[20] A copy of New Hampshire's August 23, 2023 letter to Granite Shore Power is included in the docket for this action.

total of 16.4 tons of excess emissions occurred on these days, and the state is currently evaluating the appropriate enforcement response to these violations.

Comment: Sierra Club also commented that New Hampshire's requirements are not sufficient for regional haze purposes.

Response: This comment is not germane to the subject matter of this action which pertains to New Hampshire's NO_X RACT requirements for coal-fired cyclone boilers and does not address regional haze requirements. Therefore, EPA is not addressing this comment here.

III. Final Action

EPA is approving RACT requirements limiting NO_X emissions from coal-fired cyclone boilers powering electrical generating units that are codified within New Hampshire Air Pollution Control Regulation Env-A 1300: Nitrogen Oxides (NO_X) RACT, portions of New Hampshire's NO_X RACT certifications for the 2008 and 2015 ozone standards that pertain to requirements for coal-fired cyclone boilers, and withdrawal from the SIP of two previously issued RACT orders containing emission limits for this equipment that are less stringent than what is contained within the provisions of Env-A 1300 that we are approving within this action.

IV. Incorporation by Reference

In this rule, the EPA is finalizing regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, the EPA is finalizing the incorporation by reference of portions of New Hampshire Air Pollution Control Regulation Env-A 1300, Nitrogen Oxides (NO_X) RACT; specifically, incorporating by reference Env-A 1303.06(b) and (c) pertaining to the coal-fired cyclone boilers at Merrimack Station, as described in the amendments to 40 CFR part 52 set forth below. The EPA has made, and will continue to make, these documents generally available through *https://www.regulations.gov* and at the EPA Region 1 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 State implementation plan, have been incorporated by reference by EPA into that plan, are fully federally enforceable under sections 110 and 113 of the CAA as of the effective date of the final rulemaking of EPA's approval, and will be incorporated by reference in the next update to the SIP compilation.[21]

EPA is also finalizing the removal of provisions within Table (d) of 52.1520 pertaining to these coal-fired cyclone boilers by removing Permits ''Order ARD–97–001: Source specific NO_X RACT Order for Public Service of New Hampshire, Bow, NH; state effective date 4/14/1997'' and ''Order ARD–98–001: Source-specific NO_X RACT order and discrete emission reduction protocols for Public Service of New Hampshire; state effective date 7/17/1998'' as described in the amendments to 40 CFR part 52 set forth below.

V. Statutory and Executive Order Reviews

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

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- 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 an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001); and
- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act.

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

Executive Order 12898 (Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations, 59 FR 7629, 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. EPA defines environmental justice (EJ) as ''the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.'' EPA further defines the term fair treatment to mean that ''no group of people should bear a disproportionate burden of environmental harms and risks, including those resulting from the negative environmental consequences of industrial, governmental, and commercial operations or programs and policies.''

The New Hampshire Department of Environmental Services did not evaluate environmental justice considerations as part of its SIP submittal; the CAA and applicable implementing regulations neither prohibit nor require such an evaluation. EPA did not perform an EJ analysis and did not consider EJ in this action. Due to the nature of the action being taken here, this action is expected to have a neutral to positive impact on the air quality of the affected area. Consideration of EJ is not required as part of this action, and there is no information in the record inconsistent with the stated goal of E.O. 12898 of achieving environmental justice for people of color, low-income populations, and Indigenous peoples.

The Congressional Review Act, 5 U.S.C. 801 *et seq.,* as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a

[21] 62 FR 27968 (May 22, 1997).

copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action 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**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. 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 July 1, 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 52

Environmental protection, Air pollution control, Incorporation by reference, Nitrogen dioxide, Ozone.

Dated: April 18, 2024.

David Cash,

Regional Administrator, EPA Region 1.

Part 52 of chapter I, title 40 of the Code of Federal Regulations 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.*

Subpart EE—New Hampshire

■ 2. In § 52.1520:

■ a. Amend the table in paragraph (c) by revising the entry for ''Env-A 1300'';

■ b. Amend the table in paragraph (d) by removing the entries for ''Source specific NO_X RACT order for Public Service of New Hampshire, Bow, NH'' and ''Source-specific NO_X RACT order and discrete emission reduction protocols for Public Service of New Hampshire''; and

■ c. Amend the table in paragraph (e) by revising the entry for ''Certifications for RACT for the 2008 and 2015 ozone standards''.

The revisions read as follows:

§ 52.1520 Identification of plan.

* * * * *

(c) * * *

EPA-APPROVED NEW HAMPSHIRE REGULATIONS

State citation	Title/subject	State effective date	EPA approval date [1]	Explanations
*	*	*	*	*
Env-A 1300	NO_X RACT	8/15/2018 and 3/20/2023	9/6/2023, 88 FR 60893	Regulation, effective 8/15/2018, containing emissions limits and other requirements for stationary sources of nitrogen oxides approved except for sections pertaining to coal-fired cyclone boilers at Env-A 1303.06(b) and (c). Revisions made to Env-A 1303.02 and 1303.04. effective 3/20/2023.
		8/15/2018	4/30/2024 [Insert **Federal Register** citation].	Requirements pertaining to coal-fired cyclone boilers at Env-A 1303.06(b) and (c).
*	*	*	*	*

[1] In order to determine the EPA effective date for a specific provision listed in this table, consult the FEDERAL REGISTER notice cited in this column for the particular provision.

(e) * * *

NEW HAMPSHIRE NONREGULATORY

Name of nonregulatory SIP provision	Applicable geographic or nonattainment area	State submittal date/effective date	EPA approved date	Explanations
*	*	*	*	*
Certifications for RACT for the 2008 and 2015 ozone standards.	Statewide	9/6/2018	9/6/2023, 88 FR 60893	RACT certifications for stationary sources of VOC and NO_X approved for purposes of the 2008 and 2015 ozone standards except for NO_X RACT requirements pertaining to coal-fired cyclone boilers.
		9/6/2018	4/30/2024 [Insert **Federal Register** citation].	NO_X RACT certifications for the 2008 and 2015 ozone standards pertaining to coal-fired cyclone boilers.
*	*	*	*	*

[FR Doc. 2024–08713 Filed 4–29–24; 8:45 am]
BILLING CODE 6560–50–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Indian Health Service

42 CFR Part 136

RIN 0917–AA24

Removal of Outdated Regulations

AGENCY: Indian Health Service, Department of Health and Human Services.

ACTION: Final rule.

SUMMARY: The Indian Health Service (IHS) of the Department of Health and Human Services (HHS or ''the Department'') is issuing this final rule to remove outdated regulations that do not align with the current statutory text.

DATES: This final rule is effective May 30, 2024.

FOR FURTHER INFORMATION CONTACT: Joshuah Marshall, Senior Advisor to the Director, Indian Health Service, 5600 Fishers Lane, Rockville, MD 20857, email: *joshuah.marshall@ihs.gov,* telephone: 301–443–7252.

SUPPLEMENTARY INFORMATION:

I. Background

On January 27, 1982, the IHS published regulations imposing restrictions on the use of Federal funding for certain abortions, currently codified at 42 CFR 136.51 through 136.57.[1] These regulations implementing IHS program authority pursuant to 25 U.S.C. 13 and 42 U.S.C. 2001 allowed the use of IHS funds for abortions only when a physician certified that ''the life of the mother would be endangered if the fetus were carried to term.'' This restriction was to be consistent with a provision in the annual appropriations legislation for the Departments of Labor, Health and Human Services, and Education, sometimes referred to as the ''Hyde Amendment,'' that restricted the use of Federal funds for certain abortions, which did not automatically apply to IHS funding.[2] The purpose of these IHS regulations was specifically ''to conform IHS practice to that of the rest of the Department [of Health and Human Services] in accordance with the applicable congressional guidelines.'' [3] In 1988, Congress enacted 25 U.S.C. 1676, explicitly extending any limitations on the use of funds included in HHS appropriations laws with respect to the performance of abortions to apply to funds appropriated to IHS. As such, IHS became subject to the Hyde Amendment as included in annual appropriations legislation.

Since the IHS promulgated these regulations in 1982, Congress has repeatedly revised annual restrictions related to the use of Federal funds for certain abortions. In fiscal year 1994, for instance, Congress revised the Hyde Amendment to include additional exceptions to the general prohibition on the use of Federal funds for abortions, including in instances in which a pregnancy is the result of an act of rape or incest.[4] Similarly, in fiscal year 1998, Congress also altered the standards for when the ''life of the mother'' may be considered an exception.[5] As relevant here, the Hyde Amendment currently provides that no covered funds ''shall be expended for any abortion'' or ''for health benefits coverage that includes coverage of abortion,'' except ''if the pregnancy is the result of an act of rape or incest; or . . . in the case where a woman suffers from a physical disorder, physical injury, or physical illness, including a life-endangering physical condition caused by or arising from the pregnancy itself, that would, as certified by a physician, place the woman in danger of death unless an abortion is performed.'' [6]

The current IHS regulations do not align with the current text of the Hyde Amendment or with 25 U.S.C. 1676. The IHS has complied with, and will continue to comply with, the statutory exceptions; has clarified its compliance with the statutory limitations through policy directives; [7] and now removes these outdated regulations in their entirety.[8] Doing so will eliminate any potential confusion regarding these outdated regulations and will ensure alignment with the applicable congressional restrictions governing HHS given Congress's enactment of 25 U.S.C. 1676, which independently aligns relevant restrictions applicable to the IHS and HHS. Regulations on this subject are not necessary to implement the IHS's authority. Nor are they necessary to comply with statutory directives. Moreover, amending the regulations to reflect the current Hyde Amendment could cause additional confusion in the future if Congress changes the annual appropriations language, as it has in the past.

II. Development of Rule

The IHS published a notice of proposed rulemaking in the **Federal Register** on January 8, 2024 (89 FR 896), with a sixty-day comment period, which closed on March 8, 2024. Notification regarding a Tribal consultation session was sent via a Dear Tribal Leader Letter on January 17, 2024. The consultation session was conducted virtually on February 27, 2024. The IHS has reviewed public comments it received and addresses them below.

III. Comments

The IHS received six written comments.[9] Two of the written comments were generally in favor of the removal. These two written comments were submitted by: (1) an individual and (2) a group of 20 individuals and advocacy organizations. Four of the written comments were generally opposed to the removal. These four comments were submitted by advocacy organizations. At the Tribal Consultation session, the IHS received three oral comments from representatives of Indian Tribes. Each of these three oral comments were generally in favor of the removal or non-germane to the removal.

After reviewing both written comments and those comments received orally through the Tribal consultation session, the IHS is finalizing this rule as proposed. Accordingly, this final rule will remove the current IHS Hyde regulations in their entirety, by removing and reserving subpart F, consisting of 42 CFR 136.51 through 136.57. Below, IHS summarizes and

[1] Final Rule, *Provision of Abortion Services by the Indian Health Service,* 47 FR 4016 (Jan. 27, 1982).

[2] Continuing Appropriations for FY 1981, Public Law 96–369 (1980); Continuing Appropriations Act for FY 1982, Public Law 97–92 (1981).

[3] Final Rule, *Provision of Abortion Services by the Indian Health Service,* 47 FR 4016 (Jan. 27, 1982).

[4] Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 1994, Public Law 103–112, 509, 107 Stat. 1082, 1113 (1993).

[5] Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 1998, Public Law 105–78, 509(b), 111 Stat. 1467, 1516 (1997).

[6] Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2024, Public Law 118–47, secs. 506–507, title V of Division D, 138 Stat. 703 (2024).

[7] Indian Health Service Circular No. 22–15, Use of Indian Health Service Funds for Abortions (Jun. 30, 2022), *https://www.ihs.gov/ihm/circulars/2022/use-of-indian-health-service-funds-for-abortions/.*

[8] The regulations also speak to recordkeeping requirements and confidentiality of information. However, these provisions are unnecessary to maintain, because recordkeeping and confidentiality of information are independently required by other laws and regulations that will remain in effect. See, *e.g.,* 45 CFR parts 160, 164 (Standards for Privacy of Individually Identifiable Health Information (The Privacy Rule)).

[9] *See generally,* public comments posted in response to Docket ID # IHS–2024–0001, *https://www.regulations.gov/document/IHS-2024-0001-0001/comment.*

addresses all substantive topics raised in comments.

A. Comments Supporting the Removal

One commenter in the consultation session supported removal of the regulations. That commenter additionally suggested as a policy matter that the IHS consider allowing a nurse practitioner or licensed practitioner other than a physician to certify an abortion in cases in which certification is required. Under the current version of the Hyde Amendment, the IHS cannot make the requested change.

The current version of the Hyde Amendment, made applicable to IHS funding by 25 U.S.C. 1676(a), includes an exception in cases ''where a woman suffers from a physical disorder, physical injury, or physical illness, including a life-endangering physical condition caused by or arising from the pregnancy itself, that would, *as certified by a physician,* place the woman in danger of death unless an abortion is performed.'' Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2024, Public Law 118–47, secs. 506–507, title V of Division D, 138 Stat. 703 (2024) (emphasis added). The IHS' removal of the outdated regulations cannot affect the separate statutory requirement that the certification be made by a physician. Therefore, the IHS has not made changes based on this comment.

Another commenter in the consultation session supported removal of the regulations and asked the IHS whether it intends to replace these regulations at a later time. While the IHS appreciates this question, regulations on this subject are not necessary to implement IHS' authority, nor are they necessary to comply with statutory directives. Moreover, amending the regulations to reflect the current Hyde Amendment could cause additional confusion in the future if Congress changes the annual appropriations language, as it has in the past. Therefore, the IHS has not made changes based on this comment. However, the IHS retains the discretion to promulgate regulations at a later date.

The IHS received an additional comment during the consultation session about what Tribes are permitted to do with their own, non-Federal funds. While the IHS appreciates the comment, it is outside the scope of this action. The regulations at issue apply only to IHS' operations as a healthcare provider and payer. Therefore, the IHS has not made changes based on this comment.

One commenter [10] supported removal of the regulations, based on the justifications provided in the notice of proposed rulemaking. The commenter opined that it was common sense to eliminate the regulations, since the IHS is required by 25 U.S.C. 1676 to follow the Hyde Amendment. The commenter also believes that removal would reduce confusion. In addition to agreeing with the justifications provided in the notice of proposed rulemaking, this commenter explained that the outdated regulations could lead to violations of the Equal Protection Clause of the Constitution if enforced. The commenter argued that if the regulation were enforced, American Indian and Alaska Native (AI/AN) people seeking abortions funded by the IHS would be treated differently than other individuals seeking abortions funded by HHS in other circumstances because only the second group would be able to take advantage of all of the exceptions included in the current Hyde Amendment. This comment requires no change to the proposed rule.

One comment,[11] submitted on behalf of a group of individuals, supported the removal but recommended that the IHS address disparate reproductive health outcomes for AI/AN people, including in urban areas, through activities outside of this rulemaking. The comment also recommended that the IHS improve its capacity for abortions consistent with the Hyde Amendment, and provide additional information, education, and engagement with AI/AN people about permitted abortions. This comment also discussed the commenters' opposition to the scope and impact of the Hyde Amendment itself. These comments are outside of the scope of the rulemaking.

B. Comments Recommending Retaining the Regulations as Written

Several commenters asked that the IHS retain the regulations as written, specifically 42 CFR 136.53 and 136.54 (the two sections that describe the limitations on the use of IHS funding for abortions). These commenters stated that the Hyde Amendment does not require, only permits, the use of IHS funding for abortion in cases of rape or incest. Therefore, the commenters opined that the IHS regulations are not outdated or in conflict with the current law, and also expressed their belief that abortions should not be provided when a pregnancy is the result of rape or incest. One commenter [12] also expressed concern that, should the Hyde Amendment not be included in the annual appropriations act and these regulations are removed, the IHS would be able to further expand access to abortions.

Congress has intentionally broadened the exceptions to the limitation on the use of Federal funds for abortion to include instances of rape or incest, and has specifically made the current scope of the Hyde Amendment applicable to IHS, via 25 U.S.C. 1676(a). Removing the outdated and unnecessary provisions of 42 CFR 136.53 and 136.54 simply aligns IHS regulations with congressional action. Comments about the substance and application of the Hyde Amendment itself are outside of the scope of this rulemaking.

Should Federal law regarding the use of Federal funds for abortion change in the future, the IHS could consider whether regulatory provisions should be proposed. But this final rule will ensure that the IHS follows applicable statutory provisions at any given time. Therefore, the IHS has not made changes based on these comments.

Two commenters [13] stated that removing the regulations is inconsistent with the IHS mission and authority under the Snyder Act, 25 U.S.C. 13, to provide care and assistance for the ''conservation of health,'' claiming that providing abortions in the case of rape or incest is not healthcare, and that abortion in general does not conserve the health of the fetus. The IHS has determined that removing 42 CFR 136.53 and 136.54 clearly aligns with congressional action, and this regulatory action simply removes outdated and unnecessary regulations. Comments about the substance and application of the Hyde Amendment itself are outside of the scope of this rulemaking. Therefore, the IHS has not made changes based on these comments.

One commenter [14] stated that providing abortions in the cases of rape or incest is not consistent with the trust relationship between the Federal Government and Tribes, and asserted that it infringes on Tribal sovereignty. The IHS has determined that removing 42 CFR 136.53 and 136.54 clearly aligns with congressional action, and this

[10] Docket ID # IHS–2024–0001, Comment ID # IHS–2024–0001–0003, *https://www.regulations.gov/comment/IHS-2024-0001-0003.*

[11] Docket ID # IHS–2024–0001, Comment ID # IHS–2024–0001–0007, *https://www.regulations.gov/comment/IHS-2024-0001-0007.*

[12] Docket ID # IHS–2024–0001, Comment ID # IHS–2024–0001–0005, *https://www.regulations.gov/comment/IHS-2024-0001-0005.*

[13] Docket ID # IHS–2024–0001, Comment ID # IHS–2024–0001–0005, *https://www.regulations.gov/comment/IHS-2024-0001-0005,* Comment ID # IHS–2024–0001–0006, *https://www.regulations.gov/comment/IHS-2024-0001-0006.*

[14] Docket ID # IHS–2024–0001, Comment ID # IHS–2024–0001–0005, *https://www.regulations.gov/comment/IHS-2024-0001-0005.*

regulatory action simply removes outdated and unnecessary regulations. Comments about the substance of the Hyde Amendment itself are outside of the scope of this rulemaking. The use of IHS funds for certain abortions does not infringe on Tribal sovereignty. The IHS' clinicians and patients work together to determine the most appropriate treatment in an individual case. Moreover, this action does not affect a Tribe's right to self-determination or self-governance, nor does it impact any Tribe's choice to administer IHS health care programs itself. This action applies only to IHS operations as a healthcare provider and payer. The current regulations also do not reflect a determination that considerations surrounding Tribal sovereignty or the trust relationship forecloses funding for abortions in cases of rape or incest. *See* 46 FR 22617; 47 FR 4017–18. Therefore, the IHS has not made changes based on this comment.

One commenter [15] suggested that an exception to provide abortions in the cases of rape or incest is inappropriate. Removing the outdated regulations, however, would merely align IHS policy, via 25 U.S.C. 1676, with whatever limitations Congress has imposed at any given time, and with that of the rest of HHS. Comments about the substance of the Hyde Amendment itself are outside of the scope of this rulemaking. Therefore, the IHS has not made changes based on this comment.

C. Comments recommending amending the regulations

Several commenters suggested, as an alternative to retaining the regulations as written, that the IHS consider amending 42 CFR 136.54. Two commenters [16] suggested amending 42 CFR 136.54 to align with the Hyde Amendment. One of these commenters [17] recommended options to incorporate a reference to the Hyde Amendment, or to include a qualifier that, if the limitations in the Hyde Amendment change, the regulations will as well, or to cross reference the Hyde Amendment without describing the exceptions currently contained in that language. One of these commenters [18] explained its view that removing the regulations would cause more confusion to providers, and described problematic historical practices as an example of why clear IHS rules are needed. The IHS finds that these recommendations would merely restate Federal law, and are therefore unnecessary. The IHS disagrees that removal will cause more confusion. To the contrary, amending the regulations to reflect the current Hyde Amendment could cause additional confusion in the future if Congress changes the annual appropriations language, as it has in the past. Since 25 U.S.C. 1676 already applies the Hyde Amendment to IHS by law, regulations reflecting the Hyde Amendment are superfluous. The IHS has also clarified its compliance with the statutory limitations through policy directives and will continue to provide clear guidance to its staff. Therefore, the IHS has not made changes based on these comments.

One commenter [19] recommended amending 42 CFR 136.54 to state that Federal funds are available when a physician has found and certified that, on the basis of his or her professional judgment, ''a statutory condition for such funding, referenced in 25 U.S.C. 1676, is satisfied.'' The IHS does not view this change as necessary, since 25 U.S.C. 1676 is applicable to the IHS as a matter of law. In addition, the language recommended by the commenter is unclear, because there are no statutory conditions in 25 U.S.C. 1676 itself. This statute instead applies certain other Federal limitations on the use of funds for the performance of abortions to the IHS. Therefore, the IHS has not made changes based on this comment.

One commenter [20] stated that the IHS must publish a supplemental notice of proposed rulemaking to explain why it is removing and not replacing the regulations. The IHS clearly outlined its reasoning for removing the regulations in the proposed rule.[21] Therefore, the IHS has not made changes based on this comment.

One commenter [22] also offered edits to 42 CFR 136.55 (''Drugs and devices and termination of ectopic pregnancies'') to suggest that Federal funds cannot be used for some treatments for ectopic pregnancy. The IHS does not agree and, consistent with these regulations that are now being withdrawn, reaffirms the policy stated in current 42 CFR 136.55 that Federal funds are available for medical procedures necessary for the termination of an ectopic pregnancy. The IHS has existing broad authority under 25 U.S.C. 13 and 42 U.S.C. 2001 to provide healthcare. Accordingly, a regulation stating that funds are available for medical treatments for ectopic pregnancy is unnecessary and the IHS has not made changes based on this comment.

One commenter [23] stated that the certification requirement in 42 CFR 136.54 should be retained, even if other portions were changed or moved, to ensure compliance with Congress's funding limitations. The IHS believes retaining this section of the regulation is unnecessary. The language in the Hyde Amendment, already made applicable to the IHS via 25 U.S.C. 1676(a), currently contains a physician certification requirement. Retaining that language in the regulation could cause confusion in the future if Congress changes the annual appropriations language, as it has in the past. Therefore, the IHS has not made changes based on this comment.

Some commenters also stated that the remaining sections in subpart F should be retained. These commenters stated that the IHS did not provide justification as to why it was removing the entire section, and not just 42 CFR 136.54. As stated in the notice of proposed rulemaking,[24] the sections on recordkeeping and confidentiality of information (42 CFR 136.56, 136.57) are unnecessary to maintain because these requirements are independently required by other laws and regulations that will remain in effect. See, *e.g.,* 45 CFR parts 160, 164 (Standards for Privacy of Individually Identifiable Health Information (The Privacy Rule)); 44 U.S.C. 31 (The Federal Records Act).

Other commenters similarly requested that the sections on recordkeeping and confidentiality of information be maintained, stating that doing so would ensure accountability, confidentiality, and patient safety. The IHS agrees that recordkeeping and confidentiality requirements serve those important purposes. However, the IHS has sufficient safeguards in place for recordkeeping already required by other

[15] Docket ID # IHS–2024–0001, Comment ID # IHS–2024–0001–0006, *https://www.regulations.gov/comment/IHS-2024-0001-0006.*

[16] Docket ID # IHS–2024–0001, Comment ID # IHS–2024–0001–0004, *https://www.regulations.gov/comment/IHS-2024-0001-0004;* Comment ID # IHS–2024–0001–0006, *https://www.regulations.gov/comment/IHS-2024-0001-0006.*

[17] Docket ID # IHS–2024–0001, Comment ID # IHS–2024–0001–0006, *https://www.regulations.gov/comment/IHS-2024-0001-0006.*

[18] Docket ID # IHS–2024–0001, Comment ID # IHS–2024–0001–0004, *https://www.regulations.gov/comment/IHS-2024-0001-0004.*

[19] Docket ID # IHS–2024–0001, Comment ID # IHS–2024–0001–0002, *https://www.regulations.gov/comment/IHS-2024-0001-0002.*

[20] Docket ID # IHS–2024–0001, Comment ID # IHS–2024–0001–0004, *https://www.regulations.gov/comment/IHS-2024-0001-0004.*

[21] 89 FR 896 at 897.

[22] Docket ID # IHS–2024–0001, Comment ID # IHS–2024–0001–0002, *https://www.regulations.gov/comment/IHS-2024-0001-0002.*

[23] Docket ID # IHS–2024–0001, Comment ID # IHS–2024–0001–0002, *https://www.regulations.gov/comment/IHS-2024-0001-0002.*

[24] 89 FR 897.

Federal laws and regulations, and therefore retaining these regulations is unnecessary. The definition of ''physician'' in 42 CFR 136.52 is also unnecessary as the meaning of ''physician'' is well-established in practice and law. See, *e.g.,* 42 U.S.C. 1395x(r).

As acknowledged by a different commenter,[25] certain sections (§§ 136.51 (''Applicability''), 136.53 (''General rule'')) only exist in relation to other sections of subpart F, and thus are superfluous upon the removal of 42 CFR 136.54. Finally, the IHS has existing broad authority under 25 U.S.C. 13 and 42 U.S.C. 2001 to provide healthcare; accordingly, and as described above, 42 CFR 136.55 is unnecessary. Therefore, the IHS has not made changes based on these comments.

D. Other Comments

One commenter [26] stated that, as a policy matter, the IHS should not use Federal funds for drugs or devices to prevent implantation of the fertilized ovum. The IHS disagrees with this assertion and the removal of 42 CFR 136.55 makes no changes to IHS' existing authority to use Federal funds for the purposes described in the regulatory language being removed. The IHS' broad authority under 25 U.S.C. 13 and 42 U.S.C. 2001 authorizes the IHS to use Federal funds for necessary medical care such as contraception and therefore the IHS does not accept the commenter's policy suggestion to limit the use of funds for this purpose. Therefore, the IHS has not made changes based on this comment.

One commenter [27] explained its view that abortion harms AI/AN people, and recounted some of the history of maltreatment of AI/ANs. These comments are outside of the scope of this action, which merely aligns IHS regulation with statutory text. Therefore, the IHS has not made changes based on this comment.

One commenter [28] made suggestions for changing IHS policy, including statements in IHS policy about the impact of State law on IHS activities, but recognizes that these policy matters are separate from this rulemaking. The IHS also considers these comments outside of the scope of the rulemaking, and therefore has not made changes based on that discussion.

Another commenter [29] stated that the IHS failed to conduct a federalism analysis pursuant to Executive Order 13132, suggesting that IHS clarify whether ''its regulations can preempt state law and, if so, address the federalism implications of its rule.'' The IHS complied with the requirements of Executive Order 13132.[30] Removing these outdated and unnecessary regulations does not impose a substantial direct requirement or cost on State or local governments, as they apply only to IHS operations as a healthcare provider and payer. This action to remove outdated and unnecessary regulations does not have any preemptive effect. Therefore, the IHS has not made changes based on this comment.

Two commenters [31] stated that the IHS should focus its efforts on services for victims of sexual assault, and improving maternal and infant health, instead of removing the outdated rules. The IHS notes that it has a detailed Sexual Assault policy and a robust Maternal and Child Health Program, which will not be affected by the removal of the outdated regulations. The comment is thus outside of the scope of this action, which merely removes outdated and unnecessary regulations. Therefore, the IHS has not made changes based on these comments.

E. Required Determinations

Executive Orders 12866, 13563, and 14094

Executive Order 12866, as amended by Executive Order 14094, and Executive Order 13563 direct agencies to assess all costs and benefits of available regulatory alternatives. Section 3(f) of Executive Order 12866, as amended by Executive Order 14094, 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 3 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 impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise legal or policy issues for which centralized review would meaningfully further the President's priorities or the principles set forth in the Executive order, as specifically authorized in a timely manner by the Administrator of OIRA in each case. OIRA has determined that this final rule is a significant regulatory action as defined by Executive Order 12866, section 3(f).

Regulatory Flexibility Act

This action will not have a significant economic impact on Indian health programs. Therefore, the regulatory flexibility analysis provided for under the Regulatory Flexibility Act is not required.

Executive Order 13132 (Federalism)

Executive Order 13132, ''Federalism,'' establishes certain requirements that an agency must meet when it promulgates a rule that imposes substantial direct requirement costs on State and local governments or has federalism implications. HHS has determined that this final rule, which removes outdated regulations, does not impose such costs or have any federalism implications.

Executive Order 13175

This rule does not have a substantial direct effect on one or more Indian Tribes under Executive Order 13175, because it only removes outdated regulations that do not align with the current statutory text of the Hyde Amendment, with 25 U.S.C. 1676, or with current IHS practice.

National Environmental Policy Act

HHS has determined that this final rule does not have a significant impact on the environment.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)) requires the IHS to consider the impact of paperwork and other information collection burdens it imposes on the public. The IHS has determined no new requirement for information collection is associated with this final rule. This action does not affect any information collections.

[25] Docket ID # IHS–2024–0001, Comment ID # IHS–2024–0001–0002, *https://www.regulations.gov/comment/IHS-2024-0001-0002.*

[26] Docket ID # IHS–2024–0001, Comment ID # IHS–2024–0001–0002, *https://www.regulations.gov/comment/IHS-2024-0001-0002.*

[27] Docket ID # IHS–2024–0001, Comment ID # IHS–2024–0001–0005, *https://www.regulations.gov/comment/IHS-2024-0001-0005.*

[28] Docket ID # IHS–2024–0001, Comment ID # IHS–2024–0001–0002, *https://www.regulations.gov/comment/IHS-2024-0001-0002.*

[29] Docket ID # IHS–2024–0001, Comment ID # IHS–2024–0001–0006, *https://www.regulations.gov/comment/IHS-2024-0001-0006.*

[30] See 89 FR 897–98.

[31] Docket ID # IHS–2024–0001, Comment ID # IHS–2024–0001–0002, *https://www.regulations.gov/comment/IHS-2024-0001-0002;* Comment ID # IHS–2024–0001–0006, *https://www.regulations.gov/comment/IHS-2024-0001-0006.*

Congressional Review Act

Pursuant to Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (also known as the Congressional Review Act, 5 U.S.C 801 *et seq.*), OIRA has determined that this rule does not meet the criteria set forth in 5 U.S.C. 804(2).

Unfunded Mandates Reform Act of 1995

We have examined the impacts of this rule as required by section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA; March 22, 1995; Pub. L. 104–4). Section 202 of UMRA requires that a covered agency prepare a budgetary impact statement before promulgating a rule that includes any Federal mandate that may result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year (adjusted for inflation). In 2024, that threshold is approximately $183 million (in 2023 dollars). If a covered agency must prepare a budgetary impact statement, section 205 further requires that it select the most cost-effective and least burdensome alternative that achieves the objectives of the rule and is consistent with the statutory requirements. In addition, section 203 requires a plan for informing and advising any small governments that may be significantly or uniquely impacted by the rule. Based on information currently available, we expect the combined impact on State, local, or Tribal governments and the private sector does not meet the UMRA definition of unfunded mandate.

List of Subjects in 42 CFR Part 136

Employment, Government procurement, Healthcare, Health facilities, Indians, Penalties, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, the Department of Health and Human Services amends 42 CFR part 136 as follows:

PART 136—INDIAN HEALTH

■ 1. The authority citation for part 136 continues to read as follows:

Authority: 25 U.S.C. 13; sec. 3, 68 Stat. 674 (42 U.S.C., 2001, 2003); Sec. 1, 42 Stat. 208 (25 U.S.C. 13); 42 U.S.C. 2001, unless otherwise noted.

Subpart F—[Removed and Reserved]

■ 2. Remove and reserve subpart F, consisting of §§ 136.51 through 136.57.

Dated: April 24, 2024.

Xavier Becerra,

Secretary, Department of Health and Human Services.

[FR Doc. 2024–09152 Filed 4–29–24; 8:45 am]

BILLING CODE 4166–14–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 1, 2, 9, and 25

[GN Docket No. 23–65, IB Docket No. 22–271; FCC 24–28; FR ID 210313]

Single Network Future: Supplemental Coverage From Space; Space Innovation

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Federal Communications Commission (FCC or Commission) adopts rules to facilitate the deployment of supplemental coverage from space (SCS) in an effort to serve several important public interest goals for the Nation and expand the reach of communications services, particularly emergency services, so that connectivity and assistance is available in more remote places. In this document, to allow satellite communications on spectrum previously allocated only to terrestrial services, the Commission modifies the United States Table of Frequency Allocations to authorize bi-directional, secondary mobile-satellite service operations in certain spectrum bands that have no primary, non-flexible-use legacy incumbents, Federal or non-Federal. For these bands, we authorize SCS only where one or more terrestrial licensees—together holding all licenses on the relevant channel throughout a defined geographically independent area—lease access to their spectrum rights to a participating satellite operator, whose license reflects these frequencies and the geographically independent area in which they will offer SCS. In recognition that this new offering has the potential to bring life-saving connectivity to remote areas, the Commission also applies interim 911 call and text routing requirements to ensure that help is available to those who need it today while we work toward enabling automatic location-based routing of all emergency communications whether or not there is a terrestrial connection available.

DATES: The rules are effective May 30, 2024, except for the amendments to §§ 1.9047(d)(2) (amendatory instruction 3), 9.10(t)(3) through (5) (amendatory instruction 8), and 25.125(b)(1) and (2) and (c) (amendatory instruction 16), which are indefinitely delayed. The Federal Communications Commission will publish a document in the **Federal Register** announcing the effective date of these rule sections.

FOR FURTHER INFORMATION CONTACT: For additional information on this proceeding, contact Jon Markman of the Mobility Division, Wireless Telecommunications Bureau, at *Jonathan.Markman@fcc.gov* or (202) 418–7090, or Merissa Velez of the Space Bureau Satellite Programs and Policy Division, at *Merissa.Velez@fcc.gov* or (202) 418–0751. For information regarding the Paperwork Reduction Act of 1995 (PRA) information collection requirements contained in this document, contact Cathy Williams, Office of Managing Director, at (202) 418–2918 or *Cathy.Williams@fcc.gov.*

SUPPLEMENTARY INFORMATION: This is a summary of Commission's *Report and Order*, in GN Docket No. 23–65 and IB Docket No. 22–271; FCC 24–28, adopted and released on March 15, 2024. The full text of this document is available for public inspection online at *https://docs.fcc.gov/public/attachments/FCC-24-28A1.pdf.* The *Report and Order* was corrected by an erratum released on April 18, 2024. The changes made by the erratum are included in this document.

Synopsis

1. In the *Report and Order*, the Commission adopts a regulatory framework—the first of its kind in the world—to enable collaborations between satellite operators and terrestrial service providers to offer ubiquitous connectivity directly to consumer handsets using spectrum previously allocated only to terrestrial service. We anticipate that supplemental coverage from space, or SCS, will enable consumers in areas not covered by terrestrial networks to be connected using their existing devices via satellite-based communications.

2. In the *Report and Order*, to allow satellite communications on spectrum previously allocated only to terrestrial services, the Commission modifies the United States Table of Frequency Allocations to authorize bi-directional, secondary mobile-satellite service (MSS) operations in certain spectrum bands that have no primary, non-flexible-use legacy incumbents, Federal or non-Federal. Accordingly, the list of bands that will be available for the provision of SCS (the SCS Bands) is as follows:

• 600 MHz: 614–652 MHz and 663–698 MHz;
• 700 MHz: 698–769 MHz, 775 MHz–799 MHz, and 805–806 MHz;
• 800 MHz: 824–849 MHz and 869–894 MHz;
• Broadband PCS: 1850–1915 MHz and 1930–1995 MHz; and
• AWS–H Block: 1915–1920 MHz and 1995–2000 MHz.

3. For these bands, the Commission finds it in the public interest to limit SCS authorizations to the following geographically independent areas (GIAs): (1) the contiguous United States (CONUS); (2) Alaska; (3) Hawaii; (4) American Samoa; (5) Puerto Rico/U.S. Virgin Islands; and (6) Guam/Northern Mariana Islands. Given the novel technical challenges at play when introducing satellite communications to terrestrial spectrum, we believe that a GIA restriction is necessary in the initial SCS framework because it minimizes the risk of potential interference to geographically-adjacent, co-channel license areas. For these bands, the Commission authorizes SCS only where one or more terrestrial licensees—together holding all licenses on the relevant channel throughout a defined geographically independent area—lease access to their spectrum rights to a participating satellite operator, whose part 25 license reflects these frequencies and the geographically independent area in which they will offer SCS.

4. In the *Report and Order*, the Commission also adopts entry criteria that non-geostationary satellite orbit (NGSO) and geostationary satellite orbit (GSO) operators must meet in order to apply for or modify an existing part 25 license to operate satellites in the SCS Bands in the United States and its territories. Specifically, we establish an SCS framework allowing satellite operators to apply to modify a current part 25 license to include SCS where: (1) the satellite operator has one or more leasing notification(s) or application(s), or in the case of FirstNet, a Form 601, on file with the Commission to access the spectrum allocated for MSS provision of SCS from a single terrestrial licensee or multiple licensees that hold, collectively or individually, all co-channel licenses throughout a GIA; (2) the current part 25 space station licensee or part 25 grantee of market access for NGSO or GSO satellite operation seeks modification of authority to provide SCS in the same geographic areas covered in the relevant GIA; and (3) the terrestrial devices involved in SCS qualify as ''licensed by rule'' earth stations under the new provisions of part 25. Similarly, satellite operators may apply for an initial part 25 license with authority to provide SCS if they meet requirements (1) and (3) above, and if in their part 25 application, those operators seek to provide SCS in the same geographic areas covered in the relevant GIA.

5. Our actions to facilitate the deployment of SCS will serve several important public interest goals for the Nation. First, the SCS framework will expand the reach of communications services, particularly emergency services, so that connectivity and assistance is available in more remote places. Second, the SCS framework will spur advancements in cutting-edge, space-based technologies that will position the United States as a global leader in this arena. And third, the SCS framework will continue our efforts to promote the innovative and efficient use of our Nation's spectrum resources in ways that foster creative collaborations among users.

6. In crafting this new framework, it is essential that we balance the desire to accelerate innovative SCS operations that will serve these critical public interest goals with the need to retain service quality of terrestrial networks, protect spectrum usage rights, and minimize the risk of harmful interference, both domestically and internationally. Accordingly, the framework we adopt in the *Report and Order* represents an initial step to encourage the development of SCS while minimizing the risks of harmful interference to existing terrestrial and satellite networks that support non-Federal and Federal users. In the future, as the marketplace for SCS develops, we plan to build on the framework we adopt in the *Report and Order*, to enable deployment of SCS in additional bands and scenarios. We will also continue to monitor the nascent SCS marketplace to consider modifications and address proposals that do not fit neatly within our framework by waiver.

7. In addition, the Commission considered a framework for authorizing terrestrial devices to communicate with a space station in the SCS context. In the *Report and Order*, the Commission adopts a license by rule approach for terrestrial devices as earth stations communicating with a satellite network for the purposes of SCS. Specifically, so long as the terrestrial devices connecting to the SCS network are doing so pursuant to an effective part 1 leasing arrangement or agreement and are operating within the existing technical parameters of their Office of Engineering and Technology (OET) equipment authorization, the terrestrial licensee's license parameters, and applicable part 22, 24, or 27 rules, then those devices will be licensed as earth stations by rule without the need to file a part 25 earth station application for additional authority.

8. In recognizing the importance of 911 service to emergency response and disaster preparedness, we adopt interim 911 text and call routing requirements for terrestrial providers that use SCS arrangements to extend coverage areas. Specifically, we require terrestrial providers to transmit all 911 voice calls and texts to a Public Safety Answering Point (PSAP) using location-based routing or an emergency call center. Terrestrial providers must also transmit location information and the user's phone number to facilitate dispatch and callback capabilities at the receiving PSAP. We also require terrestrial providers that use SCS to file annual reports with the Commission, submit a privacy certification, and provide consumer disclosures regarding SCS 911 connectivity.

9. Under the SCS framework, satellite operators and terrestrial licensees providing SCS must comply with existing satellite and terrestrial rules to avoid harmful interference into radio astronomy and related services. The Commission also amended some of its technical rules as they apply to SCS. In addition, the new MSS allocations will remain subject to the United States' international obligations under treaties, bilaterial or multilateral agreements, the International Radio Regulations, and other instruments of the International Telecommunication Union (ITU).

Procedural Matters

Paperwork Reduction Act

10. The requirements in §§ 1.9047(d)(2), 9.10(t)(3) through (5), and 25.125(b)(1) and (2) and (c) constitute new or modified collections subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. They will be submitted to the Office of Management and Budget (OMB) for review under section 3507(d) of the PRA. OMB, the general public, and other Federal agencies will be invited to comment on the new or modified information collection requirements contained in this proceeding. In addition, the Commission notes that, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, see 44 U.S.C. 3506(c)(4), the Commission previously sought, but did not receive, specific comment on how the Commission might further reduce the information collection burden for small business concerns with fewer than 25 employees. The Commission describes impacts that

might affect small businesses, which includes more businesses with fewer than 25 employees, in the Final Regulatory Flexibility Analysis.

Final Regulatory Flexibility Analysis

11. The Regulatory Flexibility Act (RFA) requires that an agency prepare a regulatory flexibility analysis for notice and comment rulemakings, unless the agency certifies that ''the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.'' Accordingly, the Commission has prepared a Final Regulatory Flexibility Analysis (FRFA) concerning the possible impact of the rule changes contained in the *Report and Order* on small entities. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Notice of Proposed Rulemaking (NPRM)* released in March 2023 in this proceeding (88 FR 21944, Mar. 16, 2023). The Commission sought written public comment on the proposals in the *NPRM* including comments on the IRFA. No comments were filed addressing the IRFA. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.

Congressional Review Act

12. The Commission will send a copy of the *Report and Order* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, see 5 U.S.C. 801(a)(1)(A).

Final Regulatory Flexibility Analysis

13. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *NPRM* released in March 2023. The Federal Communications Commission (Commission) sought written public comment on the proposals in the *NPRM*, including comment on the IRFA. No comments were filed addressing the IRFA. This Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.

A. Need for, and Objectives of, the Report and Order

14. In the *Report and Order*, the Commission takes a major step toward harnessing the power of hybrid satellite-terrestrial networks to connect people to modern communications services. To accomplish this objective, the Commission adopts a regulatory framework to enable collaborations between satellite operators and terrestrial service providers to offer ubiquitous connectivity directly to consumer handsets using spectrum previously allocated only to terrestrial service. Supplemental coverage from space (SCS) will enable consumers in areas not covered by terrestrial infrastructure to be connected using their existing devices via satellite-based communications. The framework the Commission adopts in the *Report and Order* balances the desire to accelerate innovative SCS operations that will serve these critical public interest goals with the need to retain service quality of terrestrial networks, protect spectrum usage rights, and minimize the risk of harmful interference, both domestically and internationally. The objectives of the framework include facilitating ubiquitous wireless coverage across the Nation, expanding the availability of emergency communications to consumers and the geographic range of first responders to provide emergency services, and promoting competition in the provision of wireless services to consumers.

15. In the *Report and Order*, to allow satellite communications on spectrum previously allocated only to terrestrial services, the Commission modifies the United States Table of Frequency Allocations (U.S. Table) to authorize bi-directional, secondary mobile-satellite service (MSS) operations in certain spectrum bands that have no primary, non-flexible-use legacy incumbents, Federal or non-Federal. For these bands, the Commission authorizes SCS only where one or more terrestrial licensees—together holding all licenses on the relevant channel throughout a defined geographically independent area (GIA)—lease access to their spectrum rights to a participating satellite operator, whose part 25 license reflects these frequencies and the GIA in which they will offer SCS. The list of bands (SCS Bands) that will be available for the provision of SCS is as follows:

- 600 MHz: 614–652 MHz and 663–698 MHz;
- 700 MHz: 698–769 MHz, 775 MHz–799 MHz, and 805–806 MHz;
- 800 MHz: 824–849 MHz and 869–894 MHz;
- Broadband PCS: 1850–1915 MHz and 1930–1995 MHz; and
- AWS–H Block: 1915–1920 MHz and 1995–2000 MHz.

16. In an effort to realize the public interest benefits of SCS as soon as possible, while minimizing the risk of harmful interference, the Commission adopts the proposal to limit SCS authorizations to the following GIAs: (1) the contiguous United States (CONUS); (2) Alaska; (3) Hawaii; (4) American Samoa; (5) Puerto Rico/U.S. Virgin Islands; and (6) Guam/Northern Mariana Islands.

17. Additionally, in the *Report and Order*, the Commission adopts rules requiring a part 25 license as a necessary component of an SCS authorization that must be obtained prior to commencing SCS. The Commission also adopts entry criteria that non-geostationary satellite orbit (NGSO) and geostationary satellite orbit (GSO) operators must meet to apply for or modify an existing part 25 license to operate satellites in SCS Bands. The Commission adopts rules to establish a license by rule approach for terrestrial devices as earth stations communicating with a satellite network for the purposes of SCS. Furthermore, the *Report and Order* authorizes SCS based on a lease arrangement or agreement between one or more terrestrial licensees and one or more satellite operators, subject to the restrictions adopted. The Commission also adopts limited amendments to the service rules governing satellite and terrestrial licensees to enable the provision of SCS.

18. Similarly, the Commission adopts certain technical rules, including requiring terrestrial device equipment authorization grantees to modify existing, or obtain new, equipment authorizations for previously certified terrestrial devices and also grants a limited waiver of certain rules. The Commission also addresses international coordination, stating that SCS will be authorized pursuant to a secondary MSS allocation in the U.S. Table. These operations may not cause harmful interference to—and shall not claim protection from—any station operating in accordance with ITU provisions, whether in the United States or internationally. Finally, the Commission clarifies that the SCS framework is limited to operations performed in the bands designated in the *Report and Order* for SCS and remains separate from the service rules for MSS systems. Consequently, the rules the Commission adopts in the *Report and Order* represent an initial step to encourage the development of SCS while minimizing the risks of harmful interference to existing terrestrial and satellite networks that support non-Federal and Federal users.

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

19. Parties that filed comments did not specifically reference the IRFA in their comments; however, some commenters, some of which include small entities, expressed concerns that the proposal in the *NPRM* in which a single terrestrial licensee must hold all co-channel licenses in a given GIA

would either limit SCS to large carriers with nationwide authority over a block of spectrum, or, at a minimum, exclude smaller or regional terrestrial operators from participation in the framework. These concerns are discussed in greater detail in section F of this FRFA.

C. Response to Comments by the Chief Counsel for Advocacy of the Small Business Administration

20. Pursuant to the Small Business Jobs Act of 2010, which amended the RFA, the Commission is required to respond to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration (SBA), and to provide a detailed statement of any change made to the proposed rules as a result of those comments.

21. The Chief Counsel did not file any comments in response to the proposed rules or policies in this proceeding.

D. Description and Estimate of the Number of Small Entities to Which the Rules Will Apply

22. The RFA directs agencies to provide a description of, and where feasible, an estimate of, the number of small entities that may be affected by the rules adopted herein. The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act. A ''small business concern'' is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.

23. *Small Businesses, Small Organizations, Small Government Jurisdictions.* Our actions, over time, may affect small entities that are not easily categorized at present. We therefore describe, at the outset, three broad groups of small entities that could be directly affected herein. First, where there are industry specific size standards for businesses that are used in the regulatory flexibility analysis, according to data from the Small Business Administration's (SBA) Office of Advocacy, in general a small business is an independent business having fewer than 500 employees. These types of small businesses represent 99.9% of all businesses in the United States, which translates to 33.2 million businesses.

24. Next, the type of small entity described as a ''small organization'' is generally ''any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.'' The Internal Revenue Service (IRS) uses a revenue benchmark of $50,000 or less to delineate its annual electronic filing requirements for small exempt organizations. Nationwide, for tax year 2020, there were approximately 447,689 small exempt organizations in the U.S. reporting revenue of $50,000 or less according to the registration and tax data for exempt organizations available from the IRS.

25. Finally, the small entity described as a ''small governmental jurisdiction'' is defined generally as ''governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.'' U.S. Census Bureau data from the 2017 Census of Governments indicate there were 90,075 local governmental jurisdictions consisting of general purpose governments and special purpose governments in the United States. Of this number, there were 36,931 general purpose governments (county, municipal, and town or township) with populations of less than 50,000 and 12,040 special purpose governments—independent school districts with enrollment populations of less than 50,000. Accordingly, based on the 2017 U.S. Census of Government data, we estimate that at least 48,971 entities fall into the category of ''small government jurisdictions.''

26. *Satellite Telecommunications.* This industry comprises firms ''primarily engaged in providing telecommunications services to other establishments in the telecommunications and broadcasting industries by forwarding and receiving communications signals via a system of satellites or reselling satellite telecommunications.'' Satellite telecommunications service providers include satellite and earth station operators. The SBA small business size standard for this industry classifies a business with $38.5 million or less in annual receipts as small. U.S. Census Bureau data for 2017 show that 275 firms in this industry operated for the entire year. Of this number, 242 firms had revenue of less than $25 million. Additionally, based on Commission data in the 2022 Universal Service Monitoring Report, as of December 31, 2021, there were 65 providers that reported they were engaged in the provision of satellite telecommunications services. Of these providers, the Commission estimates that approximately 42 providers have 1,500 or fewer employees. Consequently, using the SBA's small business size standard, a little more than half of these providers can be considered small entities.

27. *Wireless Telecommunications Carriers (except Satellite).* This industry comprises establishments engaged in operating and maintaining switching and transmission facilities to provide communications via the airwaves. Establishments in this industry have spectrum licenses and provide services using that spectrum, such as cellular services, paging services, wireless internet access, and wireless video services. The SBA size standard for this industry classifies a business as small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2017 show that there were 2,893 firms in this industry that operated for the entire year. Of that number, 2,837 firms employed fewer than 250 employees. Additionally, based on Commission data in the 2021 Universal Service Monitoring Report, as of December 31, 2020, there were 797 providers that reported they were engaged in the provision of wireless services. Of these providers, the Commission estimates that 715 providers have 1,500 or fewer employees. Consequently, using the SBA's small business size standard, most of these providers can be considered small entities.

28. *600 MHz Band.* These wireless communications services are radiocommunication services licensed in the 617–652 MHz and 663–698 MHz frequency bands that can be used for fixed and mobile flexible uses. 600 MHz Band services fall within the scope of the Wireless Telecommunications Carriers (except Satellite) industry where the SBA small business size standard classifies a business as small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2017 show that there were 2,893 firms that operated in this industry for the entire year. Of this number, 2,837 firms employed fewer than 250 employees. Thus, under the SBA size standard, the Commission estimates that a majority of licensees in this industry can be considered small.

29. Based on Commission data as of November 2021, there were approximately 3,327 active licenses in the 600 MHz Band service. The Commission's small business size standards with respect to 600 MHz Band services involve eligibility for bidding credits and installment payments in the auction of licenses for these services. For purposes of bidding credits, the Commission defined ''small business'' as an entity with average gross revenues not exceeding $55 million for each of the three preceding years, and a ''very small business'' as an entity with average gross revenues not exceeding

$20 million for each of the three preceding years for the 600 MHz band auction. Pursuant to these definitions, 15 bidders claiming small business status won 290 licenses.

30. In frequency bands where licenses were subject to auction, the Commission notes that as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Further, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated. Additionally, since the Commission does not collect data on the number of employees for licensees providing these services, at this time we are not able to estimate the number of licensees with active licenses that would qualify as small under the SBA's small business size standard.

31. *Lower 700 MHz Band Licenses.* The lower 700 MHz band encompasses spectrum in the 698–746 MHz frequency bands. Permissible operations in these bands include flexible fixed, mobile, and broadcast uses, including mobile and other digital new broadcast operation; fixed and mobile wireless commercial services (including frequency division duplex (FDD)- and time division duplex (TDD)-based services); as well as fixed and mobile wireless uses for private, internal radio needs, two-way interactive, cellular, and mobile television broadcasting services. Wireless Telecommunications Carriers (*except* Satellite) is the closest industry with a SBA small business size standard applicable to licenses providing services in these bands. The SBA small business size standard for this industry classifies a business as small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2017 show that there were 2,893 firms that operated in this industry for the entire year. Of this number, 2,837 firms employed fewer than 250 employees. Thus, under the SBA size standard, the Commission estimates that a majority of licensees in this industry can be considered small.

32. According to Commission data as of December 2021, there were approximately 2,824 active Lower 700 MHz Band licenses. The Commission's small business size standards with respect to Lower 700 MHz Band licensees involve eligibility for bidding credits and installment payments in the auction of licenses. For auctions of Lower 700 MHz Band licenses the Commission adopted criteria for three groups of small businesses. A very small business was defined as an entity that, together with its affiliates and controlling interests, has average annual gross revenues not exceeding $15 million for the preceding three years, a small business was defined as an entity that, together with its affiliates and controlling interests, has average gross revenues not exceeding $40 million for the preceding three years, and an entrepreneur was defined as an entity that, together with its affiliates and controlling interests, has average gross revenues not exceeding $3 million for the preceding three years. In auctions for Lower 700 MHz Band licenses seventy-two winning bidders claiming a small business classification won 329 licenses, twenty-six winning bidders claiming a small business classification won 214 licenses, and three winning bidders claiming a small business classification won all five auctioned licenses.

33. In frequency bands where licenses were subject to auction, the Commission notes that as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Further, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated. Additionally, since the Commission does not collect data on the number of employees for licensees providing these services, at this time we are not able to estimate the number of licensees with active licenses that would qualify as small under the SBA's small business size standard.

34. *Upper 700 MHz Band Licenses.* The upper 700 MHz band encompasses spectrum in the 746–806 MHz bands. Upper 700 MHz D Block licenses are nationwide licenses associated with the 758–763 MHz and 788–793 MHz bands. Permissible operations in these bands include flexible fixed, mobile, and broadcast uses, including mobile and other digital new broadcast operation; fixed and mobile wireless commercial services (including FDD- and TDD-based services); as well as fixed and mobile wireless uses for private, internal radio needs, two-way interactive, cellular, and mobile television broadcasting services. Wireless Telecommunications Carriers (*except* Satellite) is the closest industry with a SBA small business size standard applicable to licenses providing services in these bands. The SBA small business size standard for this industry classifies a business as small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2017 show that there were 2,893 firms that operated in this industry for the entire year. Of that number, 2,837 firms employed fewer than 250 employees. Thus, under the SBA size standard, the Commission estimates that a majority of licensees in this industry can be considered small.

35. According to Commission data as of December 2021, there were approximately 152 active Upper 700 MHz Band licenses. The Commission's small business size standards with respect to Upper 700 MHz Band licensees involve eligibility for bidding credits and installment payments in the auction of licenses. For the auction of these licenses, the Commission defined a ''small business'' as an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $40 million for the preceding three years, and a ''very small business'' an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $15 million for the preceding three years. Pursuant to these definitions, three winning bidders claiming very small business status won five of the twelve available licenses.

36. In frequency bands where licenses were subject to auction, the Commission notes that as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Further, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated. Additionally, since the Commission does not collect data on the number of employees for licensees providing these services, at this time we are not able to estimate the number of licensees with active licenses that would qualify as small under the SBA's small business size standard.

37. *Cellular Radiotelephone Service.* This service is radio service in which licensees are authorized to offer and provide cellular service for hire to the general public and was formerly titled Domestic Public Cellular Radio Telecommunications Service. Cellular Radiotelephone Service falls within the scope the Wireless Telecommunications Carriers (except Satellite) industry, where the SBA small business size standard classifies a business as small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2017 show that there were 2,893 firms that operated in this industry for the entire year. Of this number, 2,837 firms employed fewer than 250 employees. Thus, under the SBA size standard, the Commission

estimates that a majority of licensees in this industry can be considered small.

38. Based on Commission data, as of November 2021, there were approximately 1,908 active licenses in this service. The Commission's small business size standards with respect to Cellular Radiotelephone Services involve eligibility for bidding credits and installment payments in the auction of licenses for these services. For purposes of bidding credits, the Commission has defined ''small business'' as an entity that either (1) together with its affiliates and controlling interests has average gross revenues of not more than $3 million for each of the three preceding years, or (2) together with its affiliates and controlling interests has average gross revenues of not more $15 million for each of the three preceding years.

39. In frequency bands where licenses were subject to auction, the Commission notes that as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Further, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated. Additionally, since the Commission does not collect data on the number of employees for licensees providing these services, at this time we are not able to estimate the number of licensees with active licenses that would qualify as small under the SBA's small business size standard.

40. *Advanced Wireless Services (AWS)—(1710–1755 MHz and 2110–2155 MHz bands (AWS–1); 1915–1920 MHz, 1995–2000 MHz, 2020–2025 MHz and 2175–2180 MHz bands (AWS–2); 2155–2175 MHz band (AWS–3); 2000–2020 MHz and 2180–2200 MHz (AWS–4)).* Spectrum is made available and licensed in these bands for the provision of various wireless communications services. Wireless Telecommunications Carriers (except Satellite) is the closest industry with a SBA small business size standard applicable to these services. The SBA small business size standard for this industry classifies a business as small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2017 show that there were 2,893 firms that operated in this industry for the entire year. Of this number, 2,837 firms employed fewer than 250 employees. Thus, under the SBA size standard, the Commission estimates that a majority of licensees in this industry can be considered small.

41. According to Commission data as December 2021, there were approximately 4,472 active AWS licenses. The Commission's small business size standards with respect to AWS involve eligibility for bidding credits and installment payments in the auction of licenses for these services. For the auction of AWS licenses, the Commission defined a ''small business'' as an entity with average annual gross revenues for the preceding three years not exceeding $40 million, and a ''very small business'' as an entity with average annual gross revenues for the preceding three years not exceeding $15 million. Pursuant to these definitions, 57 winning bidders claiming status as small or very small businesses won 215 of 1,087 licenses. In the most recent auction of AWS licenses 15 of 37 bidders qualifying for status as small or very small businesses won licenses.

42. In frequency bands where licenses were subject to auction, the Commission notes that as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Further, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated. Additionally, since the Commission does not collect data on the number of employees for licensees providing these services, at this time we are not able to estimate the number of licensees with active licenses that would qualify as small under the SBA's small business size standard.

43. *All Other Telecommunications.* This industry is comprised of establishments primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications telemetry, and radar station operation. This industry also includes establishments primarily engaged in providing satellite terminal stations and associated facilities connected with one or more terrestrial systems and capable of transmitting telecommunications to, and receiving telecommunications from, satellite systems. Providers of Internet services (*e.g.* , dial-up ISPs) or voice over Internet protocol (VoIP) services, via client-supplied telecommunications connections are also included in this industry. The SBA small business size standard for this industry classifies firms with annual receipts of $35 million or less as small. U.S. Census Bureau data for 2017 show that there were 1,079 firms in this industry that operated for the entire year. Of those firms, 1,039 had revenue of less than $25 million. Based on this data, the Commission estimates that the majority of ''All Other Telecommunications'' firms can be considered small.

E. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

44. While the Commission sought to minimize compliance burdens where practicable, the SCS framework adopted in the *Report and Order* will impose new or additional reporting, recordkeeping, and/or other compliance obligations on small entities. In addition, while it sought comment from concerned parties regarding costs related to those obligations, the record does not contain a detailed cost/benefit analysis that would allow us to quantify such related costs to small entities. The rules adopted in the *Report and Order* encompass a broad range of leasing, licensing, and technical compliance requirements that are summarized in further detail below.

45. *Part 25 License Entry Criteria.* The *Report and Order* effectuates SCS in certain flexible-use bands previously allocated solely for terrestrial use by the adoption of rules to authorize satellite-to-terrestrial (uplink and downlink) operations in these bands whereby a NGSO or GSO satellite operator may apply for a new or modify an existing part 25 authorization when that entity meets certain prerequisites, or ''entry criteria.'' The ''entry criteria'' requires the satellite operator intending to modify its existing part 25 application in order to provide SCS to include a certification that provides the following information: (1) the satellite operator has one or more leasing notification(s) or application(s), or in the case of FirstNet, a Form 601, on file with the Commission to access the spectrum allocated for MSS provision of SCS from a single terrestrial licensee or multiple licensees that hold, collectively or individually, all co-channel licenses throughout a GIA; (2) the current part 25 space station licensee or part 25 grantee of market access for NGSO or GSO satellite operation seeks modification of authority to provide SCS in the same geographic areas covered in the relevant GIA; and (3) the terrestrial devices involved in SCS qualify as ''licensed by rule'' earth stations under the new provisions of part 25. Similarly, satellite operators may apply for an initial part 25 license with authority to provide SCS if it shows that it meets requirements (1) and (3) above, and if in their part 25 application, those operators request to provide SCS in in the same geographic areas covered in the relevant GIA.

46. In its adopted rules, the Commission maintains its existing part

25 rules for obtaining and modifying a license and applies them to the SCS framework. Under this framework, meeting the proposed entry criteria would allow small and other entities to apply to modify its existing satellite authorization. However, all related applications—including those seeking modification, lease applications, and earth station equipment certifications—must first be granted to provide SCS. Thus, the *Report and Order's* requirements are in addition to the existing underlying reporting, recordkeeping, and compliance requirements. We further note, however, that due to the significant costs involved in SCS development and deployment, we anticipate that few satellite operators affected by this rulemaking would qualify under the definition of ''small entity.''

47. *Part 1 Leasing.* In the *Report and Order*, the Commission adopts a framework authorizing SCS by amending its part 1 leasing rules to permit terrestrial licensees to lease terrestrial spectrum rights to satellite operators for the purpose of providing SCS. In order to properly comply, the adopted rules require applicants for and current licensees of the authorized SCS bands to provide the following information using the current FCC Form 608: (1) a certification that the parties are entering into the leasing arrangement for the purpose of fulfilling the part 25 entry criteria; (2) a description of which method, single or multiple terrestrial licensee, the parties are utilizing to meet the part 25 entry criteria; and (3) if the parties are utilizing the spectrum leasing arrangement under the multiple terrestrial licensee method, the parties must: (a) describe the nature of the leasing arrangement(s); and (b) demonstrate how the entirety of the GIA is covered by the lease arrangement(s). The Commission believes that this requirement will improve the level of interference protection licensees receive in the band; and will create a more predictable and transparent spectrum environment for any current and future users of the band(s). This process also utilizes the Commission's current application approval and notification processing procedures because it will remove unnecessary delay by utilizing the procedures that are already in place. Further, in light of these limited changes to the current application procedures, the Commission does not believe that small entities will have to hire professionals to comply with the *Report and Order*.

48. *Part 25 Automatic Termination.* In the *Report and Order*, the Commission retains the current part 25 rules regarding automatic termination of station authorizations to satellite licensees seeking to provide SCS jointly with a terrestrial operator, and adds a rule whereby the termination of any lease(s) that allow for the use of specific terrestrial spectrum for SCS is a trigger for automatic termination of the part 25 license. This requirement utilizes and applies the Commission's current part 25 automatic termination process. In light of these limited changes to the current procedures, the Commission does not believe that small entities will have to hire professionals to comply with the *Report and Order*.

49. *911 Call Transmission Requirements.* In the *Report and Order*, the Commission establishes on an interim basis that terrestrial providers must transmit all SCS 911 calls and texts to a PSAP using either an emergency call center or location-based routing. Terrestrial providers must also transmit location information and the user's phone number to facilitate dispatch and callback capabilities at the receiving PSAP. This interim step will balance the need for SCS 911 voice calls and texts to be routed to the appropriate PSAP with the need for terrestrial providers to have flexibility in their implementation of SCS. Under this approach, terrestrial providers must either: (1) use information regarding the location of a device, including but not limited to device-based location information, and transmit the phone number of the device used to send the SCS 911 voice call or SCS 911 text message and available information to an appropriate PSAP; or (2) use an emergency call center, at which emergency call center personnel must determine the emergency caller's phone number and location and then transfer or otherwise direct the SCS voice call or SCS text message to an appropriate PSAP. In addition, the Commission requires terrestrial providers that use SCS to file an SCS 911 report with the Commission on an annual basis, by October 15th of each year, that explains how their SCS deployments have supported 911 call/text routing to the geographically appropriate PSAP with sufficient location information. Terrestrial providers that utilize SCS to extend coverage must maintain records of SCS 911 voice calls and 911 text messages received under their SCS arrangements and received at their emergency centers. The Commission finds that these reporting and location-based routing requirements represent minimally burdensome requirements when weighed against the necessity of 911 service for emergency response and disaster preparedness. Further, while these recordkeeping and reporting requirements present new obligations for small entities, we note that these measures will promote the Commission's objectives regarding transparency and accountability in routing SCS voice calls and 911 text messages and provide useful data. Additionally, to advance consumer awareness of the extent to which SCS is used to provide connectivity to 911, the Commission adopts consumer disclosure requirements for terrestrial providers to inform their subscribers of the limitations when using SCS to contact 911. Finally, there is a one-time requirement that, prior to use of SCS location information to meet the Commission's 911 rules, terrestrial providers must certify that neither they nor any third party they rely on to obtain SCS location information will use that information or associated data for any non-911 purpose, except with prior express consent or as otherwise permitted or required by law. The certification also must state that terrestrial providers and any third party they rely on to obtain SCS location information will implement measures sufficient to safeguard the privacy and security of the information.

50. *Market Area Boundary Limits.* In the *Report and Order*, the Commission maintains the existing market area boundary limits in parts 22, 24, and 27 of the Commission's rules. Noting that SCS partners should be expected to coordinate regarding the technical parameters necessary to avoid co-channel interference with one another's operations. Although the introduction of SCS into spectrum licensed for terrestrial networks should have no impact to other radio systems operating in the band within the same or nearby geographical areas, the Commission adopts a rule to limit the signal levels from SCS at and beyond the terrestrial operator's licensed area to be the same as those defined for terrestrial operation in each respective band. More specifically, the Commission maintains the existing market area boundary limits established in parts 22, 24, and 27 of the Commission's rules. These limits have also been used and shown to be feasible for operations similar to SCS. SCS can therefore only be deployed on the condition that stations using these frequencies will not cause harmful interference to, or claim protection from harmful interference caused by, an international station operating in accordance with the provisions of the

Constitution, the Convention, and the Radio Regulations of the ITU.

51. The Commission recognizes that managing time varying signal levels from SCS space stations, which may be moving and utilizing multibeam transmissions, will require careful and dynamic management of power level and beams for small and other entities. Satellite operators must also account for multiple overlapping and changing satellites or beams covering the same areas, as well as leakage and interference from side beams. Therefore, the power limit for interference protection at any given point or area should be applied to aggregation of power received across all visible beams and satellites at all times as they move over any given point or area. In addition, operators may need to cease beam transmissions in zones to allow for signal degradation from the edge of SCS coverage. Given that the size of such zones depends on target services, satellite and beamforming configuration, and power management solutions which may improve over time, the Commission does not set a limit on the zone size as long as the receive power limits are met.

52. *Out of Band Emission (OOBE) Limits.* In the *Report and Order* the Commission adopted a uniform OOBE limit of −120 dBW/m2/MHz for SCS operation across the SCS Bands expressed as a terrestrial power flux-density (PFD) limit. To ensure those adjacent band devices are protected from the risk of harmful interference, we find that both OOBE limits are warranted, and given the nature of SCS, that these limits should be measured and enforced on the ground. In setting these limits, we recognize that different factors may affect the potential for harmful interference due to the inherent difference in propagation effects when the signal is generated from a multibeam satellite constellation compared to when it is transmitted from a terrestrial base station. As a result, we therefore adopt limits that constitute a reasonable middle ground between existing terrestrial OOBE limits and satellite-based limits.

53. The existing OOBE limits for base stations vary across different radio services, and these services are governed by different parts of the Commission's rules (*e.g.,* parts 22, 24, 27). Although different OOBE limits apply across individual SCS Bands, we believe adopting a uniform PFD limit for supplemental satellite coverage across the various bands is reasonable and provides a simple requirement for satellite operator compliance. To provide a uniform limit across the various SCS Bands, the Commission considers some balancing of these effects for PFD limits that are normalized to both ''per MHz'' and ''per square meter''-*i.e.,* dBW/m2/MHz. We also specify that this PFD limit will apply at 1.5 meters above ground level, a height frequently associated with handset usage that has been used by the Commission when developing interference protection criteria for other wireless services. We believe that this limit represents an equitable- and technologically feasible-balance between the positions expressed in the record and will effectively protect adjacent band operations across the SCS Bands. Further, given that the Commission is breaking new ground in permitting satellite operations to not only operate in bands allocated for terrestrial systems, but permitting them to be fully integrated into those systems, we believe that it is in the public interest to require that those satellites protect terrestrial systems commensurate with the protections they are afforded from terrestrial-only systems. While the out-of-band PFD limits the Commission adopted may require more stringent attenuation than the emission limits specified in § 25.202(f) for satellite operation, the Commission believes that these stricter limits are both necessary and technologically feasible for small and other satellite operators providing SCS.

54. *Equipment Authorization for SCS.* The adopted rules in the *Report and Order* also require terrestrial device equipment authorization grantees to modify existing, or obtain new, equipment authorizations for previously certified terrestrial devices to reflect those devices' approval to operate under a part 25 MSS allocation and applicable SCS rules. New applicants should include a request for part 25 on future certification applications for equipment that is capable of operation in an SCS mode. This requirement does introduce a new administrative burden for equipment authorization grantees and applicants, especially as it relates to already certified equipment. The Commission's existing procedures through the permissive change process which enable electrical or mechanical changes to certified equipment when those changes do not affect the characteristics required to be reported to the Commission do not apply here where the only change being made to the certification is adding authorization for part 25. Under the Commission's existing rules, ''a change other than a permissive change'' requires a grantee to file a new application for certification accompanied by the information specified in part 2 of the Commission's rules. The Commission believes there is good reason to provide grantees a way to effectuate the necessary changes to their equipment authorization grants under the Commission's rules that also minimizes the administrative burdens associated with a new equipment certification application by waiving relevant rule provisions to provide a simplified process for existing grantees to modify their certifications to reflect part 25 authorization for SCS.

55. In granting a limited waiver of its rules, the Commission aims to minimize the burden on small and other equipment certification holders, while ensuring tracking and accountability for devices capable of SCS, and compliance with its prohibition on the authorization of covered equipment. Similarly, for new equipment authorizations, terrestrial devices need only show compliance with the terrestrial technical rules for the rule parts under which they will operate; no additional tests are needed for part 25 SCS capability. Thus, seeking to have the part 25 SCS designation on the equipment certification only requires the applicant to request such a designation pursuant to the SCS rules.

56. *International Coordination.* In the *Report and Order*, the adopted rules require that SCS operations that may occur in bands not allocated for such services in the International Table must be consistent with ITU Radio Regulation No. 4.4 and finds that it would serve the public interest to include express conditions in the SCS licenses to ensure that the Commission's obligations are met as the ITU notifying administration for U.S. licensed space station operations. In these cases, the Commission will require additional assurances from SCS licensees that while operating outside of the United States, pursuant to an authorization from another country, the satellite operations will not cause harmful interference into a nearby country. Prior to conducting any communications with earth stations outside the United States, a satellite operator licensed to provide SCS, or applicant for a license to provide SCS, must certify to Space Bureau and the Office of International Affairs (OIA) that it has obtained all necessary authorizations from the relevant country prior to initiation of communications with earth stations in that country. The certification must include steps that were taken to address harmful interference concerns and that these SCS operations will not result in harmful interference to operations that are in conformity with the ITU Radio Regulations in neighboring or nearby

countries. The certification must also be accompanied by a demonstration specifying the measures that the U.S. licensee or applicant will take to eliminate any harmful interference immediately, in the event that it is notified of harmful interference resulting from such SCS operations. These requirements are consistent with existing Commission rules, thereby limiting the compliance burden for small and other entities.

F. Steps Taken To Minimize the Significant Economic Impact on Small Entities and Significant Alternatives Considered

57. The RFA requires an agency to provide, ''a description of the steps the agency has taken to minimize the significant economic impact on small entities . . . including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.

58. As discussed above, the Report and Order adopts an SCS framework that allows, through a collaboration between a terrestrial mobile service provider and satellite operator, transmissions directly from satellites to terrestrial devices on spectrum that was previously allocated and licensed exclusively on a terrestrial basis. In the discussion of the issues, the initial NPRM sought comment on, the Commission raised alternatives and sought input such as a cost and benefit analyses from small and other entities. By requesting such information, the Commission gave small entities the opportunity to broaden the scope of the Commission's understanding of impacts which may not be readily apparent, and offer alternatives not already considered that could minimize the economic impact on small entities.

59. *Waiver-Based Approach.* The Commission declines to adopt a waiver-based approach to enable SCS, opting instead to enable SCS on a variety of bands in all parts of the United States through generally-applicable rules. Some commenters argued for a waiver-based approach instead, but the Commission believes a generally-applicable rules approach allows the Commission to better serve the public by allowing it to more carefully consider the entire landscape of an issue as well as make more comprehensive policy decisions. However, because there are particular SCS implementations that do not perfectly align with this framework, in order to not discourage or delay other innovative solutions for SCS, the Commission will continue to consider on a case-by-case basis filings for waiver or special temporary authority (STA) made by interested parties for SCS. Permitting case-by-case filings for waiver or STA will allow more flexibility for smaller entities who do not have the resources that larger entities have to participate in providing SCS.

60. *Geographically Independent Area (GIA).* In the initial *NPRM*, the Commission proposed to limit the provision of SCS ''to instances where a single terrestrial licensee holds all co-channel licenses in the relevant band throughout one of the six GIAs.'' In the *Report and Order*, the Commission adopted the proposal to limit SCS authorizations to the following GIAs: (1) CONUS; (2) Alaska; (3) Hawaii; (4) American Samoa; (5) Puerto Rico/U.S. Virgin Islands; and (6) Guam/Northern Mariana Islands. The Commission adopted its original proposal to limit SCS to GIAs at this time, and acknowledges that this decision does not foreclose the ability for parties with proposals for providing SCS that do not satisfy the framework from applying to the Commission and demonstrating that they will not cause harmful interference. Some commenters, some of which include small entities, suggested this proposal would limit SCS to large carriers with nationwide authority over a block of spectrum, or otherwise exclude smaller or regional terrestrial operators from participation in the framework. Because of these concerns, the Commission has taken the step of expanding its entry criteria so that multiple terrestrial service providers may work with a satellite operator to provide SCS, as long as together those service providers hold all the licenses in the relevant channel throughout a GIA. These more expansive entry criteria help provide an opportunity for broader deployment of SCS both spectrally and geographically and allows additional licensees to participate, while still minimizing the risk of harmful interference.

61. *Part 25 License Entry Criteria.* In the *Report and Order*, the Commission adopted rules to authorize satellite-to-terrestrial (uplink and downlink) operations in certain bands whereby a NGSO or GSO satellite operator may apply for a new or modify an existing part 25 authorization where that entity meets certain prerequisites, or ''entry criteria.'' This approach will significantly expand and enhance secondary markets in a manner that aligns with the Commission's public interest objectives in order to permit spectrum to flow more freely among users and uses in response to economic demand. The Commission believes that by allowing spectrum to be utilized in this way, it will encourage small entities to become more involved in this process and collaborate with larger providers.

62. Furthermore, in the *Report and Order*, the Commission declined to require part 25 blanket earth station licensing because the comments in the record reflected that blanket licensing would be unnecessarily burdensome to small and other entities. In the initial *NPRM*, the Commission proposed that a terrestrial licensee seeking to collaborate with a satellite operator to offer SCS must apply for and obtain a blanket earth station license for all of its subscribers' terrestrial devices that will be transmitting to space stations for SCS operations. The Commission sought comment on this approach as well as any other approaches that would be consistent with statutory and international obligations. However, commenters raised significant concerns regarding blanket licensing, and, thus, the Commission instead adopts a license by rule approach for terrestrial devices as earth stations communicating with a satellite network for the purposes of SCS. By not requiring providers to apply for and obtain a blanket earth station license, the Commission removes a barrier that was potentially unnecessarily burdensome, in particular for small entities with limited resources.

63. *Part 1 Leasing.* The Commission adopts a framework authorizing SCS by amending its part 1 leasing rules to permit terrestrial licensees to lease terrestrial spectrum rights to satellite operators for the purpose of providing SCS. These requirements are consistent with existing Commission part 1 leasing rules, and the Commission will require applicants for and current licensees of the authorized SCS bands to provide the necessary information using current FCC Form 608. This process will benefit small entities by saving time and resources, as it utilizes the Commission's current application approval and notification processing procedures, and it will remove unnecessary delay by utilizing the procedures that are already in place. Additionally, the Commission considered, but declined, to adopt an approach where a lease was not initially required. Some commenters advocated for the adoption of a ''two-step'' licensing model in response to the *NPRM*, which would have involved a deployment grant that would not have required a lease initially. However, the Commission believes that a two-step part 25 licensing process would require

a duplicative and inefficient use of staff resources that could create a significant economic burden to small entities.

64. *Part 25 Automatic Termination.* The Commission retains the current part 25 rules regarding automatic termination of station authorizations to satellite licensees seeking to provide SCS jointly with a terrestrial operator and adds a rule whereby the termination of any lease(s) that allow for the use of specific terrestrial spectrum for SCS is a trigger for automatic termination of the part 25 license. The new rule that triggers the current part 25 automatic termination requirement is consistent with the current automatic termination rules. By retaining the current part 25 rules regarding automatic termination, small and other entities will not have to become acquainted with a new set of rules, thus reducing their compliance burden.

65. *911 Call Transmission Requirements.* The Commission establishes on an interim basis that terrestrial providers must transmit all SCS 911 calls and texts to a PSAP using either an emergency call center or location-based routing. Terrestrial providers must also transmit location information and the user's phone number to facilitate dispatch and callback capabilities at the receiving PSAP. This interim step will balance the need for SCS 911 voice calls and texts to be routed to the appropriate PSAP with the need for entities to have flexibility in their implementation of SCS. The Commission implements this interim step because some terrestrial 911 requirements may not be feasible at this time and, thus, balanced feasibility with the vital importance of 911 services. In connection with this interim requirement, terrestrial providers that use SCS to extend coverage must maintain records of SCS 911 voice calls and text messages received on their network and emergency call centers. In addition, the adopted rules require terrestrial providers to file an SCS 911 report with the Commission on an annual basis, which will provide critical information regarding SCS 911 connectivity to the Commission while accomplishing it in a manner that does not create a severe burden for entities required to file. The Commission concluded that extending and adapting the existing MSS 911 reporting and location-based routing requirements are minimally burdensome. While these requirements do present new obligations for small entities, these measures will promote transparency and accountability in routing SCS voice calls and provide useful data. In addition, the concurrently adopted *Further Notice of Proposed Rulemaking*, published elsewhere in this issue of the **Federal Register**, will also provide an ample record in which the Commission may consider any additional concerns regarding SCS 911-related issues.

66. The *Report and Order* also establishes disclosure requirements for terrestrial providers to inform their subscribers of the limitations resulting from the use of SCS to contact 911. This disclosure requirement is consistent with the disclosure requirement the Commission adopted for interconnected Voice Over Internet Protocol (VoIP) service providers, demonstrating that it will be familiar to entities and not cause a significant economic impact. While this is a new requirement for providers, it will provide vital information to consumers about the limitations of SCS when contacting 911. The Commission also adopts a rule requiring terrestrial providers to file with the Commission a one-time certification regarding safeguarding the privacy and security of SCS location information. These obligations are consistent with the Commission's existing rules that apply to z-axis and dispatchable location data, as well as location information used for location-based routing; therefore, it will be familiar to terrestrial providers and not create an additional costly burden on small entities.

67. *Market Area Boundary Limits.* The Commission maintains the existing market area boundary limits in parts 22, 24, and 27 of the Commission's rules, noting that SCS partners should be expected to coordinate regarding the technical parameters necessary to avoid co-channel interference with one another's operations. Although the existing market area boundary limits remain, the Commission states that certain limits may be necessary and applicable to the boundaries of the GIA, including at international borders or boundaries extending into water. Therefore, the Commission adopts a rule to limit the signal levels from SCS at and beyond the terrestrial operator's licensed area to be the same as those defined for terrestrial operation in each respective band.

68. *Out of Band Emission (OOBE) Limits.* The Commission adopts a uniform OOBE limit for SCS operation across the SCS Bands expressed as a terrestrial PFD limit. The Commission declined to apply the existing OOBE limits for base stations; instead, after the perspective of commenters who expressed mixed views on which OOBE limits to apply, the Commission adopts a uniform PFD limit for SCS, which provides an equitable- and technologically feasible-compromise between the positions expressed in the record and will also effectively protect adjacent band operations across the SCS Bands. Further, by adopting a uniform OOBE limit for SCS operations, entities will not have to become knowledgeable about several different limitations, which will save much needed time and resources for small entities. We note that even though the out-of-band PFD limits adopted may require more stringent attenuation than the emission limits specified in § 25.202(f) for satellite operation, the Commission believes these stricter limits are both necessary and technologically feasible for satellite operators providing SCS.

69. *Equipment Authorization for SCS.* In the *Report and Order*, the Commission requires terrestrial device equipment authorization grantees to modify existing, or obtain new, equipment authorizations for previously certified terrestrial devices to reflect those devices' approval to operate under a part 25 MSS allocation and applicable SCS rules. This requirement does introduce a new administrative burden for equipment authorization grantees and applicants, especially as it relates to already certified equipment. The Commission's existing procedures through the permissive change process which enable electrical or mechanical changes to certified equipment when those changes do not affect the characteristics required to be reported to the Commission do not apply here where the only change being made to the certification is adding authorization for part 25. Under the Commission's existing rules, ''a change other than a permissive change'' requires a grantee to file a new application for certification accompanied by the information specified in part 2 of the Commission's rules. While the Commission believes there is good reason to provide grantees a way to effectuate the necessary changes to their equipment authorization grants under the Commission's rules that also minimizes the administrative burdens associated with a new equipment certification application. The Commission therefore waives relevant provisions to provide a simplified process for existing grantees to modify their certifications to reflect part 25 authorization for SCS. In providing this limited waiver to existing rules, the Commission aims to minimize the burden on equipment certification holders, while ensuring tracking and accountability for devices capable of SCS, and compliance with our prohibition on the authorization of covered equipment. Similarly, for new equipment authorizations, terrestrial

devices need only show compliance with the terrestrial technical rules for the rule parts under which they will operate; no additional tests are needed for part 25 SCS capability.

70. *International Coordination.* In the *Report and Order*, the Commission requires that SCS operations in bands not allocated for such services in the International Table must be consistent with ITU Radio Regulation No. 4.4 and finds it would serve the public interest to include express conditions in the SCS licenses to ensure that the Commission's obligations are met as the ITU notifying administration for U.S. licensed space station operations. In these cases, the Commission will require additional assurances from SCS licensees that while operating outside the United States, pursuant to an authorization from another country, the satellite operations will not cause harmful interference. Prior to conducting any communications with earth stations outside the United States, a satellite operator licensed to provide SCS, or applicant for a license to provide SCS, must certify to the Space Bureau and OIA that it has obtained all necessary authorizations from the relevant country prior to initiation of communications with earth stations in that country.

71. *ECIP Program.* The initial *NPRM* sought comment on eligibility for the Enhanced Competition Incentive Program (ECIP), which the Commission established in July 2022 to facilitate new opportunities for small carriers and Tribal nations to increase access to spectrum, while incorporating provisions to ensure against program waste, fraud and abuse. Given that the framework is primarily intended to facilitate provision of SCS to existing consumer handsets, and ECIP was adopted with requirements tailored specifically towards provision of service through terrestrial base stations, the Commission considered whether to make SCS participants, necessarily engaged in leasing arrangements, eligible for ECIP benefits which could reduce the economic impacts for small carriers and Tribal nations. In the *Report and Order*, the Commission declines to extend ECIP benefits to stakeholders that presently intend to enter into leasing arrangements for the provision of SCS. The Commission highlights that the provisions of SCS do not align with the goals or entry criteria of the ECIP program and believes it is in the public interest to allow the SCS marketplace and the ECIP program to further develop before determining whether it is appropriate for these two new Commission efforts to support one another.

G. Report to Congress

72. The Commission will send a copy of the *Report and Order*, including the FRFA, in a report to Congress pursuant to the Congressional Review Act. In addition, the Commission will send a copy of the *Report and Order*, including the FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of the *Report and Order* and FRFA (or summaries thereof) will also be published in the **Federal Register.**

Ordering Clauses

73. Accordingly, *it is ordered* that, pursuant to the authority found in sections 1, 4(i), 157, 301, 303, 307, 308, 309, and 310 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 157, 301, 303, 307, 308, 309, and 310, that the *Report and Order* and *Further Notice of Proposed Rulemaking is hereby adopted*.

74. *It is further ordered* that the *Report and Order shall be effective* 30 days after publication in the **Federal Register,** with the exception of revisions to §§ 1.9047(d)(2), 9.10(t)(3) through (5), and 25.125(b)(1) and (2) and (c) of the Commission's rules, 47 CFR 1.9047(d)(2), 9.10(t)(3) through (5), and 25.125(b)(1) and (2) and (c), which may contain new or modified information collection requirements and will not be effective until after the Office of Management and Budget completes any review the Wireless Telecommunications Bureau and the Space Bureau determine is required under the Paperwork Reduction Act and provide an effective date by subsequent Public Notice.

75. *It is further ordered* that, pursuant to section 4(i) of the Communications Act, as amended, 47 U.S.C. 154(i), and § 1.3 of the Commission's rules, 47 CFR 1.3, the following rules are waived, effective immediately upon adoption of the *Report and Order* and extending until the date that is six months following the effective date announced in the Public Notice issued pursuant to paragraph 268 in the *Report and Order*, to the limited extent and as described herein: §§ 2.1043(c) and 2.911(c) and (e) of the Commission's rules, 47 CFR 2.1043(c) and 2.911(c) and (e). This temporary waiver is granted only for the purpose of adding a part 25 designation to equipment certifications granted on or before the 60th day after a summary of the Report and Order is published in the **Federal Register.**

76. *It is further ordered* that the Commission's Office of the Secretary, SHALL SEND a copy of the *Report and Order* and *Further Notice of Proposed Rulemaking*, including the Final Regulatory Flexibility Analysis and the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

77. *It is further ordered* that the Commission *shall send* a copy of the *Report and Order* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

List of Subjects

47 CFR Part 1

Practice and procedure, Reporting and recordkeeping requirements, Telecommunications, Wireless radio services.

47 CFR Part 2

Communications, Satellites, Telecommunications.

47 CFR Part 9

Communications common carriers, Communications equipment, Radio.

47 CFR Part 25

Administrative practice and procedure, Satellites.

Federal Communications Commission.

Marlene Dortch,

Secretary.

Final Rules

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR parts 1, 2, 9, and 25 as follows:

PART 1—PRACTICE AND PROCEDURE

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

Authority: 47 U.S.C. chs. 2, 5, 9, 13; 28 U.S.C. 2461 note; 47 U.S.C. 1754, unless otherwise noted.

■ 2. Effective May 30, 2024, add § 1.9047 to read as follows:

§ 1.9047 Special provisions relating to spectrum leasing arrangements involving terrestrial spectrum rights for supplemental coverage from space.

(a) *Supplemental coverage from space.* For purposes of this section, *supplemental coverage from space (SCS)* has the same meaning as in § 25.103 of this chapter.

(b) *Geographically independent area (GIA).* For purposes of this section, *geographically independent area (GIA)* has the same meaning as in § 25.103 of this chapter.

(c) *Part 25 SCS Entry Criteria.* For purposes of this section, part 25 SCS Entry Criteria refers to the requirements

outlined in § 25.125(a) and (b) of this chapter.

(d) *Scope.* Under this section, a licensee may enter into a spectrum manager (*see* § 1.9020) or *de facto* transfer (see §§ 1.9030 and 1.9035) leasing or subleasing arrangement with a spectrum lessee in only the bands identified in § 2.106(d)(33)(i) of this chapter for the purpose of meeting the part 25 SCS Entry Criteria.

(1) The licensee seeking to engage in spectrum leasing under this section may do so under the following parameters:

(i) A single licensee that holds all co-channel licenses on the relevant band in a GIA may enter into a leasing arrangement with one or more satellite operators.

(ii) If there are multiple co-channel licensees that collectively hold all co-channel licenses in a particular band throughout one of six GIAs, the licensees may enter into spectrum leasing arrangements only under one of the following conditions:

(A) One licensee holding a license in the GIA must enter into an individual spectrum leasing arrangement with each of the other co-channel licensees in that GIA. The licensee may then enter into a leasing arrangement with one satellite operator; or

(B) One satellite operator may enter into individual leasing arrangements with each of the relevant co-channel licensees that together hold all co-channel licenses on the relevant band in the GIA.

(2) [Reserved]

(e) *FirstNet.* In order for the First Responder Network Authority (FirstNet), as defined in 47 U.S.C. 1424, to fulfill the part 25 SCS Entry Criteria, FirstNet must file an FCC Form 601 in the Universal Licensing System (ULS) that:

(1) Describes the manner in which FirstNet has conveyed to its satellite partner an authorization to utilize the 758–769/788–799 MHz band or portions of the band;

(2) Identifies and describes the geographic area(s) and nature of the proposed SCS operations; and

(3) Demonstrates how, under the agreement, the rights and responsibilities of the satellite operator partner are substantively the same as those of a lessee under this part.

(f) *Subleasing.* Notwithstanding the provisions of §§ 1.9020(l) and 1.9030(k), an SCS spectrum lessee may sublease spectrum usage rights subject to the following condition.

(1) Satellite operators may not enter into a spectrum subleasing arrangement where there are multiple terrestrial licensees jointly leasing their co-channel rights in a given GIA pursuant to paragraph (d)(1)(ii) of this section.

(2) [Reserved]

(g) *Construction/performance requirements.* Notwithstanding the provisions of §§ 1.9020(d)(5)(i) and 1.9030(d)(5)(i), a licensee may not attribute to itself the build-out or performance activities of its SCS spectrum lessee(s) for purposes of complying with any applicable performance or build-out requirement.

■ 3. Delayed indefinitely, further amend § 1.9047 by adding paragraph (d)(2) to read as follows:

§ 1.9047 Special provisions relating to spectrum leasing arrangements involving terrestrial spectrum rights for supplemental coverage from space.

* * * * *

(d) * * *

(2) The spectrum lessee or sublessee seeking to engage in spectrum leasing under this section must provide within the FCC Form 608:

(i) A certification that the parties are entering into the leasing arrangement for the purpose of fulfilling the part 25 Entry Criteria;

(ii) A description of which method, single or multiple terrestrial licensee, the parties are utilizing to meet the part 25 Entry Criteria; and

(iii) If the parties are utilizing the spectrum leasing arrangement outlined in paragraph (d)(1)(ii) of this section, the parties must:

(A) Describe the nature of the leasing arrangement(s); and

(B) Demonstrate how the entirety of the GIA is covered by the lease arrangement(s).

* * * * *

PART 2—FREQUENCY ALLOCATIONS AND RADIO TREATY MATTERS; GENERAL RULES AND REGULATIONS

■ 4. The authority citation for part 2 continues to read as follows:

Authority: 47 U.S.C. 154, 302a, 303, and 336, unless otherwise noted.

■ 5. Effective May 30, 2024, amend § 2.106 by:

■ a. Revising pages 30, 36, 37, and 38 in paragraph (a); and

■ b. Adding paragraph (d)(33)(i) and reserved paragraph (d)(33)(ii).

The revisions and additions read as follows:

§ 2.106 Table of Frequency Allocations.

(a) * * *

BILLING CODE 6712–01–P

5.149 5.291A 5.294 5.296 5.300 5.304 5.306 5.312	614-698 BROADCASTING Fixed Mobile 5.293 5.308 5.308A 5.309		614-890	614-698 FIXED MOBILE Mobile-satellite NG33A NG5 NG14 NG33 NG115 NG149	RF Devices (15) Satellite Communications (25) Wireless Communications (27) LPTV, TV Translator/Booster (74G Low Power Auxiliary (74H)
694-790 MOBILE except aeronautical mobile 5.312A 5.317A BROADCASTING	698-806 MOBILE 5.317A BROADCASTING Fixed			698-758 FIXED MOBILE BROADCASTING Mobile-satellite NG33A NG159	Satellite Communications (25) Wireless Communications (27) LPTV and TV Translator (74G)
				758-775 FIXED MOBILE Mobile-satellite NG33A NG34 NG159	Satellite Communications (25) Public Safety Land Mobile (90R)
				775-788 FIXED MOBILE BROADCASTING Mobile-satellite NG33A NG159	Satellite Communications (25) Wireless Communications (27) LPTV and TV Translator (74G)
5.300 5.311A 5.312				788-805 FIXED MOBILE Mobile-satellite NG33A NG34 NG159	Satellite Communications (25) Public Safety Land Mobile (90R)
790-862 FIXED MOBILE except aeronautical mobile 5.316B 5.317A BROADCASTING				805-806 FIXED MOBILE BROADCASTING Mobile-satellite NG33A NG159	Satellite Communications (25) Wireless Communications (27) LPTV and TV Translator (74G)
	5.293 5.309			806-809 LAND MOBILE	Public Safety Land Mobile (90S)
	806-890 FIXED MOBILE 5.317A BROADCASTING			809-849 FIXED LAND MOBILE Mobile-satellite NG33A	Public Mobile (22) Satellite Communications (25) Private Land Mobile (90)
				849-851 AERONAUTICAL MOBILE	Public Mobile (22)
				851-854 LAND MOBILE	Public Safety Land Mobile (90S)
5.312 5.319				854-894 FIXED LAND MOBILE Mobile-satellite NG33A	Public Mobile (22) Satellite Communications (25) Private Land Mobile (90)
862-890 FIXED MOBILE except aeronautical mobile 5.317A BROADCASTING 5.322					
	5.317 5.318	5.149 5.305 5.306 5.307 5.320		US116 US268	Page 30

5.319 5.323					
1700-1710 FIXED METEOROLOGICAL-SATELLITE (space-to-Earth) MOBILE except aeronautical mobile 5.289 5.341		1700-1710 FIXED METEOROLOGICAL-SATELLITE (space-to-Earth) MOBILE except aeronautical mobile 5.289 5.341 5.384	5.341	5.341 US88	
1710-1930 FIXED MOBILE 5.384A 5.388A 5.388B 5.149 5.341 5.385 5.386 5.387 5.388			1710-1761 5.341 US91 US378 US385 1761-1780 SPACE OPERATION (Earth-to-space) G42 US91 1780-1850 FIXED MOBILE SPACE OPERATION (Earth-to-space) G42 1850-2025	1710-1780 FIXED MOBILE 5.341 US91 US378 US385 1780-1850 1850-2000 FIXED MOBILE Mobile-satellite NG33A	RF Devices (15) Personal Communications (24) Satellite Communications (25 Wireless Communications (27) Fixed Microwave (101)
1930-1970 FIXED MOBILE 5.388A 5.388B 5.388	1930-1970 FIXED MOBILE 5.388A 5.388B Mobile-satellite (Earth-to-space) 5.388	1930-1970 FIXED MOBILE 5.388A 5.388B 5.388			
1970-1980 FIXED MOBILE 5.388A 5.388B 5.388					
1980-2010 FIXED MOBILE MOBILE-SATELLITE (Earth-to-space) 5.351A 5.388 5.389A 5.389B 5.389F				2000-2020 FIXED MOBILE MOBILE-SATELLITE (Earth-to-space)	Satellite Communications (25) Wireless Communications (27)
2010-2025 FIXED MOBILE 5.388A 5.388B 5.388	2010-2025 FIXED MOBILE MOBILE-SATELLITE (Earth-to-space) 5.388 5.389C 5.389E	2010-2025 FIXED MOBILE 5.388A 5.388B 5.388		2020-2025 FIXED MOBILE	

2025-2110 SPACE OPERATION (Earth-to-space) (space-to-space) EARTH EXPLORATION-SATELLITE (Earth-to-space) (space-to-space) FIXED MOBILE 5.391 SPACE RESEARCH (Earth-to-space) (space-to-space) 5.392	2025-2110 SPACE OPERATION (Earth-to-space) (space-to-space) EARTH EXPLORATION-SATELLITE (Earth-to-space) (space-to-space) SPACE RESEARCH (Earth-to-space) (space-to-space) FIXED MOBILE 5.391 5.392 US90 US92 US222 US346 US347	2025-2110 FIXED NG118 MOBILE 5.391 5.392 US90 US92 US222 US346 US347	TV Auxiliary Broadcasting (74F) Cable TV Relay (78) Local TV Transmission (101J) Page 36

Table of Frequency Allocations — 2110-2483.5 MHz (UHF) — Page 37

International Table			United States Table		FCC Rule Part(s)
Region 1 Table	Region 2 Table	Region 3 Table	Federal Table	Non-Federal Table	
2110-2120 FIXED MOBILE 5.388A 5.388B SPACE RESEARCH (deep space) (Earth-to-space) 5.388			2110-2120 US252	2110-2120 FIXED MOBILE US252	Public Mobile (22) Wireless Communications (27) Fixed Microwave (101)
2120-2170 FIXED MOBILE 5.388A 5.388B 5.388	2120-2160 FIXED MOBILE 5.388A 5.388B Mobile-satellite (space-to-Earth) 5.388 2160-2170 FIXED MOBILE MOBILE-SATELLITE (space-to-Earth) 5.388 5.389C 5.389E	2120-2170 FIXED MOBILE 5.388A 5.388B 5.388	2120-2200	2120-2180 FIXED MOBILE NG41	
2170-2200 FIXED MOBILE MOBILE-SATELLITE (space-to-Earth) 5.351A 5.388 5.389A 5.389F				2180-2200 FIXED MOBILE MOBILE-SATELLITE (space-to-Earth)	Satellite Communications (25) Wireless Communications (27)
2200-2290 SPACE OPERATION (space-to-Earth) (space-to-space) EARTH EXPLORATION-SATELLITE (space-to-Earth) (space-to-space) FIXED MOBILE 5.391 SPACE RESEARCH (space-to-Earth) (space-to-space) 5.392			2200-2290 SPACE OPERATION (space-to-Earth) (space-to-space) US96 EARTH EXPLORATION-SATELLITE (space-to-Earth) (space-to-space) FIXED (line-of-sight only) MOBILE (line-of-sight only including aeronautical telemetry, but excluding flight testing of manned aircraft) 5.391 SPACE RESEARCH (space-to-Earth) (space-to-space) 5.392 US303	2200-2290 US96 US303	
2290-2300 FIXED MOBILE except aeronautical mobile			2290-2300 FIXED MOBILE except aeronautical mobile SPACE RESEARCH (deep space)	2290-2300 SPACE RESEARCH (deep space) (space-to-Earth)	

SPACE RESEARCH (deep space) (space-to-Earth)		(space-to-Earth)		
2300-2450 FIXED MOBILE 5.384A Amateur Radiolocation	2300-2450 FIXED MOBILE 5.384A RADIOLOCATION Amateur	2300-2305 G122	2300-2305 Amateur	Amateur Radio (97)
		2305-2310 US97 G122	2305-2310 FIXED MOBILE except aeronautical mobile RADIOLOCATION Amateur US97	Wireless Communications (27) Amateur Radio (97)
		2310-2320 Fixed Mobile US100 Radiolocation G2 US97 US327	2310-2320 FIXED MOBILE BROADCASTING-SATELLITE RADIOLOCATION US97 US100 US327	Wireless Communications (27)
		2320-2345 Fixed Radiolocation G2 US327	2320-2345 BROADCASTING-SATELLITE US327	Satellite Communications (25)
		2345-2360 Fixed Mobile US100 Radiolocation G2 US327	2345-2360 FIXED MOBILE US100 BROADCASTING-SATELLITE RADIOLOCATION US327	Wireless Communications (27)
		2360-2390 MOBILE US276 RADIOLOCATION G2 G120 Fixed US101	2360-2390 MOBILE US276 US101	Aviation (87) Personal Radio (95)
		2390-2395 MOBILE US276 US101	2390-2395 AMATEUR MOBILE US276 US101	Aviation (87) Personal Radio (95) Amateur Radio (97)
		2395-2400 US101 G122	2395-2400 AMATEUR US101	Personal Radio (95) Amateur Radio (97)
		2400-2417 5.150 G122	2400-2417 AMATEUR 5.150 5.282	RF Devices (15) ISM Equipment (18) Amateur Radio (97)
5.150 5.282 5.395	5.150 5.282 5.393 5.394	2417-2450 Radiolocation G2	2417-2450 Amateur	

		5.150	5.150 5.282	
2450-2483.5 FIXED MOBILE Radiolocation	2450-2483.5 FIXED MOBILE RADIOLOCATION	2450-2483.5	2450-2483.5 FIXED MOBILE Radiolocation	RF Devices (15) ISM Equipment (18) TV Auxiliary Broadcasting (74F) Private Land Mobile (90) Fixed Microwave (101)
5.150	5.150	5.150 US41	5.150 US41	Page 38

BILLING CODE 6712–01–C

(d) * * *

(33) * * *

(i) NG33A The secondary MSS operations in the bands 614–652 MHz and 663–769 MHz, 775–799 MHz, and 805–806 MHz, 824–849 MHz and 869–894 MHz, and 1850–1920 MHz and 1930–2000 MHz are limited to supplemental coverage from space (SCS) and are subject to the Commission's SCS rules in part 25 of this chapter.

(ii) [Reserved]

* * * * *

PART 9—911 REQUIREMENTS

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

Authority: 47 U.S.C. 151–154, 152(a), 155(c), 157, 160, 201, 202, 208, 210, 214, 218, 219, 222, 225, 251(e), 255, 301, 302, 303, 307, 308, 309, 310, 316, 319, 332, 403, 405, 605, 610, 615, 615 note, 615a, 615b, 615c, 615a–1, 616, 620, 621, 623, 623 note, 721, and 1471, and Section 902 of Title IX, Division FF, Pub. L. 116–260, 134 Stat. 1182, unless otherwise noted.

■ 7. Effective May 30, 2024, amend § 9.10 by revising paragraph (a) introductory text and adding paragraph (t) to read as follows:

§ 9.10 911 Service.

(a) *Scope of section.* Except as described in paragraph (r) of this section, the following requirements of paragraphs (a) through (t) of this section are only applicable to CMRS providers, excluding mobile satellite service (MSS) operators, to the extent that they:

* * * * *

(t) *Interim 911 requirements for supplemental coverage from space*—(1) *Supplemental coverage from space.* For purposes of this paragraph (t), *supplemental coverage from space (SCS)* has the same meaning as in part 25, subpart A, of this chapter; *SCS 911 calls* are 911 calls (as defined in § 9.3) that are carried over satellite facilities pursuant to a CMRS provider's SCS arrangement; and an *SCS 911 text message* is a 911 text message (as defined in paragraph (q)(9) of this section) that is carried over satellite facilities pursuant to a CMRS provider's SCS arrangement.

(2) *Call Transmission requirements.* For purposes of delivering SCS 911 voice calls and SCS 911 text messages, CMRS providers must either:

(i) Use information regarding the location of a device, including but not limited to device-based location information, to route SCS 911 voice calls and SCS 911 text messages to an appropriate PSAP and transmit the phone number of the device used to send the SCS 911 voice call or SCS 911 text message and available location information to an appropriate PSAP; or

(ii) Use an emergency call center, at which emergency call center personnel must determine the emergency caller's phone number and location and then transfer or otherwise direct the 911 caller to an appropriate PSAP.

■ 8. Delayed indefinitely, further amend § 9.10 by adding paragraphs (t)(3) through (5) to read as follows:

§ 9.10 911 Service.

* * * * *

(t) * * *

(3) *Reporting.* Each CMRS provider that utilizes SCS arrangements to expand its coverage areas for providing service to its end-user subscribers must maintain records of all SCS 911 voice calls and SCS 911 text messages received on its network and received at its emergency call center. By October 15 of each year, each CMRS provider that utilizes SCS arrangements to expand its coverage areas for providing service to its end-user subscribers must submit a report to the Commission regarding SCS 911 voice calls and 911 text messages, and its emergency call center data, current as of September 30 of that year. CMRS providers that utilize SCS arrangements to expand their coverage areas for providing service to their end-user subscribers must submit this certification in the Commission's Electronic Comment Filing System. These reports must include, at a minimum, the following:

(i) The name and address of the CMRS provider, the address of that CMRS provider's emergency call center, and the contact information of the emergency call center;

(ii) The aggregate number of SCS 911 voice calls and SCS 911 text messages received by the network of the CMRS provider that provides SCS service to its end-user subscribers during each month during the relevant reporting period;

(iii) The aggregate number of SCS 911 voice calls and SCS 911 text messages received by the emergency call center each month during the relevant reporting period;

(iv) The aggregate number of SCS 911 voice calls and SCS 911 text messages received by the emergency call center each month during the relevant reporting period that required forwarding to a PSAP and how many did not require forwarding to a PSAP;

(v) The aggregate number of SCS 911 voice calls that were routed using location information that met the timeliness and accuracy thresholds defined in paragraphs (s)(3)(i)(A) and (B) of this section;

(vi) The aggregate number of SCS 911 voice calls and SCS 911 text messages that were routed using location information that did not meet the timeliness and accuracy thresholds defined in paragraphs (s)(3)(i)(A) and (B) of this section; and

(vii) An explanation of how the SCS deployment, including network architecture, systems, and procedures, will support routing SCS 911 voice calls and SCS 911 text messages to the geographically appropriate PSAP with sufficient location information in compliance with paragraph (t)(2) of this section.

(4) *Certification.* CMRS providers that utilize SCS arrangements to expand their coverage areas for providing service to their end-user subscribers must certify on a one-time basis that neither they nor any third party they rely on to obtain location information or associated data used for compliance with paragraph (t)(2)(i) or (ii) of this section will use such location information or associated data for any non-911 purpose, except with prior express consent or as otherwise permitted or required by law. The certification must state that the CMRS provider and any third parties it relies on to obtain location information or associated data used for compliance with paragraph (t)(2)(i) or (ii) have implemented measures sufficient to safeguard the privacy and security of such location information or associated data. CMRS providers that utilize SCS arrangements to expand their coverage areas for providing service to their end-user subscribers must submit this one-time certification in the Commission's Electronic Comment Filing System on the due date of the first report made under paragraph (t)(3) of this section.

(5) *Subscriber notification.* Each CMRS provider that utilizes SCS arrangements to expand its coverage areas for providing service to its end-user subscribers shall specifically advise every subscriber, both new and existing, in writing prominently and in plain language, of the circumstances under which 911 service for all SCS 911 calls, or SCS 911 text messages may not be available via SCS or may be in some way limited by comparison to traditional enhanced 911 service.

PART 25—SATELLITE COMMUNICATIONS

■ 9. The authority citation for part 25 continues to read as follows:

Authority: 47 U.S.C. 154, 301, 302, 303, 307, 309, 310, 319, 332, 605, and 721, unless otherwise noted.

■ 10. Effective May 30, 2024, amend § 25.103 by adding definitions for ''Geographically independent area (GIA)'', ''SCS earth stations'', and ''Supplemental coverage from space (SCS)'' in alphabetical order to read as follows:

§ 25.103 Definitions.

* * * * *

Geographically independent area (GIA). Any of the following six areas:

(1) CONUS;

(2) Alaska;

(3) Hawaii;

(4) American Samoa;

(5) Puerto Rico/U.S. Virgin Islands; and

(6) Guam/Northern Mariana Islands.

* * * * *

SCS earth stations. Any earth station used for the provision of supplemental coverage from space consistent with § 25.115(q).

* * * * *

Supplemental coverage from space (SCS). The provision of coverage to terrestrial wireless subscribers through an arrangement or agreement (see § 1.9047 of this chapter) between one or more NGSO or GSO operator(s) and one or more terrestrial wireless licensee(s), involving transmissions between space stations and SCS earth stations. NGSO and GSO operators and terrestrial wireless service licensees seeking to provide SCS must be authorized in compliance with § 25.125.

* * * * *

■ 11. Effective May 30, 2024, amend § 25.109 by adding paragraph (f) to read as follows:

§ 25.109 Cross-reference.

* * * * *

(f) Space and SCS earth stations providing SCS are subject to technical rules in parts 2, 22, 24, and 27 of this chapter where applicable.

■ 12. Effective May 30, 2024, amend § 25.114 by adding paragraph (a)(4) to read as follows:

§ 25.114 Applications for space station authorizations.

(a) * * *

(4) For an application filed pursuant to the SCS procedure in § 25.125, the filing must be submitted on FCC Form 312, Main Form and Schedule S, with attached exhibits as required by paragraph (d) of this section, and must constitute a comprehensive proposal.

* * * * *

■ 13. Effective May 30, 2024, amend § 25.115 by adding paragraph (q) to read as follows:

§ 25.115 Applications for earth station authorizations.

* * * * *

(q) *SCS earth stations.* An applicant seeking to use SCS earth stations to provide SCS must comply with § 25.125.

(1) A satellite operator licensed under § 25.125 to provide SCS is permitted to communicate with all terrestrial wireless licensee(s)-associated SCS earth stations that have been approved for such use under part 2 of this chapter.

(i) Such earth stations must show compliance with this part and at least one of either part 22, 24, or 27 of this chapter to provide SCS within the technical parameters and provisions associated with the device certification.

(ii) The device certification must show compliance with the licensed parameters of the terrestrial wireless license(s) and at least one of either part 22, 24, or 27 of this chapter, as applicable.

(2) An earth station may be used for the provision of SCS when:

(i) The satellite operator licensed under § 25.125 is a party to a valid and approved spectrum leasing arrangement or agreement pursuant to § 1.9047 of this chapter with at least one terrestrial wireless licensee(s) licensed under one of either part 22, 24, or 27 of this chapter; and

(ii) That terrestrial wireless licensee(s) has met and operates within all conditions associated with the relevant terrestrial wireless license(s).

(3) A satellite operator authorized to provide SCS under § 25.125 is authorized under paragraph (q)(1) of this section to communicate with SCS earth stations for any period during which each of the following apply:

(i) The service is provided during the valid duration of any spectrum leasing arrangement or agreement pursuant to § 1.9047 of this chapter between the terrestrial wireless licensee(s) and satellite operator;

(ii) The devices to which service is provided are certified under part 2 of this chapter; and

(iii) The terrestrial wireless licensee(s) is a valid licensee(s) under part 22, 24, or 27 of this chapter.

(4) A satellite operator with SCS authorization via a market access grant can avail itself of the provisions of this paragraph (q) but, in addition to the parameters established in paragraphs (q)(1) and (2) of this section, must also comply with any additional parameters included in the satellite operator's space station market access grant.

(5) A satellite operator operating in conformance with the parameters established in this part does not need a separate earth station authorization for the provision of SCS under this part.

■ 14. Effective May 30, 2024, amend § 25.117 by adding paragraph (j) to read as follows:

§ 25.117 Modification of station license.

* * * * *

(j) An application for modification of a space station authorization to provide SCS must comply with § 25.125.

■ 15. Effective May 30, 2024, add § 25.125 to read as follows:

§ 25.125 Applications for supplemental coverage from space (SCS).

(a) *SCS entry criteria.* This section applies only to applicants seeking to provide SCS. An applicant for SCS space station authorization must hold either an existing NGSO or GSO license or grant of U.S. market access under this part, or must be seeking a NGSO or GSO license or grant of U.S. market access under this part, and must have a lease arrangement(s) or agreement pursuant to § 1.9047 of this chapter with one or more terrestrial wireless licensee(s) that hold, collectively or individually, all co-channel licenses throughout a GIA in a band identified in § 2.106(d)(33)(i) of this chapter. Applicants for SCS space stations must comply with the requirements set forth in paragraph (b) of this section.

(b) *SCS space station application requirements.* An applicant seeking a space station authorization to provide SCS must either submit an application requesting modification of a current NGSO or GSO license or grant of U.S. market access under this part, or an application seeking a new NGSO or GSO license or grant of U.S. market access under this part.

(1)–(2) [Reserved]

(3) Applications to modify an authorization under this part to provide SCS and applications seeking to provide SCS in the bands identified in § 2.106(d)(33)(i) of this chapter will not be subject to the processing round procedures or first-come, first-served procedures in §§ 25.137, 25.157, and 25.158.

(c) [Reserved]

(d) *Effective date and continued operation of SCS authorization.* SCS authorization will be deemed effective in the Commission's records and for purposes of the application of the rules set forth in this section after each of the following requirements is satisfied:

(1) Grant of:

(i) A modification application under this part or request for modification of a grant of market access; or

(ii) An application to launch and operate or market access;

(2) Approval of a leasing arrangement(s) or agreement(s) under part 1 of this chapter (*see* § 1.9047 of this chapter); and

(3) Grant of a valid SCS earth station equipment certification under part 2 of this chapter.

(e) *SCS earth station equipment certification requirements.* Applicants for certification for SCS earth stations for use with a satellite system must meet all requirements for equipment certification and equipment test data necessary to demonstrate compliance with pertinent standards under part 22, 24, or 27 of this chapter as applicable.

■ 16. Delayed indefinitely, further amend § 25.125 by adding paragraphs (b)(1) and (2) and (c) to read as follows:

§ 25.125 Applications for supplemental coverage from space (SCS).

* * * * *

(b) * * *

(1) The application must include a certification that:

(i) A lease notification(s) or application(s), pursuant to § 1.9047 of this chapter, where a single terrestrial wireless licensee holds or multiple co-channel licensees collectively hold all co-channel licenses within the relevant GIA in the bands identified in § 2.106(d)(33)(i) of this chapter, or as it pertains to FirstNet, an agreement, is on file with the Commission;

(ii) The current space station licensee under this part or grantee of market access for NGSO or GSO satellite operation under this part seeks modification of authority to provide SCS in the same geographic areas covered in the relevant GIA, or the applicant for a space station license under this part or grant of market access for NGSO or GSO satellite operation under this part seeks to provide SCS in the same geographic areas covered in the relevant GIA; and

(iii) SCS earth stations will qualify as ''licensed by rule'' earth stations under § 25.115(q).

(2) The application must include a comprehensive proposal for the prospective SCS system on FCC Form 312, Main Form and Schedule S, as described in § 25.114, together with the certification described in paragraph (b)(1) of this section and include a list of the file and identification numbers associated with the relevant leasing notification(s) under part 1 of this chapter, application(s), and FCC Form 601(s), with a brief description of the coverage areas that will be served, domestically and internationally.

* * * * *

(c) *Equipment authorization for SCS earth stations.* Each SCS earth station used to provide SCS under this section must meet the equipment authorization requirements under paragraph (e) of this section and all equipment authorization requirements for all intended uses of the device pursuant to the procedures specified in part 2 of this chapter and the requirements of at least one of part 22, 24, or 27 of this chapter.

* * * * *

■ 17. Effective May 30, 2024, amend § 25.137 by revising paragraphs (b) and (f) to read as follows:

§ 25.137 Requests for U.S. market access through non-U.S.-licensed space stations.

* * * * *

(b) Any request pursuant to paragraph (a) of this section must be filed electronically through the International Communications Filing System and must include an exhibit providing legal and technical information for the non-U.S.-licensed space station of the kind that § 25.114, § 25.122, § 25.123, or § 25.125 would require in a license application for that space station, including but not limited to information required to complete Schedule S. An applicant may satisfy the requirement in this paragraph (b) by cross-referencing a pending application containing the requisite information or by citing a prior grant of authority to communicate via the space station in question in the same frequency bands to provide the same type of service.

* * * * *

(f) A non-U.S.-licensed space station operator that has been granted access to the United States market pursuant to a declaratory ruling may modify its U.S. operations under the procedures set forth in §§ 25.117(d), (h), and (j) and 25.118(e).

* * * * *

■ 18. Effective May 30, 2024, amend § 25.161 by adding paragraph (e) to read as follows:

§ 25.161 Automatic termination of station authorization.

* * * * *

(e) The failure to provide any SCS on all or some of the SCS authorized frequencies for more than 90 days. In this instance, the authorization will be terminated in whole or in part with respect to the relevant frequencies on which SCS has not been operational for more than 90 days in the United States, unless specific authority is requested.

■ 19. Effective May 30, 2024, amend § 25.202 by adding paragraph (k) read as follows:

§ 25.202 Frequencies, frequency tolerance, and emission limits.

* * * * *

(k) Space station downlinks operating as SCS under the provisions of § 25.125 and § 2.106(d)(33)(i) of this chapter are subject to the following rules.

(1) *Out of band emission limits.* Notwithstanding the emission limitations of paragraph (f) of this section, the aggregation of all space station downlink emissions outside a licensee's SCS frequency band(s) of operation shall not exceed a power flux density of −120 dBW/m²/MHz at 1.5 meters above ground level.

(2) *Interference caused by out of band emissions.* If any emission from a transmitter operating in the SCS service results in harmful interference to users of another radio service, the FCC may require a greater attenuation of the emission than specified in this section.

■ 20. Effective May 30, 2024, amend § 25.204 by revising the section heading and adding paragraph (g) to read as follows:

§ 25.204 Power and out-of-band emission limits for earth stations.

* * * * *

(g) SCS earth stations providing SCS pursuant to §§ 25.125 and 25.115 shall comply with the power requirements and out-of-band emission limits corresponding to devices operating in part 22, 24, or 27 of this chapter (*e.g.*, § 22.913, § 24.232, or § 27.50), as required for their operating frequencies.

■ 21. Effective May 30, 2024, amend § 25.208 by revising the section heading and adding paragraph (w) to read as follows:

§ 25.208 Power flux-density and in-band field strength limits.

* * * * *

(w) The aggregate field strength at the earth's surface produced by all visible beams and satellites within each satellite constellation providing SCS service as they move over any given point or area in bands authorized by NG33A in the United States Table of Frequency Allocations and § 25.125 must meet:

(1) 40 dBμV/m for the 600 MHz, 700 MHz, and 800 MHz bands; and

(2) 47 dμV/m for the AWS and PCS bands; and

(3) Licensees must comply with all applicable provisions and requirements of treaties and other international agreements between the United States Government and the governments of other countries, including Canada and Mexico. Absent specific international agreements regarding SCS, licensees must comply with the limited provided

in paragraphs (w)(1) and (2) of this section.

[FR Doc. 2024–06669 Filed 4–29–24; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 622

[Docket No. 240424–0118]

RIN 0648–BM63

Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Fishery Management Plans of Puerto Rico, St. Croix, and St. Thomas and St. John; Framework Amendment 2

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

ACTION: Final rule.

SUMMARY: NMFS issues regulations to implement management measures described in Framework Amendment 2 to each of the Puerto Rico, St. Croix, and St. Thomas and St. John Fishery Management Plans (FMPs). This final rule modifies annual catch limits (ACLs) for spiny lobster in the U.S. Caribbean exclusive economic zone (EEZ) around Puerto Rico, St. Croix, and St. Thomas and St. John. The purpose of this final rule is to update management reference points for spiny lobster under the FMPs, consistent with the best scientific information available to prevent overfishing and achieve optimum yield (OY).

DATES: This final rule is effective on May 30, 2024.

ADDRESSES: An electronic copy of Framework Amendment 2, which includes an environmental assessment, a regulatory impact review, and a Regulatory Flexibility Act analysis, may be obtained from the Southeast Regional Office website at *https://www.fisheries.noaa.gov/action/generic-framework-amendment-2-updates-spiny-lobster-overfishing-limit-acceptable-biological.*

FOR FURTHER INFORMATION CONTACT: Sarah Stephenson, NMFS Southeast Regional Office, telephone: 727–824–5305, *sarah.stephenson@noaa.gov.*

SUPPLEMENTARY INFORMATION: The Puerto Rico, St. Croix, and St. Thomas and St. John fisheries target spiny lobster, and are managed under their respective FMPs. The FMPs were prepared by the Caribbean Fishery Management Council (Council) and NMFS. NMFS implements the FMPs through regulations at 50 CFR part 622 under the authority of the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act).

On January 31, 2024, NMFS published a proposed rule to implement management measures described in Framework Amendment 2 and requested public comment (89 FR 6085). The proposed rule and Framework Amendment 2 describe the rationale for the actions contained in this final rule. A summary of the management measures described in Framework Amendment 2 and implemented by this final rule is provided below.

All weights described in this final rule are in round weight.

Background

The Magnuson-Stevens Act requires NMFS and regional fishery management councils to prevent overfishing and to achieve, on a continuing basis, the OY from federally managed fish stocks to ensure that fishery resources are managed for the greatest overall benefit to the Nation, particularly with respect to providing food production and recreational opportunities, and protecting marine ecosystems.

For Puerto Rico and the U.S. Virgin Islands, NMFS, with the advice of the Council, manages fisheries under the Puerto Rico, St. Croix, and St. Thomas and St. John FMPs. The FMPs contain management measures applicable for Federal waters off the respective island group. Federal waters around Puerto Rico extend seaward from 9 nautical miles [nmi; 16.7 kilometers (km)] from shore to the offshore boundary of the EEZ. Federal waters around St. Croix, and St. Thomas and St. John extend seaward from 3 nmi (5.6 km) from shore to the offshore boundary of the EEZ.

For spiny lobster in the U.S. Caribbean EEZ, only commercial landings data are collected. Because recreational landings data are not available, the ACLs for spiny lobster are based on commercial landings and apply to all harvest for the stock, whether commercial or recreational.

In 2019, the Southeast Data, Assessment, and Review (SEDAR) completed three separate assessments for spiny lobster for the Puerto Rico, St. Croix, and St. Thomas and St. John management areas (SEDAR 57). In response to SEDAR 57 and recommendations from their Scientific and Statistical Committee (SSC), the Council prepared Framework Amendment 1 to the FMPs to update the overfishing limits (OFLs), acceptable biological catch (ABCs), ACLs, and accountability measures (AMs) for spiny lobster. NMFS published the final rule that implemented Framework Amendment 1 on March 16, 2023 (88 FR 16194).

After NMFS implemented the final rule for Framework Amendment 1, the Council requested that the NMFS Southeast Fisheries Science Center (SEFSC) conduct an update to SEDAR 57 to provide OFL and ABC estimates for spiny lobster for each island group for 2024 to 2026, which were not included in SEDAR 57. The SEFSC presented results of the 2022 Update Assessment to SEDAR 57 (SEDAR 57 Update) to the Council's SSC at its November–December 2022 meeting. The SSC accepted the SEDAR 57 Update and OFLs and ABCs for spiny lobster under each FMP.

Consistent with the SEDAR 57 Update, and recommendations from the SSC, the Council developed Framework Amendment 2 to prevent overfishing of spiny lobster and achieve OY for each stock, consistent with the requirements of the Magnuson-Stevens Act. For each FMP, the Council recommended ACLs for spiny lobster equal to 95 percent of the ABCs recommended by the SSC, which reflects the Council's management uncertainty buffer.

Management Measures Contained in This Final Rule

For spiny lobster, this final rule revises the ACLs in the EEZ around Puerto Rico, St. Croix, and St. Thomas and St. John based on the SEDAR 57 Update.

For the EEZ around Puerto Rico, the ACL for spiny lobster will decrease from the current ACL of 366,965 pounds (lb) or 166,452 kilograms (kg) to 357,629 lb (162,218 kg).

For the EEZ around St. Croix, the ACL for spiny lobster will increase from the current ACL of 120,830 lb (54,807 kg) to 137,254 lb (62,257 kg).

For the EEZ around St. Thomas and St. John, the ACL for spiny lobster will increase from the current ACL of 126,089 lb (57,193 kg) to 133,207 lb (60,422 kg).

Measures in Framework Amendment 2 Not Codified in This Final Rule

In addition to the ACLs described in this final rule, Framework Amendment 2 specifies the OFL and ABC for spiny lobster for Puerto Rico, St. Croix, and St. Thomas and St. John.

For the Puerto Rico FMP, the OFL for spiny lobster will decrease from 438,001 lb (198,673 kg) to 426,858 lb (193,620 kg) and the ABC for spiny lobster would

decrease from 386,279 lb (175,213 kg) to 376,452 lb (170,756 kg).

For the St. Croix FMP, the OFL for spiny lobster will increase from 144,219 lb (65,416 kg) to 163,823 lb (74,309 kg) and the ABC for spiny lobster would increase from 127,189 lb (57,691 kg) to 144,478 lb (65,534 kg).

For the St. Thomas and St. John FMP, the OFL for spiny lobster will increase from 150,497 lb (68,264 kg) to 158,993 lb (75,118 kg) and the ABC for spiny lobster would increase from 132,725 lb (60,203 kg) to 140,218 (63,602 kg).

Comments and Responses

NMFS received two comment submissions on the proposed rule implementing Framework Amendment 2. One comment received was in support of the proposed rule and one was opposed. The comment in opposition included multiple points, which are stated below in three separate comments, along with NMFS' responses. The commenter also noted the need for more research on spiny lobster, which was outside the scope of the proposed rule. There have been no changes to the proposed rule as a result of public comment.

Comment 1: If the purpose of the proposed rule implementing Framework Amendment 2 is to achieve OY and address overfishing, it will not do this.

Response 1: NMFS disagrees that the regulations it has proposed would not achieve OY. These regulations implement Framework Amendment 2, which the Council developed to update OFLs, ABCs, and ACLs for spiny lobster stocks based on the best scientific information available (the SEDAR 57 Update) to prevent overfishing and achieve OY. NMFS has determined that Framework Amendment 2 is based on the best scientific information available, consistent with the Magnuson-Stevens Act.

Comment 2: The action should expand beyond the Caribbean EEZ into other areas where spiny lobsters are fished like Florida.

Response 2: Under the Magnuson-Stevens Act, the Caribbean Council does not have the authority to decide on management measures for areas beyond the range of the Caribbean island management areas. 16 U.S.C. 1852(a)(1)(D). This comment is also beyond the scope of the proposed rule.

Comment 3: In the most recent seasons, Puerto Rico did not come remotely close to exceeding their ACL, so it does not make sense to decrease their ACL. It also does not make sense to increase St. Croix, St. Thomas and St. John's ACL considering they have been significantly under the ACL for years. Additionally, NMFS states that the stocks are not overfished. Therefore, localized management by the proposed action does not make sense, especially considering its skewed effect on fishing in Puerto Rican waters.

Response 3: As described in Framework Amendment 2 and the proposed rule, the SEDAR 57 Update included spiny lobster stocks in Puerto Rico, St. Croix, and St. Thomas and St. John, and updated the OFLs and ABCs for spiny lobster for each island management area. The Council recommended ACLs for spiny lobster in each FMP based on the updated ABCs. Reference points derived from stock assessments help fishery managers determine the level of catch that can be removed from the population each year. If the catch levels used in the stock assessment model are well below the sustainable population level (*i.e.,* maximum sustainable yield) estimated for the species, then the resulting catch targets (OFL, ABC, and ACL) could increase and fishermen would be able to catch fish that were previously left in the water. This scenario explains the increase in spiny lobster ACLs for St. Croix and St. Thomas and St. John. Conversely, if catch levels used in the stock assessment model are above, or are projected to be above, the sustainable population level estimated for the species, then the resulting catch targets (OFL, ABC, and ACL) could decrease, as is the scenario for Puerto Rico spiny lobster.

SEDAR 57 included landings data through 2016, and the SEDAR 57 Update included landings data through 2021. Catch of spiny lobster in Puerto Rico from 2017 through 2019 increased substantially, requiring accountability-based seasonal closures in fishing years 2021 (86 FR 40787, July 29, 2021) and 2022 (87 FR 38008, June 27, 2022). The next stock assessments for spiny lobster, SEDAR 91, are scheduled to begin in late-summer or early-fall of 2024, and would use updated information for the species.

Classification

Pursuant to section 304(b)(1)(A) of the Magnuson-Stevens Act, the NMFS Assistant Administrator has determined that this final rule is consistent with Framework Amendment 2, the FMPs, other provisions of the Magnuson-Stevens Act, and other applicable laws.

This final rule has been determined to be not significant for purposes of Executive Order 12866.

The Magnuson-Stevens Act provides the legal basis for this final rule. No duplicative, overlapping, or conflicting Federal rules have been identified. In addition, no new reporting and record-keeping requirements are introduced by this final rule. A description of this final rule, why it is being considered, and the purposes of this final rule are contained in the **SUMMARY** and **SUPPLEMENTARY INFORMATION** sections of this final rule.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration during the proposed rule stage that this action would not have a significant economic impact on a substantial number of small entities. The factual basis for the certification was published in the proposed rule and is not repeated here. No comments were received regarding this certification. As a result, a regulatory flexibility analysis was not required and none was prepared.

This final rule contains no information collection requirements under the Paperwork Reduction Act of 1995.

List of Subjects in 50 CFR Part 622

Caribbean, Fisheries, Fishing, Spiny lobster.

Dated: April 24, 2024.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

For the reasons set out in the preamble, NMFS amends 50 CFR part 622 as follows:

PART 622—FISHERIES OF THE CARIBBEAN, GULF OF MEXICO, AND SOUTH ATLANTIC

■ 1. The authority citation for part 622 continues to read as follows:

Authority: 16 U.S.C. 1801 *et seq.*

■ 2. In § 622.440, revise paragraph (c)(1) to read as follows:

§ 622.440 Annual catch limits (ACLs), annual catch targets (ACTs), and accountability measures (Ams).

* * * * *

(c) * * *

(1) The ACL is 357,629 lb (162,218 kg), round weight.

* * * * *

■ 3. In § 622.480, revise paragraph (c)(1) to read as follows:

§ 622.480 Annual catch limits (ACLs), annual catch targets (ACTs), and accountability measures (Ams).

* * * * *

(c) * * *

(1) The ACL is 137,254 lb (62,257 kg), round weight.

* * * * *

■ 4. In § 622.515, revise paragraph (c)(1) to read as follows:

§ 622.515 Annual catch limits (ACLs), annual catch targets (ACTs), and accountability measures (AMs).

* * * * *

(c) * * *

(1) The ACL is 133,207 lb (60,422 kg), round weight.

* * * * *

[FR Doc. 2024–09227 Filed 4–29–24; 8:45 am]

BILLING CODE 3510–22–P

Proposed Rules

Federal Register
Vol. 89, No. 84
Tuesday, April 30, 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 71

[Docket No. FAA–2024–0775; Airspace Docket No. 24–ASW–6]

RIN 2120–AA66

Establishment of Class E Airspace; Lubbock, TX

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to establish Class E airspace at Lubbock, TX. The FAA is proposing this action to support new instrument procedures at this airport.

DATES: Comments must be received on or before June 14, 2024.

ADDRESSES: Send comments identified by FAA Docket No. FAA–2024–0775 and Airspace Docket No. 24–ASW–6 using any of the following methods:

* *Federal eRulemaking Portal:* Go to *www.regulations.gov* and follow the online instruction 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 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: Raul Garza Jr., Federal Aviation Administration, Operations Support Group, Central Service Center, 10101 Hillwood Parkway, Fort Worth, TX 76177; telephone (817) 222–5874.

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 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 establish Class E airspace extending upward from 700 feet above the surface at Lubbock Exec Airpark, Lubbock, TX, to support instrument flight rule (IFR) operations at this airport.

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 received 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 dely. 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 post 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–14FDMS), 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 Office (see the **ADDRESSES** section for the address, phone number, and hours of operations). An informal docket may also be examined during normal business hours at the Federal Aviation Administration, Air Traffic Organization, Central Service Center, Operations Support Group, 10101 Hillwood Parkway, Fort Worth, TX 76177.

Incorporation by Reference

Class E airspace is published in paragraph 6005 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 subsequently 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.

The Proposal

The FAA is proposing to amend 14 CFR part 71 by:

Establishing Class E airspace extending upward from 700 feet above the surface within a 6.7-mile radius of Lubbock Exec Airpark, Lubbock, TX.

This action is to support new instrument procedures and IFR operations at this airport.

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 6005 Class E Airspace Areas Extending Upward From 700 Feet or More Above the Surface of the Earth.

* * * * *

ASW TX E5 Lubbock, TX [Establish]

Lubbock Exec Airpark, TX
(Lat 33°29′01″ N, long 101°48′49″ W)

That airspace extending upward from 700 feet above the surface within a 6.7-mile radius of Lubbock Exec Airpark.

* * * * *

Issued in Fort Worth, Texas, on April 22, 2024.

Steven Phillips,

Acting Manager, Operations Support Group, ATO Central Service Center.

[FR Doc. 2024–09010 Filed 4–29–24; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2024–0732; Airspace Docket No. 24–ASW–5]

RIN 2120–AA66

Establishment of Class E Airspace; Utopia, TX

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This action proposes to establish Class E airspace at Utopia, TX. The FAA is proposing this action to support new instrument procedures at this airport.

DATES: Comments must be received on or before June 14, 2024.

ADDRESSES: Send comments identified by FAA Docket No. FAA–2024–0732 and Airspace Docket No. 24–ASW–5 using any of the following methods:

* *Federal eRulemaking Portal:* Go to *www.regulations.gov* and follow the online instruction 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 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: Raul Garza Jr., Federal Aviation Administration, Operations Support Group, Central Service Center, 10101 Hillwood Parkway, Fort Worth, TX 76177; telephone (817) 222–5874.

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 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 establish Class E airspace extending upward from 700 feet above the surface at 4D Ranch, Utopia, TX, to support instrument flight rule (IFR) operations at this airport.

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 received 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 dely. 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 post 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–14FDMS), 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 Office (see the **ADDRESSES** section for the address, phone number, and hours of operations). An informal docket may also be examined during normal business hours at the Federal Aviation Administration, Air Traffic Organization, Central Service Center, Operations Support Group, 10101 Hillwood Parkway, Fort Worth, TX 76177.

Incorporation by Reference

Class E airspace is published in paragraph 6005 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 subsequently 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.

The Proposal

The FAA is proposing to amend 14 CFR part 71 by:

Establishing Class E airspace extending upward from 700 feet above the surface within a 10-mile radius of 4D Ranch, Utopia, TX.

This action is to support new instrument procedures and IFR operations at this airport.

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 6005 Class E Airspace Areas Extending Upward From 700 Feet or More Above the Surface of the Earth.

* * * * *

ASW TX E5 Utopia, TX [Establish]

4D Ranch, TX
(Lat 29°42′49″ N, long 99°32′44″ W)

That airspace extending upward from 700 feet above the surface within a 10-mile radius of 4D Ranch.

* * * * *

Issued in Fort Worth, Texas, on April 22, 2024.

Steven Phillips,

Acting Manager, Operations Support Group, ATO Central Service Center.

[FR Doc. 2024–09011 Filed 4–29–24; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 100

[Docket Number USCG–2024–0361]

RIN 1625–AA08

Special Local Regulation; Back River, Baltimore County, MD

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard is proposing to establish special local regulations to provide for the safety of life on certain waters of the Back River, in Baltimore County, MD. These regulations would be enforced during a high-speed power boat event and air show which will be held annually, on the 2nd, 3rd or 4th weekend (Friday, Saturday, and Sunday) in July. This proposed rulemaking would prohibit persons and vessels from being in the regulated area unless authorized by the Captain of the Port, Maryland-National Capital Region,

or the Coast Guard Event Patrol Commander. We invite your comments on this proposed rulemaking.

DATES: Comments and related material must be received by the Coast Guard on or before May 30, 2024.

ADDRESSES: You may submit comments identified by docket number USCG–2024–0361 using the Federal Decision-Making Portal at *https://www.regulations.gov.* See the ''Public Participation and Request for Comments'' portion of the **SUPPLEMENTARY INFORMATION** section for further instructions on submitting comments. This notice of proposed rulemaking with its plain-language, 100-word-or-less proposed rule summary will be available in this same docket.

FOR FURTHER INFORMATION CONTACT: If you have questions about this proposed rulemaking, call or email Petty Officer Hollie Givens, U.S. Coast Guard Sector Maryland-National Capital Region; telephone 410–576–2596, email *MDNCRMarineEvents@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR Code of Federal Regulations
COTP Captain of the Port, Sector Maryland-National Capital Region
DHS Department of Homeland Security
FR Federal Register
NPRM Notice of proposed rulemaking
PATCOM Patrol Commander
§ Section
SLR Special Local Regulations
U.S.C. United States Code

II. Background, Purpose, and Legal Basis

Coast Guard regulations define ''regatta or marine parade'' as an organized water event of limited duration which is conducted according to a prearranged schedule. 33 CFR 100.05(a). And, as explained in 33 CFR 100.15, Coast Guard requires that an organization planning to hold a regatta or marine event apply for a permit if the event, by its nature, circumstances, or location, will introduce extra or unusual hazards to the safety of life on the navigable waters of the United States. These permits may be approved by the Coast Guard, or by the state in which the event is to take place, if there is a Coast Guard-State agreement in place. See 33 CFR 100.10. Upon the approval of an application, the Captain of the Port, Sector Maryland-National Capital Region (COTP) may promulgate such ''Special Local Regulations'' (SLR's) as he or she deems necessary to insure safety of life on the navigable waters immediately prior to, during, and immediately after the event. *See* 33 CFR 100.35(a).

Tiki Lee's Dock Bar of Sparrows Point, MD has submitted permit applications for two separate but concurrently held annual events in previous years. These events are ''Tiki Lee's Shootout on the River High Speed Power Boat'' event, and ''Tiki Lee's Shootout on the River Air Show.'' In the past, the Coast Guard has created temporary SLR's (which expire after a particular year's events have taken place) for the events. Because Tiki Lee's Dock Bar has indicated that it intends to continue to submit applications annually to hold these events (on the 2nd, 3rd or 4th, Friday, Saturday, and Sunday in July), however, we are proposing to incorporate the SLR into a permanent rule for these recurring events (33 CFR 100.501). Such permanent rule would not expire, but it would only be subject to enforcement during periods when the events are taking place. The Coast Guard would supplement the rule each year, when an application for the current year's events is approved, with a Notification of Enforcement providing specifics about enforcement times.

In ''Tiki Lee's Shootout on the River High Speed Power Boat'' event, approximately 40 participants compete with one another, completing individually-timed power boat speed runs on a designated, marked, linear course. The course is located in Baltimore County, Maryland, on the Back River, between Porter Point, to the south, and Stansbury Point, to the north. Both the power boat event and the air show are being held adjacent to Tiki Lee's Dock Bar, 4309 Shore Road, Sparrows Point, in Baltimore County, MD, but the speed power boat course area is different from the air show's aerobatic box. Among the hazards the high-speed power boat event pose are the chance that collisions will occur between event participants operating within, or adjacent to the navigation channel designated for the event, and non-participants traveling through that channel, or within approaches to local marinas, boat facilities and waterfront residential communities.

In ''Tiki Lee's Shootout on the River Air Show,'' civilian and military aircraft perform an air show flying low, and at high speeds. Air show performers operate within a designated, marked aerobatics box located on the Back River, between Lynch Point, to the south, and Walnut Point, to the north. Hazards from the air show which would threaten people in vessels traveling in the area if such vessels were allowed to do so without restriction include risks of injury or death resulting from aircraft accidents, being hit by dangerous projectiles or falling debris, and the chance that spectators and through traffic distracted by the air show would collide. Hazards to the environment in the event of a collision include hazardous materials spills.

The COTP Maryland-National Capital Region has determined that the potential hazards associated with the high-speed power boat event and air show would be a safety concern for anyone intending to participate in this event and for vessels that operate within specified waters of the Back River. The purpose of this rulemaking is to protect event participants, non-participants, and transiting vessels before, during, and after the scheduled event. The Coast Guard is proposing this rulemaking under authority in 46 U.S.C. 70041.

III. Discussion of Proposed Rule

The COTP proposes to establish special local regulations which may be subject to enforcement in a particular year on the 2nd, 3rd or 4th weekend (Friday, Saturday, and Sunday) in July. The regulated area for both events would cover all navigable waters of the Back River within an area which is approximately 4,200 yards in length and 1,200 yards in width. It is described with particularity in the draft regulatory text, below. The regulated area is Within the regulated area, specific zones would be designated as a ''Course Area,'' a ''Buffer zone,'' an ''Aerobatics Box,'' and three ''Spectator Areas,'' the ''East Spectator Fleet Area,'' the ''Northwest Spectator Fleet Area,'' and the Southwest Spectator Fleet Area.'' These are defined in the draft regulatory text, below. We have filed chartlets in the docket which depict these areas visually to aid commenters, but only the language of the draft regulatory text would be included in the regulation. To access documents mentioned as being available in the docket, go to section V of this document (''Public Participation and Request for Comments'').

While there are two separate events and while both are held on the same weekends, the two events will not necessarily occur at the same time, or on the same days. Historically, the air show has occurred on Friday, Saturday, and Sunday, while the high-speed power boat runs have occurred on Saturday, with a rain date of Sunday. On Saturday, when both events occur, the high-speed power boat runs have been halted at 2 p.m. to accommodate the air show. The speed runs then have then resumed at 3 p.m. and continue until they have finished.

The proposed enforcement periods and and the size of the regulated area were chosen to ensure the safety of life

on these navigable waters before, during, and after activities associated with the high-speed power boat event and air show. As is now provided in 33 CFR 10.501(a), the Coast Guard would publish an annual notification of enforcement (identifying the overall enforcement periods and periods of enforcement of particular zones within the regulated area) in the **Federal Register**, provide notice in the Fifth Coast Guard District Local Notice to Mariners, and issue a marine information broadcast on VHF–FM marine band radio announcing specific event dates and times.

Consistent with 33 CFR 100.35(a), the COTP and the Coast Guard Event PATCOM would have authority to forbid or control the movement of all vessels and persons, including event participants, in the regulated area. When hailed or signaled by an official patrol, a vessel or person in the regulated area would be required to immediately comply with the directions given by the COTP or Event PATCOM, as is now provided in 33 CFR 100.501(d). If a person or vessel fails to follow such directions, the Coast Guard may expel them from the area, issue them a citation for failure to comply, or both.

Only participant vessels would be allowed to enter the course area and aerobatics box. Except for Tiki Lee's Shootout on the River participants and vessels already at berth, a vessel or person would be required to get permission from the COTP or Event PATCOM before entering the regulated area. Vessel operators would be able to request permission to enter and transit through the regulated area by contacting the Event PATCOM on VHF–FM channel 16. Operators of vessels already at berth desiring to move those vessels when the event is subject to enforcement would be required to obtain permission before doing so.

If permission is granted by the COTP or Event PATCOM, a person or vessel would be allowed to enter the regulated area or pass directly through the regulated area as instructed. Vessels would be required to operate at a safe speed that minimizes wake while within the regulated area in a manner that would not endanger event participants or any other craft.

A person or vessel not registered with the event sponsor as a participant or assigned as official patrols would be considered a spectator. A spectator vessel must not loiter within the navigable channel while within the regulated area. Official patrol vessels would direct spectators to the designated spectator area. Official Patrols are any vessel assigned or approved by the Commander, Coast Guard Sector Maryland-National Capital Region with a commissioned, warrant, or petty officer onboard and displaying a Coast Guard ensign. Official Patrols enforcing this regulated area can be contacted on VHF–FM channel 16 and channel 22A.

This proposed rule would modify 33 CFR 100.501 by listing a new recurring marine event in Table 2 to Paragraph (i)(2), which covers the Coast Guard Sector Maryland-National Capital Region COTP Zone. The Coast Guard is proposing this rulemaking under authority in 46 U.S.C. 70041.

The regulatory text we are proposing appears at the end of this document.

IV. Regulatory Analyses

We developed this proposed rule after considering numerous statutes and Executive orders related to rulemaking. Below we summarize our analyses based on a number of these statutes and Executive orders, and we discuss First Amendment rights of protestors.

A. Regulatory Planning and Review

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. This NPRM has not been designated a ''significant regulatory action,'' under section 3(f) of Executive Order 12866, as amended by Executive Order 14094 (Modernizing Regulatory Review). Accordingly, the NPRM has not been reviewed by the Office of Management and Budget (OMB).

This regulatory action determination is based on the size and duration of the regulated area, which would impact a small, designated area of Back River. This waterway supports mainly recreational vessel traffic, which at its peak, occurs during the summer season. Although this regulated area extends across the entire width of the waterway, the rule would allow vessels and persons to seek permission to enter the regulated area, and vessel traffic would be able to transit the regulated area as instructed by Event PATCOM. Such vessels must operate at safe speed that minimizes wake and not loiter within the navigable channel while within the regulated area. Moreover, the Coast Guard would issue a Broadcast Notice to Mariners via VHF–FM marine channel 16 about the status of the regulated area.

B. Impact on Small Entities

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601–612, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. The Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule would not have a significant economic impact on a substantial number of small entities.

While some owners or operators of vessels intending to transit the regulated area may be small entities, for the reasons stated in section IV.A above, this proposed rule would not have a significant economic impact on any vessel owner or operator.

If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this proposed rule would have a significant economic impact on it, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this proposed rule. If the proposed rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please call or email the person listed in the **FOR FURTHER INFORMATION CONTACT** section. The Coast Guard will not retaliate against small entities that question or complain about this proposed rule or any policy or action of the Coast Guard.

C. Collection of Information

This proposed rule would not call for a new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

D. Federalism and Indian Tribal Governments

A rule has implications for federalism under Executive Order 13132 (Federalism), if it has a substantial direct effect on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. We have analyzed this proposed rule under that Order and have determined that it is consistent with the fundamental federalism principles and preemption requirements described in Executive Order 13132.

Also, this proposed rule does not have tribal implications under Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments) because it would not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. If you believe this proposed rule has implications for federalism or Indian tribes, please call or email the person listed in the **FOR FURTHER INFORMATION CONTACT** section.

E. Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 (adjusted for inflation) or more in any one year. Though this proposed rule would not result in such an expenditure, we do discuss the potential effects of this proposed rule elsewhere in this preamble.

F. Environment

We have analyzed this proposed rule under Department of Homeland Security Directive 023–01, Rev. 1, associated implementing instructions, and Environmental Planning COMDTINST 5090.1 (series), which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321–4370f), and have made a preliminary determination that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This proposed rule involves implementation of regulations within 33 CFR part 100 applicable to organized marine events on the navigable waters of the United States that could negatively impact the safety of waterway users and shore side activities in the event area. Normally such actions are categorically excluded from further review under paragraph L61 of Appendix A, Table 1 of DHS Instruction Manual 023–01–001–01, Rev. 1. We seek any comments or information that may lead to the discovery of a significant environmental impact from this proposed rule.

G. Protest Activities

The Coast Guard respects the First Amendment rights of protesters. Protesters are asked to call or email the person listed in the **FOR FURTHER INFORMATION CONTACT** section to coordinate protest activities so that your message can be received without jeopardizing the safety or security of people, places, or vessels.

V. Public Participation and Request for Comments

We view public participation as essential to effective rulemaking and will consider all comments and material received during the comment period. Your comment can help shape the outcome of this rulemaking. If you submit a comment, please include the docket number for this rulemaking, indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation.

Submitting comments. We encourage you to submit comments through the Federal Decision-Making Portal at *https://www.regulations.gov.* To do so, go to *https://www.regulations.gov,* type USCG–2024–0361 in the search box and click ''Search.'' Next, look for this document in the Search Results column, and click on it. Then click on the Comment option. If you cannot submit your material by using *https://www.regulations.gov,* call or email the person in the **FOR FURTHER INFORMATION CONTACT** section of this proposed rule for alternate instructions.

Viewing material in docket. To view documents mentioned in this proposed rule as being available in the docket, find the docket as described in the previous paragraph, and then select ''Supporting & Related Material'' in the Document Type column. Public comments will also be placed in our online docket and can be viewed by following instructions on the *https://www.regulations.gov* Frequently Asked Questions web page. Also, if you click on the Dockets tab and then the proposed rule, you should see a ''Subscribe'' option for email alerts. The option will notify you when comments are posted, or a final rule is published.

We review all comments received, but we will only post comments that address the topic of the proposed rule. We may choose not to post off-topic, inappropriate, or duplicate comments that we receive.

Personal information. We accept anonymous comments. Comments we post to *https://www.regulations.gov* will include any personal information you have provided. For more about privacy and submissions to the docket in response to this document, see DHS's eRulemaking System of Records notice (85 FR 14226, March 11, 2020).

List of Subjects in 33 CFR Part 100

Marine safety, Navigation (water), Reporting and recordkeeping requirements, Waterways.

For the reasons discussed in the preamble, the Coast Guard is proposing to amend 33 CFR part 100 as follows:

PART 100—SAFETY OF LIFE ON NAVIGABLE WATERS

■ 1. The authority citation for part 100 continues to read as follows:

Authority: 46 U.S.C. 70041; 33 CFR 1.05–1.

■ 2. In § 100.501 amend table 4 to paragraph (i)(2) by adding a new entry in alphabetical order to read as follows:

§ 100.501 Special Local Regulations; Marine Events Within the Fifth Coast Guard District.

* * * * *

(i) * * *

(2) * * *

TABLE 2 TO PARAGRAPH (i)(2)

Event	Regulated area	Enforcement period(s)	Sponsor
*	* * *	* *	*
Tiki Lee's Shootout on the River High Speed Power Boat Event and Air Show.	*Regulated area.* All navigable waters of Back River, within an area bounded by a line connecting the following points: from the shoreline at Lynch Point at latitude 39°14′46″ N, longitude 076°26′23″ W, thence northeast to Porter Point at latitude 39°15′13″ N, longitude 076°26′11″ W, thence north along the shoreline to Walnut Point at latitude 39°17′06″ N, longitude 076°27′04″ W, thence southwest to the shoreline at latitude 39°16′41″ N, longitude 076°27′31″ W, thence south along the shoreline to and terminating at the point of origin. The course area, aerobatics box and spectator areas are within the regulated area. *Course Area.* The course area is a polygon in shape measuring approximately 1,400 yards in length by 50 yards in width. The area is bounded by a line commencing at position latitude 39°16′14.98″ N, longitude 076°26′57.38″ W, thence east to latitude 39°16′15.36″ N, longitude 076°26′55.56″ W, thence south to latitude 39°15′33.40″ N, longitude 076°26′49.70″ W, thence west to latitude 39°15′33.17″ N, longitude 076°26′51.60″ W, thence north to and terminating at the point of origin. *Buffer Zone.* The buffer zone is a polygon in shape measuring approximately 100 yards in east and west directions and approximately 150 yards in north and south directions surrounding the entire course area described in the preceding paragraph of this section. The area is bounded by a line commencing at position latitude 39°16′18.72″ N, longitude 076°27′01.74″ W, thence east to latitude 39°16′20.36″ N, longitude 076°26′52.39″ W, thence south to latitude 39°15′29.27″ N, longitude 076°26′45.36″ W, thence west to latitude 39°15′28.43″ N, longitude 076°26′54.94″ W, thence north to and terminating at the point of origin. *Aerobatics Box.* The aerobatics box is a polygon in shape measuring approximately 5,000 feet in length by 1,000 feet in width. The area is bounded by a line commencing at position latitude 39°16′01.2″ N, longitude 076°27′05.7″ W, thence east to latitude 39°16′04.7″ N, longitude 076°26′53.7″ W, thence south to latitude 39°15′16.9″ N, longitude 076°26′35.2″ W, thence west to latitude 39°15′13.7″ N, longitude 076°26′47.2″ W, thence north to and terminating at the point of origin. *East Spectator Fleet Area.* The area is a polygon in shape measuring approximately 2,200 yards in length by 450 yards in width. The area is bounded by a line commencing at position latitude 39°15′20.16″ N, longitude 076°26′17.99″ W, thence west to latitude 39°15′17.47″ N, longitude 076°26′27.41″ W, thence north to latitude 39°16′18.48″ N, longitude 076°26′48.42″ W, thence east to latitude 39°16′25.60″ N, longitude 076°26′27.14″ W, thence south to latitude 39°15′40.90″ N, longitude 076°26′31.30″ W, thence south to and terminating at the point of origin.	This section will be enforced on the 2nd, 3rd or 4th, Friday, Saturday, and Sunday in July. A Notification of Enforcement will be published 30 days prior to the event dates with specified enforcement times.	Tiki Lee's Dock Bar of Sparrows Point, MD.

TABLE 2 TO PARAGRAPH (i)(2)—Continued

Event	Regulated area	Enforcement period(s)	Sponsor
	Northwest Spectator Fleet Area. The area is a polygon in shape measuring approximately 750 yards in length by 150 yards in width. The area is bounded by a line commencing at position latitude 39°16′01.64″ N, longitude 076°27′11.62″ W, thence south to latitude 39°15′47.80″ N, longitude 076°27′06.50″ W, thence southwest to latitude 39°15′40.11″ N, longitude 076°27′08.71″ W, thence northeast to latitude 39°15′45.63″ N, longitude 076°27′03.08″ W, thence northeast to latitude 39°16′01.19″ N, longitude 076°27′05.65″ W, thence west to and terminating at the point of origin. *Southwest Spectator Fleet Area.* The area is a polygon in shape measuring approximately 400 yards in length by 175 yards in width. The area is bounded by a line commencing at position latitude 39°15′30.81″ N, longitude 076°27′05.58″ W, thence south to latitude 39°15′21.06″ N, longitude 076°26′56.14″ W, thence east to latitude 39°15′21.50″ N, longitude 076°26′52.59″ W, thence north to latitude 39°15′29.75″ N, longitude 076°26′56.12″ W, thence west to and terminating at the point of origin.		
*	* * * * * * *		

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Dated: April 24, 2024.

David E. O'Connell,

Captain, U.S. Coast Guard, Captain of the Port, Sector Maryland-National Capital Region.

[FR Doc. 2024–09194 Filed 4–29–24; 8:45 am]

BILLING CODE 9110–04–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2024–0100; FRL–11790–01–R09]

Air Quality Plans; California; San Diego County Air Pollution Control District; Permit Program

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve a permitting rule which provides specific permit exemptions for sources otherwise requiring a permit, submitted as a revision to the San Diego County Air Pollution Control (APCD or ''District'') portion of the California State Implementation Plan (SIP). The proposed revisions would expand an existing provision that exempts tub grinders and trommel screens that process green material from permit requirements to include horizontal grinders and the processing of mixtures of green material and food material. The revisions also add a definition for ''food material.'' This action is being taken pursuant to the Clean Air Act (CAA or ''Act'') and its implementing regulations. We are taking comments on this proposal and plan to follow with a final action.

DATES: Comments must be received on or before May 30, 2024.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R09–OAR–2024–0100 at *https://www.regulations.gov.* For comments submitted at *Regulations.gov,* follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov*. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider Confidential Business Information (CBI) or other information the disclosure of which is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). For additional submission methods, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *http://www.epa.gov/dockets/commenting-epa-dockets.* If you need assistance in a language other than English or if you are a person with disabilities who needs a reasonable accommodation at no cost to you, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Camille Cassar, EPA Region IX, 75 Hawthorne St., San Francisco, CA 94105 or by email at *cassar.camille@epa.gov.*

SUPPLEMENTARY INFORMATION: Throughout this document, ''we,'' ''us,'' and ''our'' refer to the EPA.

Table of Contents

I. The State's Submittal

A. What rule did the State submit?

Table 1 lists the rule addressed by this proposal with the dates it was amended

by the District and submitted by the California Air Resources Board (CARB).

TABLE 1—SUBMITTED RULE

Rule No.	Rule title	Amended date	Submitted date
11	Exemptions From Rule 10 Permit Requirements	10/13/2022	05/11/2023

On November 11, 2023, the submittal for Rule 11 was deemed by operation of law to meet the completeness criteria in 40 CFR part 51 Appendix V, which must be met before formal EPA review.

B. Are there other versions of this rule?

The SIP-approved version of the submitted rule is identified in Table 2.

TABLE 2—SIP APPROVED RULE

Rule No.	Rule title	SIP approval date	**Federal Register** citation
11	Exemptions from Rule 10 Permit Requirements	09/28/2022	87 FR 58729

If the EPA finalizes the action proposed herein, this rule will be replaced in the SIP by the submitted rule listed in Table 1.

C. What is the purpose of the submitted rule revision?

The rule revision expands the exemption for tub grinders and trommel screens processing green material to include horizontal grinders and the processing of mixtures of green material and food material. A definition of the term ''food material'' has also been added to the rule.

II. The EPA's Evaluation and Action

A. How is the EPA evaluating the rule?

Under 40 CFR 51.160(e), a permit program must identify the types and sizes of facilities, buildings, structures, or installations that will be subject to review. A new source review (NSR) permitting program may exempt some new sources or modifications that are inconsequential to attainment or maintenance of the national ambient air quality standards (NAAQS), considering local air quality concerns.

Section 110(l) of the Act prohibits the EPA from approving SIP revisions that would interfere with any applicable requirement concerning attainment and reasonable further progress (RFP) or any other applicable requirement of the CAA. Section 193 of the Act prohibits the modification of a SIP-approved control requirement in effect before November 15, 1990, in a nonattainment area, unless the modification ensures equivalent or greater emission reductions of the relevant pollutant(s). With respect to procedures, CAA sections 110(a) and 110(l) require that a state conduct reasonable notice and public hearing before adopting a SIP revision.

B. Does the rule meet the evaluation criteria?

Subsection (d)(10)(v) of Rule 11 currently exempts tub grinders and trommel screens processing green material from permit requirements. As a result of a recent California organic waste landfill diversion mandate, State of California Senate Bill (SB) 1383, San Diego County residents and businesses are now recycling food material along with yard waste. Consequently, composting facilities are now receiving, and processing, green material mixed with food material. Additionally, due to technological advancements, tub grinders are being replaced with more efficient horizontal grinders that are safer to operate. The rule revisions expand the existing exemption to include horizontal grinders and the processing of mixtures of green material and food material. A definition of the term ''food material'' has also been added to the rule.

The emissions from tub grinders and horizontal grinders are related to the throughput of materials; therefore horizontal grinders do not produce emissions that are measurably different from those from a tub grinder. Therefore, we find this expanded exemption provision acceptable. The definition for the term ''food material'' is clear and provides clarification of the type of materials that can be processed in the exempt equipment. Therefore, we find this new definition acceptable.

The submitted rule complies with the substantive and procedural requirements of CAA section 110(l). With respect to the procedural requirements, based on our review of the public process documentation included with the submitted rule, we find that the District has provided sufficient evidence of public notice and opportunity for comment and public hearings prior to submittal of this SIP revision and has satisfied the procedural requirements under CAA section 110(l).

With respect to the substantive requirements of CAA section 110(l), we have determined that our approval of the submitted rule would not interfere with the area's ability to attain or maintain the NAAQS or with any other applicable requirements of the CAA. Similarly, we find that the submitted rule is approvable under section 193 of the Act because it does not modify any control requirement in effect before November 15, 1990, without ensuring equivalent or greater emission reductions.

For the reasons stated above and explained further in our technical support document, we find that the submitted San Diego County APCD Rule 11 satisfies the applicable CAA and regulatory requirements for nonattainment NSR permit programs at 40 CFR 51.160 through 51.165 and other applicable requirements.

C. Proposed Action and Public Comment

As authorized in section 110(k)(3) of the Act, the EPA is proposing approval of San Diego County APCD Rule 11. We are proposing this action based on our determination that the submitted rule satisfies the applicable statutory and regulatory provisions governing regulation of stationary sources at 40 CFR 51.160 through 51.165. In support of our proposed action, we have concluded that our approval would comply with sections 110(l) and 193 of the Act because the amended rule will not interfere with continued attainment

of the NAAQS in San Diego County and does not relax control technology and offset requirements.

We will accept comments from the public on this proposal until May 30, 2024. If finalized, this action would incorporate the submitted rule into the SIP and our action would be codified through revisions to 40 CFR 52.220, ''Identification of plan—in part.''

III. Incorporation by Reference

In this rule, the 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, the EPA is proposing to incorporate by reference San Diego County APCD Rule 11, ''Exemptions From Rule 10 Permit Requirements,'' amended October 13, 2022, which provides specific permit exemptions for sources otherwise requiring a permit. The EPA has made, and will continue to make, these materials available through *https://www.regulations.gov* and at the EPA Region IX 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 Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, the EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this proposed action merely proposes to approve state law as meeting federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this proposed action:

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

In addition, the SIP is not approved to apply on any Indian reservation land or in any other area where the EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rules do 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, 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 air agency 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. The EPA did not perform an EJ analysis and did not consider EJ in this action. Consideration of EJ is not required as part of this action, and there is no information in the record inconsistent with the stated goal of 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, Administrative practice and procedure, Air pollution control, Carbon oxides, Incorporation by reference, Intergovernmental relations, Nitrogen oxides, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: April 22, 2024.

Martha Guzman Aceves,

Regional Administrator, Region IX.

[FR Doc. 2024–09248 Filed 4–29–24; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 1, 9, and 25

[GN Docket No. 23–65, IB Docket No. 22–271; FCC 24–28; FR ID 210325]

Single Network Future: Supplemental Coverage From Space; Space Innovation

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In this document, the Federal Communications Commission (Commission) seeks comment on ways in which it can improve 911 service for supplemental coverage from space (SCS) connections. Specifically, the Commission seeks comment on how it can propel the industry toward a truly ubiquitous automatic location-based routing of all 911 calls to accelerate connections between first responders and those who need help, regardless of their location. Next, in recognition of the importance of safeguarding radio astronomy, the Commission seeks further comment on ways to improve the coordination process between Federal and non-Federal stakeholders in the SCS context and on whether additional rule changes or policies are necessary to avoid harmful interference to radio astronomy and related services beyond the SCS licensing process the Commission adopts today.

DATES: Interested parties may file comments on or before May 30, 2024; and reply comments on or before July 1, 2024.

ADDRESSES: You may submit comments, identified by GN Docket No. 23–65 and IB Docket No. 22–271, by any of the following methods:

• *Electronic Filers:* Comments may be filed electronically using the internet by accessing the ECFS: *http://apps.fcc.gov/ecfs/.*

• *Paper Filers:* Parties who choose to file by paper must file an original and one copy of each filing.

• Filings can be sent by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

• Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9050 Junction Drive, Annapolis Junction, MD 20701.

• U.S. Postal Service first-class, Express, and Priority mail must be addressed to 45 L Street NE, Washington, DC 20554.

• Effective March 19, 2020, and until FNPRM, the Commission no longer accepts any hand or messenger delivered filings. This is a temporary measure taken to help protect the health and safety of individuals, and to mitigate the transmission of COVID–19. See FCC Announces Closure of FCC Headquarters Open Window and Change in Hand-Delivery Policy, Public Notice, DA 20–304 (March 19, 2020). *https://www.fcc.gov/document/fcc-closes-headquarters-open-window-and-changes-hand-delivery-policy.*

People with Disabilities: To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an email to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (TTY).

FOR FURTHER INFORMATION CONTACT: For additional information on this proceeding, contact Jon Markman of the Mobility Division, Wireless Telecommunications Bureau, at *Jonathan.Markman@fcc.gov* or (202) 418–7090, or Merissa Velez of the Space Bureau Satellite Programs and Policy Division, at *Merissa.Velez@fcc.gov* or (202) 418–0751.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's further notice of proposed rulemaking (*FNPRM*) in GN Docket No. 23–65 and IB Docket No. 22–271; FCC 24–28, adopted and released on March 14, 2024. The full text of this document is available for public inspection online at *https://docs.fcc.gov/public/attachments/FCC-24-28A1.pdf.*

Synopsis

1. *Improving Public Safety Communications Over SCS.* In the further notice of proposed rulemaking (*FNPRM*), the Commission seeks comment on how and whether it should modify requirements for routing SCS 911 voice calls and 911 text messages, including whether we should require the use of location-based routing to route 911 SCS voice calls directly to an appropriate Public Safety Answering Point (PSAP), if technically feasible. In light of the Commission's existing requirement that Commercial Mobile Radio Service (CMRS) providers deploy and use location-based routing for wireless 911 voice calls and real-time text (RTT) communications to 911 when available location information meets certain requirements for accuracy and timeliness, it also seeks comment on how such a requirement would impact the availability of location-based routing for terrestrial wireless providers that use SCS to extend their coverage areas.

2. In the *Report and Order,* published elsewhere in this issue of the **Federal Register**, the Commission establishes on an interim basis that terrestrial providers must route all SCS 911 voice calls to a PSAP using either location-based routing or an emergency call center. In light of the ongoing deployment and continued innovation of SCS, the Commission seeks any new and updated information regarding technological or other developments in routing SCS 911 voice calls since the last round of filings. The Commission also asks whether there are any improvements to the 911 rules that apply to such terrestrial providers when using SCS to extend their coverage. Further, in recognizing that the technology likely used to identify the precise location of the device may be different when a terrestrial provider uses SCS to extend its coverage, as opposed to when it is using only terrestrial networks, it seeks comment on any such technological differences.

3. Furthermore, it seeks comment on whether there are other threshold requirements that the Commission should consider when requiring location-based routing, beyond accuracy and timeliness of available location information. Specifically, it seeks comment on the availability, reliability, and accuracy of the location information that terrestrial providers currently have access to when using location-based routing for SCS 911 voice calls. In addition, it seeks comment on how the Commission should address any potential inconsistencies between the 911 call routing requirements of terrestrial providers and satellite operators as SCS evolves.

4. Next, in the context of how SCS can function as an extension of a terrestrial network, the Commission noted that a satellite can be considered as a bi-directional ''bent pipe,'' receiving and forwarding signaling and user payload to and from a user's device to a terrestrial network (*e.g.,* 5G base station (gNB), 5G core network (5GC), and other terrestrial network elements). A satellite can also play a more active role in the network, connecting directly to the 5GC on the ground. In other words, the gNB and 5GC can belong to and be operated by either the terrestrial provider or the satellite operator. Regardless of deployment model, the SCS satellite should be able to send and receive the 5G signaling information needed for placing an emergency call between the user equipment (UE) and 5G network along with the caller location information needed for call routing and dispatch. Given that 911 calls and texts would typically be placed outdoors with the user device having view of the Global Positioning System (GPS) satellites in the sky, and given that user devices typically have GPS receivers, user devices should be able to determine their location, and for Assisted GPS (A–GPS), SCS should be able to provide the needed assistance information. The Commission seeks comment on this tentative analysis and asked whether there are any existing or new standards that should apply.

5. The Commission in the *FNPRM* also seeks comment on establishing rules around interconnectivity between terrestrial providers and satellite operators in the context of SCS 911 connections. Specifically, it seeks comment on the standards currently in place related to this topic, and whether any future standards work is anticipated, or required, to enable disparate networks and systems to interconnect for the purpose of enabling SCS 911 connectivity. It also seeks information on satellite data capacities, satellite link budget, and optimization schemes for the initial SCS deployments and the impact on device-to-satellite connectivity as they relate to SCS 911 connectivity and functionality, including time for obtaining a location fix for automatic location-based routing of 911 calls. Regarding privacy and security, the Commission asks whether there should be an explicit requirement for satellite operators to protect customer proprietary network information of terrestrial provider subscribers when customers make 911 calls and texts, and disclose security breaches.

6. Given that typically a 911 caller would abandon the 911 call if it is not connected within a certain time period, the Commission asks how long should

the network selection take before a 911 call is eventually attempted via SCS. Also, given the possibility that a 911 caller may be mobile and moving in and out of terrestrial network and SCS coverage, the Commission seeks comment on how the handoff between these networks should be handled to guarantee seamless call continuity and successful callback. In addition, the Commission understands that SCS is to be supplemental to terrestrial networks, including traditional terrestrial call paths, such as roaming, and additional technologies, such as Wi-Fi. However, in order to ensure that 911 calls utilize the best available path for delivery of both the message and location information, it seeks comment on how terrestrial providers intend to select the order in which networks are selected.

7. Since the delivery of SCS 911 voice calls includes the possibility of using third party emergency call centers, to promote awareness and transparency, the Commission asks whether we should mandate that terrestrial providers conduct outreach to PSAPs, and, if so, what would such a mandate look like. In addition, it seeks comment on what the planned outreach to the PSAP community entails. For 911 calls that are delivered directly to PSAPs, rather than via an emergency call center, it seeks comment on how terrestrial providers envision delivering those calls with regard to current classes of service. Specifically, it asks how location will be represented to the PSAP, *e.g.,* geodetic information, will there be confidence and uncertainty factors for that location, and are terrestrial providers considering a new class of service for SCS, and, if so, are terrestrial providers working with the public safety community presently.

8. *Radio Astronomy Considerations.* In the *Report and Order,* the Commission examined the record regarding whether existing rules addressing the protection of radio astronomy and space science services would be sufficient in the SCS context. Rather than adopt new SCS rules with respect to the protection of radio astronomy and space sciences, the Commission determined that it is in the public interest to address these concerns based on the facts of specific proposals. The Commission encourages SCS applicants to work with appropriate Federal agencies in advance, including conducting analyses of potential impacts to radio astronomy systems, and we direct applicants to contact the National Science Foundation (NSF) for more information to facilitate this coordination. The Commission expects that such advance engagement will facilitate the Commission's review of SCS applications.

9. While the Commission finds in the *Report and Order* that—at this stage—new rules to ensure protection of radio astronomy and space sciences are not required, the Commission recognizes the importance of ensuring effective and efficient coordination among Federal and non-Federal stakeholders related to SCS applications. In this *FNPRM,* the Commission seeks comment on whether there are additional ways to encourage and improve coordination among Federal and non-Federal stakeholders with respect to the coexistence of radio astronomy and SCS and whether we should make any changes to our rules to facilitate this coordination.

10. Of particular importance on this question, on February 16, 2024, National Telecommunications and Information Administration (NTIA) filed a white paper prepared by NSF in this proceeding in which NSF describes the potential impacts from SCS on current and planned radio astronomy and other space science operations, particularly from satellite downlinks—SCS transmissions in the space-to-Earth direction—and suggests potential mitigations. In the white paper, NSF states that, in addition to the National Radio Quite Zone (NRQZ), additional sites have been chosen for radio astronomy facilities, and that such ''facilities primarily employ remote locations, rather than allocated spectrum, to enable access to the relevant spectrum . . . .'' The white paper describes several locations of existing and planned radio astronomy observatories which NSF identifies as having potential to be impacted by SCS operations in bands identified for consideration for SCS in the *Notice* and describes technical details about the receivers at each facility. The white paper also identifies concerns related to impacts from SCS operations on radio astronomy, and potential recommendations to address those concerns.

11. While the Commission anticipates that the part 25 licensing process will provide an opportunity for the Commission to address concerns related to protecting radio astronomy in the context of specific SCS applications, it also plans to continue to evaluate our procedures as SCS—and the technology enabling it—evolves. To that end, the Commission seeks comment on whether the unique nature of SCS may warrant additional consideration, including rule changes, related to the protection of radio astronomy. The Commission asks that commenters provide as much specificity as possible. For example, should we consider rule changes to part 1, part 25, or another rule part that would require coordination of SCS applications? Section 1.924 of the Commission's rules—along with the NTIA Manual of Regulations and Procedures for Federal Radio Frequency Management—set forth procedures regarding coordination of certain applications within identified Quite Zones, including the NRQZ, the Arecibo Observatory, and other sites. The Commission asks commenters whether it would be appropriate to consider changes to § 1.924, to require a coordination process with regard to SCS applications. The Commission seeks comment only on whether to consider changes to § 1.924 related to SCS applications, and note that rule changes regarding other radio services are not a part of the SCS implementations which are the focus of this proceeding. If the Commission were to consider rule changes specific to SCS, should coordination requirements apply only to SCS transmissions into the NRQZ, or also to SCS transmissions into other locations with sensitive scientific facilities and, if we should include other facilities, which should be included? For example, we note that in its white paper, NSF identified several locations of existing and planned radio astronomy observatories and the details of the receiver bands at each facility. Should any changes to our rules be band-specific or should they apply to all SCS operations? In lieu of or in addition to adopting new rules, are there other incentives the Commission could implement to encourage coordination and coexistence of radio astronomy operations and SCS?

12. The Commission notes that, while we are not adopting requirements for SCS applicants to coordinate with potentially-affected Federal users at this time, some stakeholders have already engaged in coordination efforts related to SCS applications and radio astronomy. For example, in a filing opposing SpaceX's application to modify its authorization for its Gen2 NGSO satellite system to add SCS, the National Radio Astronomy Observatory (NRAO) nonetheless notes ''with appreciation SpaceX's continuing cooperation in coordination and field-testing their Ku-band [fixed-satellite service] operations.'' SpaceX also points out that it has been working closely with NRAO to coordinate and ''looks forward to continuing its precedent-setting coordination discussions with NRAO that are finding ways to allow consumers to benefit from this new service, while coexisting with radio

astronomy.'' To this end, the Commission notes that in its transmittal accompanying the NSF white paper, NTIA states that the white paper ''highlights the value of early coordination efforts between potential applicants for such [SCS] authority and affected Federal spectrum users, ideally prior to applicants finalizing their system designs.'' The Commission seeks comment on whether such early coordination efforts by stakeholders are and can be successful to enable the coexistence of SCS and radio astronomy, and if so, under what circumstances. How can such early coordination efforts facilitate review and consideration of part 25 SCS license applications by Federal agencies? Would submission of other technical information by SCS applicants regarding the protection of radio astronomy operations—in addition to Monte Carlo analyses—be helpful in these coordination efforts?

Procedural Matters

Paperwork Reduction Act

13. The *FNPRM* may contain new or modified information collection(s) subject to the Paperwork Reduction Act of 1995. If the Commission adopts any new or modified information collection requirements, they will be submitted to the Office of Management and Budget (OMB) for review under section 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the new or modified information collection requirements contained in this proceeding. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, the Commission seeks specific comment on how we might ''further reduce the information collection burden for small business concerns with fewer than 25 employees.''

Regulatory Flexibility Act

14. The Regulatory Flexibility Act of 1980, as amended (RFA), requires that an agency prepare a regulatory flexibility analysis for notice and comment rulemakings, unless the agency certifies that ''the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.'' Accordingly, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) concerning potential rule and policy changes contained in the *FNPRM.* The IRFA is contained in appendix D of the *FNPRM.*

Initial Regulatory Flexibility Analysis

15. As required by the Regulatory Flexibility Act (RFA), the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in the *FNPRM.* The Commission requests written public comments on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines provided on the first page of the *FNPRM.* The Commission will send a copy of the *FNPRM,* including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA). In addition, the *FNPRM* and IRFA (or summaries thereof) will be published in the **Federal Register**.

A. Need for, and Objectives of, the Proposed Rules

16. Building on the interim 911 call and text routing requirements established in the *Report and Order,* the *FNPRM* will help the Commission move toward its objective of enabling automatic location-based routing of all emergency communications regardless of whether or not there is a terrestrial connection available. As discussed in the *Report and Order,* the Commission takes a major step towards facilitating ubiquitous connectivity, by adopting rules that enable partnerships between terrestrial network operators and satellite operators, who will then utilize terrestrial spectrum to fill coverage gaps, thereby enabling communications with existing and future wireless devices without the need for hardware changes. This regulatory framework serves as a first step, focusing on particular supplemental coverage from space (SCS) implementations which present less complex legal and technical challenges in order to foster the rapid deployment and development of these exciting networks. Given the primary importance of emergency communications over SCS networks in the short term, the Commission seeks to further develop the record in the *FNPRM* on improving 911 service for SCS connections. The Commission seeks comment on a number of ways in which it can propel industry stakeholders towards achieving truly ubiquitous automatic location-based routing of all 911 calls to accelerate connection between first responders and those who need help, regardless of their location.

17. Further, the Commission seeks input from interested parties as to how and whether it should modify requirements for routing SCS 911 voice calls and 911 text messages, including whether it should require the use of location-based routing to route 911 SCS voice calls directly to an appropriate Public Safety Answering Point (PSAP), if technically feasible. The Commission also seeks to expand upon a number of technical issues relating to extending E911 rules to SCS that it sought comment on in the initial NPRM, 88 FR 21944 (April 12, 2023), from this proceeding. Additionally, in light of the Commission's existing requirement that Commercial Mobile Radio Service (CMRS) providers deploy and use location-based routing for wireless 911 voice calls and real-time text communications to 911 when available location information meets certain requirements for accuracy and timeliness, the Commission also seeks updated responses to the questions raised in the initial NPRM due to new requirements for CMRS providers to deploy and use location-based routing in certain situations.

18. Through its adopted rules in the *Report and Order,* the Commission establishes on an interim basis that terrestrial providers must route all SCS 911 calls to a PSAP using either location-based routing or an emergency call center. This approach will balance the need for SCS 911 voice calls and text messages to be routed to the appropriate PSAP with the need for terrestrial providers to have flexibility in their implementation of SCS. Because of the ongoing deployment and continued innovation of SCS, the *FNPRM* requests any new and updated information regarding technological or other developments in routing SCS 911 voice calls since the last rounds of filing. In addition, the Commission seeks comment on improvements to the 911 rules that apply to such terrestrial providers when using SCS to extend their coverage.

19. In the *FNPRM,* the Commission also addresses direct-to-satellite connectivity, and acknowledges that a satellite can play a more active role in the network, by connecting directly to the 5G core network. Because 911 calls and texts would typically be placed outdoors with the user device having view of the Global Positioning System (GPS) satellites in the sky and because user devices typically have GPS receivers, user devices should be able to determine their location, and for Assisted GPS, SCS should be able to provide the needed assistance information. In the *FNPRM,* the Commission seeks comment on this tentative analysis. The Commission also seeks comment on establishing rules regarding interconnectivity between terrestrial providers and satellite operators as well as information on satellite data capacities, and satellite link budget, and optimization schemes

for the initial SCS deployments and their impact on device-to-satellite connectivity, including time for obtaining a location fix for automatic location-based routing of 911 calls. The Commission also seeks comment on questions related to network selection and roaming in the *FNPRM,* focusing on a situation where a 911 caller would discontinue the 911 call if it is not connected within a certain time period. Finally, in the initial NPRM, the Commission asked whether terrestrial partners engaged in or planned any outreach or coordination with public safety entities in advance of implementation. Because the delivery of SCS 911 voice calls includes the possibility of using third party emergency call centers, to promote awareness and transparency, the Commission requests comment via the *FNPRM* regarding issues concerning PSAP outreach.

20. Finally, in recognition of the concerns raised by the National Telecommunications and Information Association (NTIA) and the National Science Foundation (NSF) related to potential impacts from SCS on radio astronomy the Commission seeks further comment on the coordination process between Federal and non-Federal stakeholders in the SCS context and on whether additional rule changes or policies are necessary to avoid harmful interference to radio astronomy beyond the part 25 SCS licensing process adopted in the *Report and Order.*

B. Legal Basis

21. The proposed action is authorized pursuant to sections 1, 4(i), 157, 301, 303, 307, 308, 309, and 310 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 301, 303, 307, 308, 309, and 310.

C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

22. The RFA directs agencies to provide a description of, and where feasible, an estimate of, the number of small entities that may be affected by the proposed rules, if adopted. The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.'' In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act. A ''small business concern'' is one that: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.

23. *Small Businesses, Small Organizations, Small Governmental Jurisdictions.* Our actions, over time, may affect small entities that are not easily categorized at present. We therefore describe here, at the outset, three broad groups of small entities that could be directly affected herein. First, while there are industry specific size standards for small businesses that are used in the regulatory flexibility analysis, according to data from the Small Business Administration's (SBA) Office of Advocacy, in general a small business is an independent business having fewer than 500 employees. These types of small businesses represent 99.9% of all businesses in the United States, which translates to 33.2 million businesses.

24. Next, the type of small entity described as a ''small organization'' is generally ''any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.'' The Internal Revenue Service (IRS) uses a revenue benchmark of $50,000 or less to delineate its annual electronic filing requirements for small exempt organizations. Nationwide, for tax year 2020, there were approximately 447,689 small exempt organizations in the U.S. reporting revenues of $50,000 or less according to the registration and tax data for exempt organizations available from the IRS.

25. Finally, the small entity described as a ''small governmental jurisdiction'' is defined generally as ''governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.'' U.S. Census Bureau data from the 2017 Census of Governments indicate that there were 90,075 local governmental jurisdictions consisting of general purpose governments and special purpose governments in the United States. Of this number there were 36,931 general purpose governments (county, municipal and town or township) with populations of less than 50,000 and 12,040 special purpose governments—independent school districts with enrollment populations of less than 50,000. Accordingly, based on the 2017 U.S. Census of Governments data, we estimate that at least 48,971 entities fall into the category of ''small governmental jurisdictions.''

26. *Satellite Telecommunications.* This industry comprises firms ''primarily engaged in providing telecommunications services to other establishments in the telecommunications and broadcasting industries by forwarding and receiving communications signals via a system of satellites or reselling satellite telecommunications.'' Satellite telecommunications service providers include satellite and earth station operators. The SBA small business size standard for this industry classifies a business with $38.5 million or less in annual receipts as small. U.S. Census Bureau data for 2017 show that 275 firms in this industry operated for the entire year. Of this number, 242 firms had revenue of less than $25 million. Additionally, based on Commission data in the 2022 Universal Service Monitoring Report, as of December 31, 2021, there were 65 providers that reported they were engaged in the provision of satellite telecommunications services. Of these providers, the Commission estimates that approximately 42 providers have 1,500 or fewer employees. Consequently, using the SBA's small business size standard, a little more than half of these providers can be considered small entities.

27. *Wireless Telecommunications Carriers (except Satellite).* This industry comprises establishments engaged in operating and maintaining switching and transmission facilities to provide communications via the airwaves. Establishments in this industry have spectrum licenses and provide services using that spectrum, such as cellular services, paging services, wireless internet access, and wireless video services. The SBA size standard for this industry classifies a business as small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2017 show that there were 2,893 firms in this industry that operated for the entire year. Of that number, 2,837 firms employed fewer than 250 employees. Additionally, based on Commission data in the 2022 Universal Service Monitoring Report, as of December 31, 2021, there were 594 providers that reported they were engaged in the provision of wireless services. Of these providers, the Commission estimates that 511 providers have 1,500 or fewer employees. Consequently, using the SBA's small business size standard, most of these providers can be considered small entities.

28. *600 MHz Band.* These wireless communications services are radiocommunication services licensed in the 617–652 MHz and 663–698 MHz frequency bands that can be used for fixed and mobile flexible uses. 600 MHz Band services fall within the scope of the Wireless Telecommunications Carriers (except Satellite) industry where the SBA small business size

standard classifies a business as small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2017 show that there were 2,893 firms that operated in this industry for the entire year. Of this number, 2,837 firms employed fewer than 250 employees. Thus under the SBA size standard, the Commission estimates that a majority of licensees in this industry can be considered small.

29. Based on Commission data as of November 2021, there were approximately 3,327 active licenses in the 600 MHz Band service. The Commission's small business size standards with respect to 600 MHz Band services involve eligibility for bidding credits and installment payments in the auction of licenses for these services. For purposes of bidding credits, the Commission defined ''small business'' as an entity with average gross revenues not exceeding $55 million for each of the three preceding years, and a ''very small business'' as an entity with average gross revenues not exceeding $20 million for each of the three preceding years for the 600 MHz band auction. Pursuant to these definitions, 15 bidders claiming small business status won 290 licenses.

30. In frequency bands where licenses were subject to auction, the Commission notes that as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Further, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated. Additionally, since the Commission does not collect data on the number of employees for licensees providing these services, at this time we are not able to estimate the number of licensees with active licenses that would qualify as small under the SBA's small business size standard.

31. *Lower 700 MHz Band Licenses.* The lower 700 MHz band encompasses spectrum in the 698–746 MHz frequency bands. Permissible operations in these bands include flexible fixed, mobile, and broadcast uses, including mobile and other digital new broadcast operation; fixed and mobile wireless commercial services (including FDD- and TDD-based services); as well as fixed and mobile wireless uses for private, internal radio needs, two-way interactive, cellular, and mobile television broadcasting services. Wireless Telecommunications Carriers (except Satellite) is the closest industry with a SBA small business size standard applicable to licenses providing services in these bands. The SBA small business size standard for this industry classifies a business as small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2017 show that there were 2,893 firms that operated in this industry for the entire year. Of this number, 2,837 firms employed fewer than 250 employees. Thus under the SBA size standard, the Commission estimates that a majority of licensees in this industry can be considered small.

32. According to Commission data as of December 2021, there were approximately 2,824 active Lower 700 MHz Band licenses. The Commission's small business size standards with respect to Lower 700 MHz Band licensees involve eligibility for bidding credits and installment payments in the auction of licenses. For auctions of Lower 700 MHz Band licenses the Commission adopted criteria for three groups of small businesses. A very small business was defined as an entity that, together with its affiliates and controlling interests, has average annual gross revenues not exceeding $15 million for the preceding three years, a small business was defined as an entity that, together with its affiliates and controlling interests, has average gross revenues not exceeding $40 million for the preceding three years, and an entrepreneur was defined as an entity that, together with its affiliates and controlling interests, has average gross revenues not exceeding $3 million for the preceding three years. In auctions for Lower 700 MHz Band licenses seventy-two winning bidders claiming a small business classification won 329 licenses, twenty-six winning bidders claiming a small business classification won 214 licenses, and three winning bidders claiming a small business classification won all five auctioned licenses.

33. In frequency bands where licenses were subject to auction, the Commission notes that as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Further, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated. Additionally, since the Commission does not collect data on the number of employees for licensees providing these services, at this time we are not able to estimate the number of licensees with active licenses that would qualify as small under the SBA's small business size standard.

34. *Upper 700 MHz Band Licenses.* The upper 700 MHz band encompasses spectrum in the 746–806 MHz bands. Upper 700 MHz D Block licenses are nationwide licenses associated with the 758–763 MHz and 788–793 MHz bands. Permissible operations in these bands include flexible fixed, mobile, and broadcast uses, including mobile and other digital new broadcast operation; fixed and mobile wireless commercial services (including FDD- and TDD-based services); as well as fixed and mobile wireless uses for private, internal radio needs, two-way interactive, cellular, and mobile television broadcasting services. Wireless Telecommunications Carriers (except Satellite) is the closest industry with a SBA small business size standard applicable to licenses providing services in these bands. The SBA small business size standard for this industry classifies a business as small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2017 show that there were 2,893 firms that operated in this industry for the entire year. Of that number, 2,837 firms employed fewer than 250 employees. Thus, under the SBA size standard, the Commission estimates that a majority of licensees in this industry can be considered small.

35. According to Commission data as of December 2021, there were approximately 152 active Upper 700 MHz Band licenses. The Commission's small business size standards with respect to Upper 700 MHz Band licensees involve eligibility for bidding credits and installment payments in the auction of licenses. For the auction of these licenses, the Commission defined a ''small business'' as an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $40 million for the preceding three years, and a ''very small business'' an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than $15 million for the preceding three years. Pursuant to these definitions, three winning bidders claiming very small business status won five of the twelve available licenses.

36. In frequency bands where licenses were subject to auction, the Commission notes that as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Further, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated. Additionally, since the Commission

does not collect data on the number of employees for licensees providing these services, at this time we are not able to estimate the number of licensees with active licenses that would qualify as small under the SBA's small business size standard.

37. *Cellular Radiotelephone Service.* This service is radio service in which licensees are authorized to offer and provide cellular service for hire to the general public and was formerly titled Domestic Public Cellular Radio Telecommunications Service. Cellular Radiotelephone Service falls within the scope the Wireless Telecommunications Carriers (except Satellite) industry, where the SBA small business size standard classifies a business as small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2017 show that there were 2,893 firms that operated in this industry for the entire year. Of this number, 2,837 firms employed fewer than 250 employees. Thus under the SBA size standard, the Commission estimates that a majority of licensees in this industry can be considered small.

38. Based on Commission data, as of November 2021, there were approximately 1,908 active licenses in this service. The Commission's small business size standards with respect to Cellular Radiotelephone Services involve eligibility for bidding credits and installment payments in the auction of licenses for these services. For purposes of bidding credits, the Commission has defined ''small business'' as an entity that either (1) together with its affiliates and controlling interests has average gross revenues of not more than $3 million for each of the three preceding years, or (2) together with its affiliates and controlling interests has average gross revenues of not more $15 million for each of the three preceding years.

39. In frequency bands where licenses were subject to auction, the Commission notes that as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Further, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated. Additionally, since the Commission does not collect data on the number of employees for licensees providing these services, at this time we are not able to estimate the number of licensees with active licenses that would qualify as small under the SBA's small business size standard.

40. *Advanced Wireless Services (AWS)—(1710–1755 MHz and 2110–2155 MHz bands (AWS–1); 1915–1920 MHz, 1995–2000 MHz, 2020–2025 MHz and 2175–2180 MHz bands (AWS–2); 2155–2175 MHz band (AWS–3); 2000–2020 MHz and 2180–2200 MHz (AWS–4)).* Spectrum is made available and licensed in these bands for the provision of various wireless communications services. Wireless Telecommunications Carriers (except Satellite) is the closest industry with a SBA small business size standard applicable to these services. The SBA small business size standard for this industry classifies a business as small if it has 1,500 or fewer employees. U.S. Census Bureau data for 2017 show that there were 2,893 firms that operated in this industry for the entire year. Of this number, 2,837 firms employed fewer than 250 employees. Thus, under the SBA size standard, the Commission estimates that a majority of licensees in this industry can be considered small.

41. According to Commission data as of December 2021, there were approximately 4,472 active AWS licenses. The Commission's small business size standards with respect to AWS involve eligibility for bidding credits and installment payments in the auction of licenses for these services. For the auction of AWS licenses, the Commission defined a ''small business'' as an entity with average annual gross revenues for the preceding three years not exceeding $40 million, and a ''very small business'' as an entity with average annual gross revenues for the preceding three years not exceeding $15 million. Pursuant to these definitions, 57 winning bidders claiming status as small or very small businesses won 215 of 1,087 licenses. In the most recent auction of AWS licenses 15 of 37 bidders qualifying for status as small or very small businesses won licenses.

42. In frequency bands where licenses were subject to auction, the Commission notes that as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Further, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated. Additionally, since the Commission does not collect data on the number of employees for licensees providing these services, at this time we are not able to estimate the number of licensees with active licenses that would qualify as small under the SBA's small business size standard.

43. *All Other Telecommunications.* This industry is comprised of establishments primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications telemetry, and radar station operation. This industry also includes establishments primarily engaged in providing satellite terminal stations and associated facilities connected with one or more terrestrial systems and capable of transmitting telecommunications to, and receiving telecommunications from, satellite systems. Providers of internet services (*e.g.,* dial-up ISPs) or voice over internet protocol (VoIP) services, via client-supplied telecommunications connections are also included in this industry. The SBA small business size standard for this industry classifies firms with annual receipts of $35 million or less as small. U.S. Census Bureau data for 2017 show that there were 1,079 firms in this industry that operated for the entire year. Of those firms, 1,039 had revenue of less than $25 million. Based on this data, the Commission estimates that the majority of ''All Other Telecommunications'' firms can be considered small.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

44. The *FNPRM* may impose new or additional reporting or recordkeeping and/or other compliance obligations on small entities if rules discussed therein are adopted. For example, small and other entities are likely to be subject to the requirement of routing SCS 911 voice calls and 911 text messages, including the use of location-based routing to route 911 SCS voice calls directly to an appropriate PSAP, if technically feasible. Additionally, those entities are also likely to be subject to compliance rules concerning the proposed requirement that all devices utilizing SCS should be able to determine their location. For Assisted GPS (A–GPS), SCS should be able to provide the needed assistance information for 911 calls and texts, if adopted. In addition, small and other entities could be subject to coordination requirements or required to submit additional technical information related to the protection of radio astronomy.

45. The Commission also seeks comment on questions regarding improvements in location-based routing, device-to-satellite connectivity, interconnectivity between terrestrial providers and satellite operators, network selection and roaming, and PSAP outreach. Because of the ongoing deployment and continued innovation

of SCS, the Commission seeks any new and updated information regarding technological or other developments in routing SCS 911 voice calls since the last rounds of filing. Entities should report any additional information regarding routing SCS 911 voice calls since their last filings.

46. The Commission also seeks comment on whether there are additional ways to encourage and improve coordination among Federal and non-Federal stakeholders with respect to the coexistence of radio astronomy and SCS and whether the Commission should make any changes to its rules to facilitate this coordination. If such rules are adopted, operators could be required to provide reports regarding coordination efforts or additional technical information in addition to the existing underlying reporting, recordkeeping, and compliance requirements adopted in the *Report and Order.*

47. At this time, the record does not include a detailed cost/benefit analysis that would allow us to quantify the costs of compliance for small entities, including whether it will be necessary for small entities to hire professionals in order for them to comply with the rules proposed in the *FNPRM,* should they be adopted. The Commission invites comment on the costs and burdens of the proposals in the *FNPRM* and expects the information received in comments including, where requested, cost and benefit analyses, to help the Commission identify and evaluate relevant compliance matters for small entities, including compliance costs and other burdens that may result if the proposals and associated requirements discussed in the *FNPRM* are adopted.

E. Steps Taken To Minimize the Significant Economic Impact on Small Entities, and Significant Alternatives Considered

48. The RFA requires an agency to describe any significant, specifically small business, alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): ''(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities.''

49. In the initial NPRM, the Commission took steps to minimize significant economic impact to small and other entities by obtaining information from interested parties on a number of technical issues relating to extending E911 rules to SCS, and it expands upon those actions in the *FNPRM.* In the *FNPRM,* the Commission considered how best to improve our 911 rules that apply to terrestrial providers when using SCS to extend their coverage. The Commission also considered whether it should require terrestrial providers to use location-based routing for SCS 911 voice calls when information about the location of the device is available to the CMRS provider's network at the time of routing. Alternatively, the Commission considered whether it should require terrestrial providers to use location-based routing for SCS 911 voice calls only when location information meets certain thresholds for accuracy and timeliness. The information obtained from commenters could provide the Commission with opportunities to ultimately adopt threshold-related rules that serve to lessen the burden on small providers.

50. The Commission also considered whether threshold requirements should be changed when requiring location-based routing, beyond accuracy and timeliness of available location information and, if changes are needed, what form they should take. Given the nature of SCS to extend coverage, cell tower information is unlikely to be available as a fallback when location-based routing does not meet whatever threshold requirements should be in place for using location-based routing. Therefore, the Commission requests comment on several questions involving what threshold requirements should be considered for SCS 911. In considering changes to the threshold requirements, we will consider the potential economic impact to small entities.

51. Additionally, in the *FNPRM,* the Commission seeks comment on ways to establish rules around interconnectivity between terrestrial providers and satellite operators within the context of SCS 911 connections. The rules that are ultimately adopted could lessen the compliance requirements for small and other entities. The *FNPRM* requests information involving both the current standards and anticipated future standards. These standards will be important to consider for informing discussions of future advances to SCS 911 connections and requires consideration of alternatives that take into account the potential impact of the adopted rules on small entities. Lastly, the Commission asked how long the network selection should take before a 911 call is eventually attempted via SCS. The Commission acknowledges that SCS is to be supplemental to terrestrial networks, including traditional terrestrial call paths, such as roaming, and additional technologies, such as Wi-Fi. The Commission seeks comment on ways to minimize the economic burden on small providers.

52. Furthermore, the Commission seeks comment on what, if any, coordination requirements should be adopted. In the alternative, to possibly lessen the compliance burdens on entities, the Commission asks if there are other incentives the Commission could implement to encourage coordination and coexistence of radio astronomy operations and SCS. Likewise, the Commission asks about the effectiveness of early coordination efforts when considering whether to adopt additional requirements and whether the submission of additional technical information would be helpful in these coordination efforts. While the Commission does not explicitly propose that additional coordination requirements be adopted, the Commission inquires as to whether additional requirements would be necessary given existing coordination efforts and the unique nature of SCS as the information obtained from commenters could provide the Commission with opportunities to ultimately adopt threshold-related rules that serve to lessen the burden on small providers.

53. The Commission is hopeful that the comments it receives will specifically address matters impacting small entities and include data and analyses relating to these matters. Further, while the Commission believes the rules that are eventually adopted in this proceeding should benefit small entities, the Commission expects to more fully consider the economic impact and alternatives for small entities following the review of comments filed in response to the *FNPRM.* The Commission's evaluation of this information will shape the final alternatives it considers, the final conclusions it reaches, and any final actions it ultimately takes in this proceeding to minimize any significant economic impact that may occur on small entities.

F. Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rules

54. None.

Federal Communications Commission.

Marlene Dortch,

Secretary.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 660

[Docket No. 240423–0117]

RIN 0648–BM85

Magnuson-Stevens Act Provisions; Fisheries off West Coast States; Pacific Coast Groundfish Fishery; 2024 Harvest Specifications for Pacific Whiting, and 2024 Pacific Whiting Tribal Allocation

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

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS issues this proposed rule for the 2024 Pacific whiting fishery under the authority of the Pacific Coast Groundfish Fishery Management Plan, the Magnuson-Stevens Fishery Conservation and Management Act, the Pacific Whiting Act of 2006 (Whiting Act), and other applicable laws. This proposed rule would establish the domestic 2024 harvest specifications for Pacific whiting including the 2024 tribal allocation for the Pacific whiting fishery, the non-tribal sector allocations, and set-asides for incidental mortality in research activities and non-groundfish fisheries. The proposed measures are intended to help prevent overfishing, achieve optimum yield, ensure that management measures are based on the best scientific information available, and provide for the implementation of tribal treaty fishing rights.

DATES: Comments on this proposed rule must be received no later than May 15, 2024.

ADDRESSES: A plain language summary of this proposed rule is available at *https://www.regulations.gov/docket/NOAA-NMFS-2024-0044.* You may submit comments on this document, identified by NOAA–NMFS–2024–0044, 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–2024–0044'' in the Search box. Click on the ''Comment'' icon, complete the required fields, and enter or attach your comments.

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are a part of the public record and will generally be posted for public viewing on *https://www.regulations.gov* without change. All personal identifying information (*e.g.,* name, address, *etc.*), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter ''N/A'' in the required fields if you wish to remain anonymous).

Background information for this action and analytical documents for the Regulatory Flexibility Act (RFA), and National Environmental Policy Act (NEPA) are available at the NMFS West Coast Region website at: *https://www.fisheries.noaa.gov/action/2024-harvest-specifications-pacific-whiting-and-2024-tribal-allocation.*

NEPA documents for West Coast groundfish actions are also available at: *https://www.fisheries.noaa.gov/west-coast/laws-and-policies/groundfish-actions-nepa-documents.*

Additional background information for the Pacific Hake/Whiting Treaty can be found at: *https://www.fisheries.noaa.gov/west-coast/laws-policies/pacific-hake-whiting-treaty.*

FOR FURTHER INFORMATION CONTACT: Colin Sayre, phone: 206–526–4656, and email: *Colin.Sayre@noaa.gov.*

SUPPLEMENTARY INFORMATION:

Background

This proposed rule announces the adjusted coastwide whiting Total Allowable Catch (TAC) of 555,000 metric tons (mt), the adjusted U.S. TAC of 410,034 mt, and proposes domestic 2024 Pacific whiting harvest specifications, including the 2024 tribal allocation of 71,755.95 mt, announces the preliminary allocations for three non-tribal commercial whiting sectors, and proposes set-asides for incidental mortality in research activities and the state-managed pink shrimp (non-groundfish) fishery. The non-tribal Pacific whiting fishery opens on May 1 of each year. The tribal and non-tribal allocations for Pacific whiting, as well as set-asides, would be effective until December 31, 2024.

Pacific Whiting Agreement

The transboundary stock of Pacific whiting is managed through the Agreement Between the Government of the United States of America and the Government of Canada on Pacific Hake/Whiting of 2003 (Agreement). The Agreement establishes bilateral management bodies to implement the terms of the Agreement, including the Joint Management Committee (JMC), which recommends the annual catch level for Pacific whiting.

In addition to the JMC, the Agreement establishes several other bilateral management bodies to set whiting catch levels: the Joint Technical Committee (JTC), which conducts the Pacific whiting stock assessment; the Scientific Review Group (SRG), which reviews the stock assessment; and the Advisory Panel (AP), which provides stakeholder input to the JMC.

The Agreement establishes a default harvest policy of F–40 percent, which means a fishing mortality rate that would reduce the spawning biomass to 40 percent of the estimated unfished level. The Agreement also allocates 73.88 percent of the Pacific whiting TAC to the United States and 26.12 percent of the TAC to Canada. Based on recommendations from the JTC, SRG, and AP, the JMC determines the overall Pacific whiting TAC by March 25th of each year. NMFS, under the delegation of authority from the Secretary of Commerce, in consultation with the Secretary of State, has the authority to accept or reject this recommendation.

2024 Stock Assessment and Scientific Review

The JTC completed a stock assessment for Pacific whiting in February 2024. The assessment was reviewed by the SRG during a 4-day meeting held in person and online in Nanaimo, British Columbia, on February 6–9, 2024 (see **ADDRESSES** for the report; Status of the Pacific hake (whiting) stock in U.S. and Canadian waters in 2024). The SRG considered the 2024 assessment report and appendices to represent the best scientific information available for Pacific hake/whiting.

The stock assessment model for 2024 has the same population dynamics structure as the 2023 model. The model is fit to an acoustic survey index of biomass (abundance), a relative index of 1-year aged fish, annual commercial catch data, and age-composition data from the survey and commercial fisheries. Acoustic surveys are conducted every two years. The most recent survey occurred in 2023 and yielded the third lowest index of Pacific whiting abundance in the time series of surveys from 1995 to 2023.

Within the assessment model, the median estimate of female spawning

biomass at the start of 2024 is 1,884,950 mt. This is an upward shift from the most recent estimate for the 2023 female spawning biomass of 1,335,485 mt.

The median estimate of the 2024 relative spawning biomass (female spawning biomass at the start of 2024 divided by that at unfished equilibrium) is 99 percent, but is highly uncertain. After declining from 2018 to 2022, the median relative spawning biomass increased in 2023 and 2024, due to the estimated above average, but uncertain, size of the 2020 and 2021 age cohorts entering maturity.

The estimated probability that the spawning biomass at the start of 2024 is below the Agreement's F–40 percent default harvest rate (40 percent of unfished levels), is 1.3 percent, and the probability that relative fishing intensity exceeded the spawning potential ratio at 40 percent unfished levels in 2023 is 0.4 percent. The joint probability that the relative spawning stock biomass is both below 40 percent of unfished levels, and that fishing mortality is above the relative fishing intensity of the Agreement's F–40 percent default harvest rate is 0.2 percent.

The 2024 stock assessment indicated that despite estimates of a healthy Pacific whiting stock status, low abundance from the 2023 acoustic survey and low fishery catch in Canada (14.4 percent attainment) suggest a population structure not conducive to fully achieving harvest allocations in recent years.

2024 Pacific Whiting Coastwide and U.S. TAC Recommendation

The AP and JMC met in Lynnwood, Washington February 27–29, 2024, to develop advice on a 2024 coastwide TAC. The AP provided its 2024 TAC recommendation to the JMC on February 29, 2024. The JMC reviewed the advice of the JTC, the SRG, and the AP, and agreed on a TAC recommendation for transmittal to the United States and Canadian Governments.

The Agreement directs the JMC to base the catch limit recommendation on the default harvest rate unless scientific evidence demonstrates that a different rate is necessary to sustain the offshore Pacific whiting resource. After consideration of the 2024 stock assessment and other relevant scientific information, the JMC did not use the default harvest rate, and instead agreed on a more conservative approach. There were two primary reasons for choosing a TAC well below the level of F–40 percent: first, uncertainty regarding the size of the 2020 and 2021 year-classes led the JMC to conclude that using the default harvest rate could be too risky if these cohorts are smaller than estimated; and second, the fact that the survey biomass was the third-lowest in the survey time series. The JMC concluded that both of these factors warranted setting the coastwide TAC below the 2023 value of 625,000 mt, and lower than the level that would result from application of the default harvest rate. This conservative approach was endorsed by the AP, and is consistent with Article II(5)(b) of the Agreement.

The Agreement allows an adjusted TAC when either country's catch exceeds or is less than its TAC in the prior year. If the catch is in excess of the country's TAC, the amount of the overage is deducted from that country's TAC in the following year. If catch falls short of the country's TAC, a portion of the shortfall, is carried over and added to the country's TAC for the following year. Under the Agreement, carryover adjustments cannot not exceed 15 percent of a party country's unadjusted TAC for the year in which the shortfall occurred. In 2023, both countries did not fully attain their respective TACs; the percentage of the U.S. TAC attained for 2023 is detailed in the Initial Regulatory Flexibility Analysis (see the **ADDRESSES** section), which is summarized in the **CLASSIFICATION** section below. For the 2024 whiting fishery, the JMC recommended a coastwide TAC of 473,513 mt prior to adjustment. Based on Article III(2) of the Agreement, the 73.88 percent U.S. share of the unadjusted coastwide TAC is 349,831 mt. Consistent with Article II(5)(b) of the Agreement, a carryover of 60,203 mt was added to the U.S. share for an adjusted U.S. TAC of 410,034 mt. The 26.12 percent Canadian share of the unadjusted coastwide TAC, consistent with Article III(2) of the Agreement, is 123,681 mt, and a carryover of 21,285 mt was added to the Canadian share, for an adjusted Canadian TAC of 144,966 mt. The total coastwide adjusted TAC is 555,000 mt for 2024.

This recommendation is consistent with the best available scientific information, and provisions of the Agreement and the Whiting Act. The recommendation was transmitted via letter to the United States and Canadian Governments on March 05, 2024. NMFS, under delegation of authority from the Secretary of Commerce, approved the TAC recommendation of 410,034 mt for U.S. fisheries on March 29, 2024.

Tribal Allocation

The regulations at 50 CFR 660.50(d) identify the procedures for implementing the treaty rights that Pacific Coast treaty Indian tribes have to harvest groundfish in their usual and accustomed fishing areas in U.S. waters. Tribes with treaty fishing rights in the area covered by the Pacific Coast Groundfish Fishery Management Plan (FMP) request allocations, set-asides, or regulations specific to the tribes during the Council's biennial harvest specifications and management measures process. The regulations state that the Secretary will develop tribal allocations and regulations in consultation with the affected tribe(s) and, insofar as possible, with tribal consensus.

NMFS allocates a portion of the U.S. TAC of Pacific whiting to the tribal fishery, following the process established in 50 CFR 660.50(d). The tribal allocation is subtracted from the U.S. Pacific whiting TAC before allocation to the non-tribal sectors.

Four Washington coastal treaty Indian tribes—the Makah Indian Tribe, the Quileute Indian Tribe, the Quinault Indian Nation, and the Hoh Indian Tribe (collectively, the ''Treaty Tribes'')—can participate in the tribal Pacific whiting fishery. Tribal allocations of Pacific whiting have been based on discussions with the Treaty Tribes regarding their intent for those fishing years. The Hoh Tribe has not expressed an interest in participating in the Pacific whiting fishery to date. The Quileute Tribe and the Quinault Indian Nation have expressed interest in beginning to participate in the Pacific whiting fishery at a future date. To date, only the Makah Tribe has prosecuted a tribal fishery for Pacific whiting, and has harvested Pacific whiting since 1996 using midwater trawl gear. Table 1 below provides a recent history of U.S. TACs and annual tribal allocation in metric tons (mt).

TABLE 1—U.S. TOTAL ALLOWABLE CATCH AND ANNUAL TRIBAL ALLOCATION IN METRIC TONS (mt)

Year	U.S. TAC [1] (mt)	Tribal allocation (mt)
2010	193,935	49,939
2011	290,903	66,908
2012	186,037	48,556
2013	269,745	63,205
2014	316,206	55,336
2015	325,072	56,888
2016	367,553	64,322

[1] Beginning in 2012, the United States started using the term Total Allowable Catch, or TAC, based on the Agreement between the Government of the United States of America and the Government of Canada on Pacific Hake/Whiting. Prior to 2012, the terms Optimal Yield (OY) and Annual Catch Limit (ACL) were used.

TABLE 1—U.S. TOTAL ALLOWABLE CATCH AND ANNUAL TRIBAL ALLOCATION IN METRIC TONS (mt)—Continued

Year	U.S. TAC [1] (mt)	Tribal allocation (mt)
2017	441,433	77,251
2018	441,433	77,251
2019	441,433	77,251
2020	424,810	74,342
2021	369,400	64,645
2022	402,646	70,463
2023	461,750	80,806

In 2009, NMFS, the states of Washington and Oregon, and the Treaty Tribes started a process to determine the long-term tribal allocation for Pacific whiting. However, they have not yet determined a long-term allocation. This rule proposes the 2024 tribal allocation of Pacific whiting. This allocation does not represent a long-term allocation and is not intended to set precedent for future allocations.

In exchanges between NMFS and the Treaty Tribes during September 2023, the Makah Tribe indicated their intent to participate in the tribal Pacific whiting fishery in 2024. The Quinault Indian Nation, the Quileute Indian Tribe and the Hoh Indian Tribe informed NMFS in November and December 2023 that they will not participate in the 2024 fishery. NMFS proposes a tribal allocation that accommodates the tribal request, specifically 17.5 percent of the U.S. TAC. The proposed 2024 adjusted U.S. TAC is 410,034 mt, and therefore the proposed 2024 tribal allocation is 71,755.95 mt. NMFS has determined that the current scientific information regarding the distribution and abundance of the coastal Pacific whiting stock indicates the 17.5 percent is within the range of the tribal treaty right to Pacific whiting.

Non-Tribal Research and Bycatch Set-Asides

The U.S. non-tribal whiting fishery is managed under the Council's Pacific Coast Groundfish FMP. Each year, the Council recommends a set-aside to accommodate incidental mortality of Pacific whiting in research activities and the state-managed pink shrimp fishery, based on estimates of scientific research catch and estimated bycatch mortality in non-groundfish fisheries. At its November 2023 meeting, the Council recommended an incidental mortality set-aside of 750 mt for 2024. This set-aside is unchanged from the 750 mt set-aside amount for incidental mortality in 2023. This rule proposes the Council's recommendations.

Non-Tribal Harvest Guidelines and Allocations

In addition to the tribal allocation, this proposed rule establishes the fishery harvest guideline (HG), also called the non-tribal allocation. The proposed 2024 fishery HG for Pacific whiting is 337,528.05 mt. This amount was determined by deducting the 71,755.95 mt tribal allocation and the 750 mt allocation for scientific research catch and fishing mortality in non-groundfish fisheries from the U.S. adjusted TAC of 410,034 mt. Federal regulations further allocate the fishery HG among the three non-tribal sectors of the Pacific whiting fishery: the catcher/processor (C/P) Co-op Program, the Mothership (MS) Co-op Program, and the Shorebased Individual Fishing Quota (IFQ) Program. The C/P Co-op Program is allocated 34 percent (114,759.53 mt for 2024), the MS Co-op Program is allocated 24 percent (81,006.73 mt for 2024), and the Shorebased IFQ Program is allocated 42 percent (141,761.78 mt for 2024). The fishery south of 42° N lat. may not take more than 7,088 mt (5 percent of the Shorebased IFQ Program allocation) prior to May 1, the start of the primary Pacific whiting season north of 42° N lat.

TABLE 2—2024 PROPOSED PACIFIC WHITING ALLOCATIONS IN METRIC TONS

Sector	2024 Pacific whiting allocation (mt)
Tribal	71,755.95
Catcher/Processor (C/P) Co-op Program	114,759.53
Mothership (MS) Co-op Program	81,006.73
Shorebased IFQ Program	141,761.78

This proposed rule would be implemented under the statutory and regulatory authority of sections 304(b) and 305(d) of the Magnuson-Stevens Act, the Pacific Whiting Act of 2006, the regulations governing the groundfish fishery at 50 CFR 660.5–660.360, and other applicable laws. Additionally, with this proposed rule, NMFS would ensure that the fishery is managed in a manner consistent with treaty rights of the four Treaty Tribes to fish in their ''usual and accustomed grounds and stations'' in common with non-tribal citizens. *United States* v. *Washington,* 384 F. Supp. 313 (W.D. 1974).

Classification

NMFS notes that the public comment period for this proposed rule is 15 days. Finalizing the Pacific whiting harvest specifications close to the start of the Pacific whiting fishing season on May 1st provides the industry with more time to plan and execute the fishery and gives them earlier access to the finalized allocations of Pacific whiting. Given the considerably short timeframe between the JMC meeting in late February—early March and the start of the primary whiting season on May 1, NMFS has determined there is good cause for a 15-day comment period to best balance the interest in allowing the public adequate time to comment on the proposed measures with the benefits of implementing the set-aside management measures, and Pacific whiting allocations in a timely manner. Timely implementation of this action will ensure the tribal and non-tribal commercial fishery sectors receive their full Pacific whiting allocations with sufficient time to maximize catch attainment within their respective fisheries during the 2024 whiting season. The NMFS Assistant Administrator has determined that this proposed rule is consistent with the Pacific Coast Groundfish FMP, other provisions of the Magnuson-Stevens Act, and other applicable law, subject to further consideration after public comment. In making its final determination, NMFS will take into account the complete record, including comments received during the comment period for this proposed rule.

Pursuant to Executive Order 13175, this proposed rule was developed after meaningful consultation and collaboration with tribal officials from the area covered by the Pacific Coast Groundfish FMP. Under the Magnuson-Stevens Act at 16 U.S.C. 1852(b)(5), one of the voting members of the Pacific Council must be a representative of an Indian tribe with federally recognized fishing rights from the area of the Council's jurisdiction. In addition, regulations implementing the Pacific Coast Groundfish FMP establish a procedure by which the tribes with treaty fishing rights in the area covered by the Pacific Coast Groundfish FMP request allocations or regulations specific to the Tribes, in writing, before the first of the two meetings at which the Council considers groundfish management measures. The regulations at 50 CFR 660.50(d) further state that the Secretary will develop tribal allocations and regulations under this paragraph in consultation with the affected tribe(s) and, insofar as possible, with tribal consensus. The tribal management measures in this proposed rule have been developed following these procedures.

The Office of Management and Budget has determined that this proposed rule

is not significant for purposes of Executive Order 12866.

A range of potential total harvest levels for Pacific whiting has been considered in the Final Environmental Impact Statement for Harvest Specifications and Management Measures for 2015–2016 and Biennial Periods thereafter (2015/16 FEIS), and in the Environmental Assessment (EA) and the Regulatory Impact Review (RIR) included in the analytical document for Amendment 30 to the Pacific Coast Groundfish Fishery Management Plan and 2023–2024 Harvest Specifications and Management Measures. These documents are available from NMFS (see **ADDRESSES**). The 2015/16 FEIS examined the harvest specifications and management measures for 2015–16 and gave 10-year projections for routinely adjusted harvest specifications and management measures. The 10-year projections were produced to evaluate the impacts of the ongoing implementation of harvest specifications and management measures and to evaluate the impacts of the routine adjustments that are the main component of each biennial cycle. The EA for the 2023–24 cycle builds on the 2015/16 FEIS and focuses on the harvest specifications and management measures that were not within the scope of the 10-year projections in the 2015/16 FEIS.

An Initial Regulatory Flexibility Analysis (IRFA) was prepared for this action, as required by section 603 of the Regulatory Flexibility Act (RFA). The IRFA describes the economic impact this proposed rule, if adopted, would have on small entities. A description of the action, why it is being considered, and the legal basis for this action is contained in the **SUMMARY** section and at the beginning of the **SUPPLEMENTARY INFORMATION** section of the preamble. A summary of the IRFA follows. Copies of the IRFA are available from NMFS (See **ADDRESSES**).

Under the RFA, the term ''small entities'' includes small businesses, small organizations, and small governmental jurisdictions. For purposes of complying with the RFA, NMFS has established size criteria for entities involved in the fishing industry that qualify as small businesses. A business involved in fish harvesting is a small business if it is independently owned and operated and not dominant in its field of operation (including its affiliates) and if it has combined annual receipts not in excess of $11 million for all its affiliated operations worldwide (80 FR 81194, December 29, 2015; 50 CFR part 200). In addition, the Small Business Administration has established size criteria for other entities that may be affected by this proposed rule. A wholesale business servicing the fishing industry is a small business if it employs 100 or fewer persons on a full time, part time, temporary, or other basis, at all its affiliated operations worldwide. A small organization is any nonprofit enterprise that is independently owned and operated and is not dominant in its field. A seafood processor is a small business if it is independently owned and operated, not dominant in its field of operation, and employs 750 or fewer persons on a full time, part time, temporary, or other basis, at all its affiliated operations worldwide (See NAICS 311710 at 13 CFR 121.201). For purposes of rulemaking, NMFS is also applying the seafood processor standard to C/Ps because whiting C/Ps earn the majority of the revenue from processed seafood product.

Description and Estimate of the Number of Small Entities to Which the Rule Applies, and Estimate of Economic Impacts by Entity Size and Industry

This proposed rule affects how Pacific whiting is allocated to the following sectors/programs: Tribal, Shorebased IFQ Program Trawl Fishery, MS Co-op Program Whiting At-sea Trawl Fishery, and C/P Co-op Program Whiting At-sea Trawl Fishery. The amount of Pacific whiting allocated to these sectors is based on the U.S. TAC, which is developed and approved through the process set out in the Agreement and the Whiting Act.

We expect one tribal entity, the Makah Tribe, to fish for Pacific whiting in 2024. Tribes are not considered small entities for the purposes of RFA. Impacts to tribes are nevertheless considered in this analysis.

This proposed rule directly affects the C/P Co-op Program, composed of 10 C/P endorsed permits owned by three companies that have formed a single co-op. These co-ops are considered large entities both because they have participants that are large entities and because they have in total more than 750 employees worldwide including affiliates.

This proposed rule also directly affects the Shorebased IFQ Program. As of March 2024, the Shorebased IFQ Program is composed of 163 Quota Share permits/accounts (122 of which were allocated whiting quota pounds), and 48 licensed first receiver sites, of which 16 sites are owned by 10 companies that receive whiting. Of these companies that receive whiting, none are considered small entities.

This proposed rule also directly affect participants in the MS Co-op Program, the limited access program that applies to eligible harvesters and processors in the MS sector of the Pacific whiting at-sea trawl fishery. This program consists of six MS processor permits, and a catcher vessel fleet currently composed of a single co-op, with 34 Mothership/Catcher Vessel (MS/CV) endorsed permits (with three permits each having two catch history assignments).

Although there are three non-tribal sectors (the C/P Co-op Program, the Shorebased IFQ Program, and the MS Co-op Program), many companies participate in two sectors and some participate in all three sectors, as well as other non-whiting groundfish fisheries. As part of the permit application processes for the non-tribal fisheries, NMFS asks permit applicants if they considered themselves a small business based on a review of the Small Business Administration size criteria, and asks each permit applicant to provide detailed ownership information. Data on employment worldwide, including affiliates, are not available for these companies, which generally operate in Alaska as well as on the West Coast in non-whiting groundfish fisheries, and which may have operations in other countries, as well. NMFS requests that limited entry permit holders self-report their size status. For 2024, all 10 C/P permits reported that they are not small businesses, as did 8 mothership catcher vessels. There is substantial, but not complete, overlap between permit ownership and vessel ownership so there may be a small number of additional small entity vessel owners who will be impacted by this rule. After accounting for cross-fishery participation, multiple Quota Share account holders, and affiliation through ownership, NMFS estimates that there are 103 non-tribal entities directly affected by these proposed regulations, 89 of which are considered small entities.

This rule will allocate Pacific whiting between tribal and non-tribal harvesters (a mixture of small and large businesses). Tribal fisheries consist of a mixture of fishing activities that are similar to the activities that non-tribal fisheries undertake. Tribal harvests may be delivered to both shoreside plants and motherships for processing. These processing facilities also process fish harvested by non-tribal fisheries. The effect of the tribal allocation on non-tribal fisheries will depend on the level of tribal harvests relative to their allocation and the reapportionment process. If the tribes do not harvest their

entire allocation, there are opportunities during the year to reapportion unharvested tribal amounts to the non-tribal fleets. For example, in 2023 NMFS reapportioned 45,000 mt of the original 80,806 mt tribal allocation (88 FR 75238, November 2, 2023). This reapportionment was based on conversations with the tribes and the best information available at the time, which indicated that this amount would not limit tribal harvest opportunities for the remainder of the year. The reapportioning process allows unharvested tribal allocations of Pacific whiting to be fished by the non-tribal fleets, benefitting both large and small entities. The revised Pacific whiting allocations for 2023 following the reapportionment were: Tribal 35,806 mt, C/P Co-op 144,566 mt; MS Co-op 102,047 mt; and Shorebased IFQ Program 178,581 mt.

The prices for Pacific whiting are largely determined by the world market because most of the Pacific whiting harvested in the United States is exported. The U.S. Pacific whiting TAC is highly variable, as is subsequent attainment of sector allocations, and ex-vessel revenues. For the years 2013 to 2023, the U.S. non-tribal commercial fishery sectors averaged harvests of approximately 271,392 mt, and revenues of $54.1 million annually. The 2023 U.S. non-tribal commercial fishery sectors attained a Pacific whiting catch of approximately 239,665 mt out of a harvest guideline of 380,194 mt (63 percent attainment), resulting in a total revenue of $46.6 million. The tribal fishery landed less than 1,000 mt out of the 2023 tribal allocation of 80,806 mt.

Impacts to the U.S. non-tribal fishery are measured with an estimate of ex-vessel revenue. The proposed adjusted coastwide TAC of 555,000 mt would result in an adjusted U.S. TAC of 410,034 mt and, after deduction of the tribal allocation and the incidental catch set-aside, a U.S. non-tribal harvest guideline of 337,528.05 mt. Using the 2023 weighted-average non-tribal price of $194.74 per metric ton, the proposed 2024 adjusted U.S. TAC is estimated to result in a potential ex-vessel revenue of $65.7 million for the U.S. non-tribal fishing fleet if fully harvested (100 percent attainment).

Impacts to tribal catcher vessels who elect to participate in the tribal fishery are measured with an estimate of ex-vessel revenue. In lieu of more complete information on tribal deliveries, total ex-vessel revenue is estimated with the 2023 average ex-vessel price of Pacific whiting, which was $194.74 per mt. At that price, the proposed 2024 tribal allocation of 71,755.95 mt would potentially have an ex-vessel value of $13.97 million if fully harvested.

A Description of any Significant Alternatives to the Proposed Rule That Accomplish the Stated Objectives of Applicable Statutes and That Minimize any Significant Economic Impact of the Proposed Rule on Small Entities

For the allocations to the non-tribal commercial sectors, the Pacific whiting tribal allocation, and set-asides for research and incidental mortality NMFS considered two alternatives: the ''No Action'' alternative and the ''Proposed Action'' alternative.

For allocations to non-tribal commercial sectors, the No Action alternative would mean that NMFS would not implement allocations to the non-tribal sectors based on the JMC recommended U.S. TAC, and this would not fulfill NMFS' responsibility to manage the U.S. fishery. This is contrary to the Whiting Act and the Agreement, both of which require sustainable management of the Pacific whiting resource. Therefore, the No Action alternative for allocations to non-tribal commercial sectors received no further consideration.

For set-asides for research and incidental mortality, the No Action alternative would mean that NMFS would not implement the set-aside amount of 750 mt recommended by the Council. Not implementing set-asides of the US whiting TAC would mean incidental mortality of the fish in research activities and non-groundfish fisheries would not be accommodated. This would be inconsistent with the Council's recommendation, the Pacific Coast Groundfish Fishery Management Plan, the regulations setting the framework governing the groundfish fishery, and NMFS' responsibility to manage the fishery. Therefore, the No Action alternative for set-asides received no further consideration.

NMFS did not consider a broader range of alternatives to the proposed tribal allocation because the tribal allocation is a percentage of the U.S. TAC and is based primarily on the requests of the Tribes. These requests reflect the level of participation in the fishery that will allow the Tribes to exercise their treaty right to fish for Pacific whiting. Under the Proposed Action alternative, NMFS proposes to set the tribal allocation percentage at 17.5 percent, as requested by the Tribes. This would yield a tribal allocation of 71,755.95 mt for 2024. Consideration of a percentage lower than the tribal request of 17.5 percent is not appropriate in this instance. As a matter of policy, NMFS has historically supported the harvest levels requested by the Tribes. Based on the information available to NMFS, the tribal request is within their tribal treaty rights. A higher percentage would arguably also be within the scope of the treaty right. However, a higher percentage would unnecessarily limit the non-tribal fishery.

Under the No Action alternative, NMFS would not make an allocation to the tribal sector. This alternative was considered, but the regulatory framework provides for a tribal allocation on an annual basis only. Therefore, the No Action alternative would result in no allocation of Pacific whiting to the tribal sector in 2024, which would be inconsistent with NMFS' responsibility to manage the fishery consistent with the Tribes' treaty rights. Given that there is a tribal request for allocation in 2024, this No Action alternative for allocation to the tribal sector received no further consideration.

Regulatory Flexibility Act Determination of No Significant Impact

NMFS has preliminarily determined this proposed rule would not have a significant economic impact on small entities. This rule is similar to previous rulemakings concerning Pacific whiting. In the context of an internationally set TAC, this rule concerns the amount of the U.S. TAC that should be allocated to the tribal fishery and a set-aside for research and bycatch in non-groundfish fisheries, and announces Pacific whiting allocations for the non-tribal fishery for 2024. Pacific whiting allocations to the non-tribal sectors provide additional economic opportunity to the entities considered in this analysis to prosecute a quota species within a multi-species groundfish catch share program. In addition, the reapportioning process allows unharvested tribal allocations of Pacific whiting, fished by small entities, to be fished by the non-tribal fleets, potentially providing economic benefits to both large and small entities. NMFS believes this rule will not adversely affect small entities. Thus, as discussed above, this action would not have a significant economic impact on small entities. Nonetheless, NMFS has prepared an IRFA and is requesting comments on this conclusion.

NMFS has prepared the IRFA, as described above, and is requesting comments on this conclusion. See **ADDRESSES.**

This proposed rule contains no information collection requirements under the Paperwork Reduction Act of 1995.

No Federal rules have been identified that duplicate, overlap, or conflict with this action.

List of Subjects in 50 CFR Part 660

Fisheries, Fishing, Indian Fisheries.

Dated: April 24, 2024

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 660 is proposed to be amended as follows:

PART 660–FISHERIES OFF WEST COAST STATES

■ 1. The authority citation for part 660 continues to read as follows:

Authority: 16 U.S.C. 1801 *et seq.,* 16 U.S.C. 773 *et seq.,* and 16 U.S.C. 7001 *et seq.*

■ 2. In § 660.50, revise paragraph (f)(4) to read as follows:

§ 660.50 Pacific Coast treaty Indian fisheries.

* * * * *

(f) * * *

(4) *Pacific whiting.* The tribal allocation for 2024 is 71,755.95 mt.

* * * * *

■ 3. Revise Table 2a to part 660, subpart C–2024, to read as follows:

TABLE 2a TO PART 660, SUBPART C—2024, SPECIFICATIONS OF OFL, ABC, ACL, ACT AND FISHERY HARVEST GUIDELINES (WEIGHTS IN METRIC TONS)

[Capitalized stocks are overfished]

Stocks	Area	OFL	ABC	ACL [a]	Fishery HG [b]
YELLOWEYE ROCKFISH [c]	Coastwide	91	76	53.3	42.6
Arrowtooth Flounder [d]	Coastwide	20,459	14,178	14,178	12,083
Big Skate [e]	Coastwide	1,492	1,267	1,267	1,207.2
Black Rockfish [f]	California (S of 42° N lat)	364	329	329	326.6
Black Rockfish [g]	Washington (N of 46°16′ N lat)	319	289	289	270.5
Bocaccio [h]	S of 40°10′ N lat	2,002	1,828	1,828	1,779.9
Cabezon [i]	California (S of 42° N lat)	185	171	171	169.4
California Scorpionfish [j]	S of 34°27′ N lat	280	252	252	248
Canary Rockfish [k]	Coastwide	1,434	1,296	12,296	1,227.4
Chilipepper [l]	S of 40°10′ N lat	2,346	2,121	2,121	2,023.4
Cowcod [m]	S of 40°10′ N lat	112	79	79	67.8
Cowcod	(Conception)	93	67	NA	NA
Cowcod	(Monterey)	19	12	NA	NA
Darkblotched Rockfish [n]	Coastwide	857	782	782	758.7
Dover Sole [o]	Coastwide	55,859	51,949	50,000	48,402.9
English Sole [p]	Coastwide	11,158	8,960	8,960	8,700.5
Lingcod [q]	N of 40°10′ N lat	4,455	3,854	3,854	3,574.4
Lingcod [r]	S of 40°10′ N lat	855	740	722	706.5
Longnose Skate [s]	Coastwide	1,955	1,660	1,660	1,408.7
Longspine Thornyhead [t]	N of 34°27′ N lat	4,433	2,846	2,162	2,108.3
Longspine Thornyhead [u]	S of 34°27′ N lat	.....	.....	683	680.8
Pacific Cod [v]	Coastwide	3,200	1,926	1,600	1,094
Pacific Ocean Perch [w]	N of 40°10′ N lat	4,133	3,443	3,443	3,297.5
Pacific Whiting [x]	Coastwide	747,588	x/	x/	337,528.05
Petrale Sole [y]	Coastwide	3,563	3,285	3,285	2,898.8
Sablefish [z]	N of 36° N lat	10,670	9,923	7,730	See Table 2c
Sablefish [aa]	S of 36° N lat	.....	.....	2,193	2,165.6
Shortspine Thornyhead [bb]	N of 34°27′ N lat	3,162	2,030	1,328	1,249.7
Shortspine Thornyhead [cc]	S of 34°27′ N lat	.....	.....	702	695.3
Spiny Dogfish [dd]	Coastwide	1,883	1,407	1,407	1,055.5
Splitnose [ee]	S of 40°10′ N lat	1,766	1,553	1,553	1,534.3
Starry Flounder [ff]	Coastwide	652	392	392	343.7
Widow Rockfish [gg]	Coastwide	12,453	11,482	11,482	11,243.7
Yellowtail Rockfish [hh]	N of 40°10′ N lat	5,795	5,291	5,291	4,263.3
Stock Complexes					
Blue/Deacon/Black Rockfish [ii]	Oregon	671	594	594	592.2
Cabezon/Kelp Greenling [jj]	Washington	22	17	17	15
Cabezon/Kelp Greenling [kk]	Oregon	198	180	180	179.2
Nearshore Rockfish North [ll]	N of 40°10′ N lat	109	91	91	87.7
Nearshore Rockfish South [mm]	S of 40°10′ N lat	1,097	902	891	886.5
Other Fish [nn]	Coastwide	286	223	223	201.8
Other Flatfish [oo]	Coastwide	7,946	4,874	4,874	4,653.2
Shelf Rockfish North [pp]	N of 40°10′ N lat	1,610	1,278	1,278	1,207
Shelf Rockfish South [qq]	S of 40°10′ N lat	1,833	1,464	1,464	1,331.4
Slope Rockfish North [rr]	N of 40°10′ N lat	1,797	1,516	1,516	1,450.6
Slope Rockfish South [ss]	S of 40°10′ N lat	868	697	697	658.1

[a] Annual catch limits (ACLs), annual catch targets (ACTs) and harvest guidelines (HGs) are specified as total catch values.

[b] Fishery HGs means the HG or quota after subtracting Pacific Coast treaty Indian tribes allocations and projected catch, projected research catch, deductions for fishing mortality in non-groundfish fisheries, and deductions for EFPs from the ACL or ACT.

[c] Yelloweye rockfish. The 53.3 mt ACL is based on the current rebuilding plan with a target year to rebuild of 2029 and an SPR harvest rate of 65 percent. 10.7 mt is deducted from the ACL to accommodate the Tribal fishery (5 mt), EFP fishing (0.12 mt), research catch (2.92 mt), and incidental open access mortality (2.66 mt) resulting in a fishery HG of 42.6 mt. The non-trawl HG is 39.2 mt. The combined non-nearshore/nearshore HG is 8.2 mt. Recreational HGs are: 10 mt (Washington); 9.1 mt (Oregon); and 11.8 mt (California). In addition, the non-trawl ACT is 30.7, and the combined non-nearshore/nearshore ACT is 6.4 mt. Recreational ACTs are: 7.9 mt (Washington), 7.2 (Oregon), and 9.3 mt (California).

[d] Arrowtooth flounder. 2,094.98 mt is deducted from the ACL to accommodate the Tribal fishery (2,041 mt), research catch (12.98 mt) and incidental open access mortality (41 mt), resulting in a fishery HG of 12,083 mt.

[e] Big skate. 59.8 mt is deducted from the ACL to accommodate the Tribal fishery (15 mt), research catch (5.49 mt), and incidental open access mortality (39.31 mt), resulting in a fishery HG of 1,207.2 mt.

[f] Black rockfish (California). 2.26 mt is deducted from the ACL to accommodate EFP fishing (1.0 mt), research catch (0.08 mt), and incidental open access mortality (1.18 mt), resulting in a fishery HG of 326.6 mt.

[g] Black rockfish (Washington). 18.1 mt is deducted from the ACL to accommodate the Tribal fishery (18 mt) and research catch (0.1 mt), resulting in a fishery HG of 270.5 mt.

[h] Bocaccio south of 40°10′ N lat. Bocaccio are managed with stock-specific harvest specifications south of 40°10′ N lat. and within the Minor Shelf Rockfish complex north of 40°10′ N lat. 48.12 mt is deducted from the ACL to accommodate EFP fishing (40 mt), research catch (5.6 mt), and incidental open access mortality (2.52 mt), resulting in a fishery HG of 1,779.9 mt. The California recreational fishery south of 40°10′ N lat. has an HG of 749.7 mt.

[i] Cabezon (California). 1.63 mt is deducted from the ACL to accommodate EFP fishing (1 mt), research catch (0.02 mt), and incidental open access mortality (0.61 mt), resulting in a fishery HG of 169.4 mt.

[j] California scorpionfish south of 34°27′ N lat. 3.89 mt is deducted from the ACL to accommodate research catch (0.18 mt) and incidental open access mortality (3.71 mt), resulting in a fishery HG of 248 mt.

[k] Canary rockfish. 68.91 mt is deducted from the ACL to accommodate the Tribal fishery (50 mt), EFP fishing (6 mt), research catch (10.08 mt), and incidental open access mortality (2.83 mt), resulting in a fishery HG of 1,227.4 mt. The combined nearshore/non-nearshore HG is 122.4 mt. Recreational HGs are: 41.8 mt (Washington); 62.9 mt (Oregon); and 112.9 mt (California).

[l] Chilipepper rockfish south of 40°10′ N lat. Chilipepper are managed with stock-specific harvest specifications south of 40°10′ N lat. and within the Minor Shelf Rockfish complex north of 40°10′ N lat. 97.7 mt is deducted from the ACL to accommodate EFP fishing (70 mt), research catch (14.04 mt), incidental open access mortality (13.66 mt), resulting in a fishery HG of 2,023.4 mt.

[m] Cowcod south of 40°10′ N lat. Cowcod are managed with stock-specific harvest specifications south of 40°10′ N lat. and within the Minor Shelf Rockfish complex north of 40°10′ N lat. 11.17 mt is deducted from the ACL to accommodate EFP fishing (1 mt), research catch (10 mt), and incidental open access mortality (0.17 mt), resulting in a fishery HG of 67.8 mt.

[n] Darkblotched rockfish. 23.76 mt is deducted from the ACL to accommodate the Tribal fishery (5 mt), EFP fishing (0.5 mt), research catch (8.46 mt), and incidental open access mortality (9.8 mt) resulting in a fishery HG of 758.7 mt.

[o] Dover sole. 1,597.11 mt is deducted from the ACL to accommodate the Tribal fishery (1,497 mt), research catch (50.84 mt), and incidental open access mortality (49.27 mt), resulting in a fishery HG of 48,402.9 mt.

[p] English sole. 259.52 mt is deducted from the ACL to accommodate the Tribal fishery (200 mt), research catch (17 mt), and incidental open access mortality (42.52 mt), resulting in a fishery HG of 8,700.5 mt.

[q] Lingcod north of 40°10′ N lat. 279.63 mt is deducted from the ACL for the Tribal fishery (250 mt), research catch (17.71 mt), and incidental open access mortality (11.92 mt) resulting in a fishery HG of 3,574.4 mt.

[r] Lingcod south of 40°10′ N lat. 15.5 mt is deducted from the ACL to accommodate EFP fishing (4 mt), research catch (3.19 mt), and incidental open access mortality (8.31 mt), resulting in a fishery HG of 706.5 mt.

[s] Longnose skate. 251.3 mt is deducted from the ACL to accommodate the Tribal fishery (220 mt), and research catch (12.46 mt), and incidental open access mortality (18.84 mt), resulting in a fishery HG of 1,408.7 mt.

[t] Longspine thornyhead north of 34°27′ N lat. 53.71 mt is deducted from the ACL to accommodate the Tribal fishery (30 mt), research catch (17.49 mt), and incidental open access mortality (6.22 mt), resulting in a fishery HG of 2,108.3 mt.

[u] Longspine thornyhead south of 34°27′ N lat. 2.24 mt is deducted from the ACL to accommodate research catch (1.41 mt) and incidental open access mortality (0.83 mt), resulting in a fishery HG of 680.8 mt.

[v] Pacific cod. 506 mt is deducted from the ACL to accommodate the Tribal fishery (500 mt), research catch (5.47 mt), and incidental open access mortality (0.53 mt), resulting in a fishery HG of 1,094 mt.

[w] Pacific ocean perch north of 40°10′ N lat. Pacific ocean perch are managed with stock-specific harvest specifications north of 40°10′ N lat. and within the Minor Slope Rockfish complex south of 40°10′ N lat. 145.48 mt is deducted from the ACL to accommodate the Tribal fishery (130 mt), EFP fishing, research catch (5.39 mt), and incidental open access mortality (10.09 mt), resulting in a fishery HG of 3,297.5 mt.

[x] Pacific hake/whiting. The 2024 OFL of 747,588mt is based on the 2024 assessment with an F40 percent of FMSY proxy. The 2024 coastwide adjusted Total Allowable Catch (TAC) is 555,000 mt. The U.S. TAC is 73.88 percent of the coastwide TAC. The 2024 adjusted U.S. TAC is 410,034 mt. From the U.S. TAC, 71,755.95 mt is deducted to accommodate the Tribal fishery, and 750 mt is deducted to accommodate research and bycatch in other fisheries, resulting in a 2024 fishery HG of 337,528.05 mt. The TAC for Pacific whiting is established under the provisions of the Agreement between the Government of the United States of America and the Government of Canada on Pacific Hake/Whiting of 2003 and the Pacific Whiting Act of 2006, 16 U.S.C. 7001–7010, and the international exception applies. Therefore, no ABC or ACL values are provided for Pacific whiting.

[y] Petrale sole. 386.24 mt is deducted from the ACL to accommodate the Tribal fishery (350 mt), EFP fishing (1 mt), research catch (24.14 mt), and incidental open access mortality (11.1 mt), resulting in a fishery HG of 2,898.8 mt.

[z] Sablefish north of 36° N lat. The sablefish coastwide ACL value is not specified in regulations. The sablefish coastwide ACL value is apportioned north and south of 36° N lat., using the rolling 5-year average estimated swept area biomass from the NMFS NWFSC trawl survey, with 77.9 percent apportioned north of 36° N lat. and 22.1 percent apportioned south of 36° N lat. The northern ACL is 7,730 mt and is reduced by 773 mt for the Tribal allocation (10 percent of the ACL north of 36° N lat.). The 773 mt Tribal allocation is reduced by 1.7 percent to account for discard mortality. Detailed sablefish allocations are shown in table 1c.

[aa] Sablefish south of 36° N lat. The ACL for the area south of 36° N lat. is 2,193 mt (22.1 percent of the calculated coastwide ACL value). 27.4 mt is deducted from the ACL to accommodate research catch (2.40 mt) and the incidental open access fishery (25 mt), resulting in a fishery HG of 2,165.6 mt.

[bb] Shortspine thornyhead north of 34°27′ N lat. 78.3 mt is deducted from the ACL to accommodate the Tribal fishery (50 mt), research catch (10.48 mt), and incidental open access mortality (17.82 mt), resulting in a fishery HG of 1,249.7 mt for the area north of 34°27′ N lat.

[cc] Shortspine thornyhead south of 34°27′ N lat. 6.71 mt is deducted from the ACL to accommodate research catch (0.71 mt) and incidental open access mortality (6 mt), resulting in a fishery HG of 695.3 mt for the area south of 34°27′ N lat.

[dd] Spiny dogfish. 351.48 mt is deducted from the ACL to accommodate the Tribal fishery (275 mt), EFP fishing (1 mt), research catch (41.85 mt), and incidental open access mortality (33.63 mt), resulting in a fishery HG of 1,055.5 mt.

[ee] Splitnose rockfish south of 40°10′ N lat. Splitnose rockfish in the north is managed in the Slope Rockfish complex and with stock-specific harvest specifications south of 40°10′ N lat. 18.42 mt is deducted from the ACL to accommodate EFP fishing (1.5 mt), research catch (11.17 mt), and incidental open access mortality (5.75 mt), resulting in a fishery HG of 1,534.3 mt.

[ff] Starry flounder. 48.28 mt is deducted from the ACL to accommodate the Tribal fishery (2 mt), research catch (0.57 mt), and incidental open access mortality (45.71 mt), resulting in a fishery HG of 343.7 mt.

[gg] Widow rockfish. 238.32 mt is deducted from the ACL to accommodate the Tribal fishery (200 mt), EFP fishing (18 mt), research catch (17.27 mt), and incidental open access mortality (3.05 mt), resulting in a fishery HG of 11,243.7 mt.

[hh] Yellowtail rockfish north of 40°10′ N lat. Yellowtail rockfish are managed with stock-specific harvest specifications north of 40°10′ N lat. and within the Minor Shelf Rockfish complex south of 40°10′ N lat. 1,027.55 mt is deducted from the ACL to accommodate the Tribal fishery (1,000 mt), research catch (20.55 mt), and incidental open access mortality (7 mt), resulting in a fishery HG of 4,263.3 mt.

[ii] Black rockfish/Blue rockfish/Deacon rockfish (Oregon). 1.82 mt is deducted from the ACL to accommodate research catch (0.08 mt), and incidental open access mortality (1.74 mt), resulting in a fishery HG of 592.2 mt.

[jj] Cabezon/kelp greenling (Washington). 2 mt is deducted from the ACL to accommodate the Tribal fishery, resulting in a fishery HG is 15 mt.

[kk] Cabezon/kelp greenling (Oregon). 0.79 mt is deducted from the ACL to accommodate research catch (0.05 mt) and incidental open access mortality (0.74 mt), resulting in a fishery HG of 179.2 mt.

[ll] Nearshore Rockfish north of 40°10′ N lat. 3.27 mt is deducted from the ACL to accommodate the Tribal fishery (1.5 mt), research catch (0.47 mt), and incidental open access mortality (1.31 mt), resulting in a fishery HG of 87.7 mt. State-specific HGs are 17.2 mt (Washington), 30.9 mt (Oregon), and 39.9 mt (California). The ACT for copper rockfish (California) is 6.99 mt. The ACT for quillback rockfish (California) is 0.96 mt.

[mm] Nearshore Rockfish south of 40°10′ N lat. 4.54 mt is deducted from the ACL to accommodate research catch (2.68 mt) and incidental open access mortality (1.86 mt), resulting in a fishery HG of 886.5 mt. The ACT for copper rockfish is 87.73 mt. The ACT for quillback rockfish is 0.97 mt.

[nn] nn/Other Fish. The Other Fish complex is comprised of kelp greenling off California and leopard shark coastwide. 21.24 mt is deducted from the ACL to accommodate research catch (6.29 mt) and incidental open access mortality (14.95 mt), resulting in a fishery HG of 201.8 mt.

[oo] Other Flatfish. The Other Flatfish complex is comprised of flatfish species managed in the PCGFMP that are not managed with stock-specific OFLs/ABCs/ACLs. Most of the species in the Other Flatfish complex are unassessed and include: butter sole, curlfin sole, flathead sole, Pacific sanddab, rock sole, sand sole, and rex sole. 220.79 mt is deducted from the ACL to accommodate the Tribal fishery (60 mt), research catch (23.63 mt), and incidental open access mortality (137.16 mt), resulting in a fishery HG of 4,653.2 mt.

[pp] Shelf Rockfish north of 40°10′ N lat. 70.94 mt is deducted from the ACL to accommodate the Tribal fishery (30 mt), research catch (15.32 mt), and incidental open access mortality (25.62 mt), resulting in a fishery HG of 1,207.1 mt.

[qq] Shelf Rockfish south of 40°10′ N lat. 132.77 mt is deducted from the ACL to accommodate EFP fishing (50 mt), research catch (15.1 mt), and incidental open access mortality (67.67 mt) resulting in a fishery HG of 1,331.4 mt.

[rr] Slope Rockfish north of 40°10′ N lat. 65.39 mt is deducted from the ACL to accommodate the Tribal fishery (36 mt), research catch (10.51 mt), and incidental open access mortality (18.88 mt), resulting in a fishery HG of 1,450.6 mt.

[ss] Slope Rockfish south of 40°10′ N lat. 38.94 mt is deducted from the ACL to accommodate EFP fishing (1 mt), research catch (18.21 mt), and incidental open access mortality (19.73 mt), resulting in a fishery HG of 658.1 mt. Blackgill rockfish has a stock-specific HG for the entire groundfish fishery south of 40°10′ N lat. set equal to the species' contribution to the 40–10-adjusted ACL. Harvest of blackgill rockfish in all groundfish fisheries south of 40°10′ N lat. counts against this HG of 169.9 mt.

* * * * *

■ 4. Revise Table 2b to part 660, subpart C–2024, to read as follows:

TABLE 2b. TO PART 660, SUBPART C–2024, AND BEYOND, ALLOCATIONS BY SPECIES OR SPECIES GROUP

[Weight in metric tons]

Stocks/stock complexes	Area	Fishery HG or ACT [a] [b]	Trawl		Non-trawl	
			%	mt	%	mt
YELLOWEYE ROCKFISH [a]	Coastwide	42.6	8	3.41	92	39.2
Arrowtooth flounder	Coastwide	12	95	11,478.9	5	604.2
Big skate [a]	Coastwide	1,207.2	95	1,146.8	5	60.4
Bocaccio [a]	S of 40°10′ N lat	1,779.9	39.04	694.9	60.96	1,085
Canary rockfish [a]	Coastwide	1,227.4	72.3	887.4	27.7	340
Chilipepper rockfish	S of 40°10′ N lat	2,023.4	75	1,517.6	25	505.9
Cowcod [a]	S of 40°10′ N lat	67.8	36	24.4	64	43.4
Darkblotched rockfish	Coastwide	758.7	95	720.8	5	37.9
Dover sole	Coastwide	48,402.8	95	45,982.7	5	2,420.1
English sole	Coastwide	8,700.5	95	8,265.5	5	435
Lingcod	N of 40°10′ N lat	3,574.4	45	1,608.5	55	1,965.9
Lingcod [a]	S of 40°10′ N lat	706.5	40	282.6	60	423.9
Longnose skate [a]	Coastwide	1,408.7	90	1,267.8	10	140.9
Longspine thornyhead	N of 34°27′ N lat	2,108.3	95	2,002.9	5	105.4
Pacific cod	Coastwide	1,094	95	1,039.3	5	54.7
Pacific ocean perch	N of 40°10′ N lat	3,297.5	95	3,132.6	5	164.9
Pacific whiting [c]	Coastwide	337,528.05	100	337,528.05	0	0
Petrale sole [a]	Coastwide	2,898.8	.....	2,868.8	.....	30
Sablefish	N of 36° N lat	NA	See Table 2c			
Sablefish	S of 36° N lat	2,165.6	42	909.6	58	1,256.0
Shortspine thornyhead	N of 34°27′ N lat	1,249.7	95	1,187.2	5	62.5
Shortspine thornyhead	S of 34°27′ N lat	695.3	.....	50	.....	645.3
Splitnose rockfish	S of 40°10′ N lat	1,534.3	95	1,457.6	5	76.7
Starry flounder	Coastwide	343.7	50	171.9	50	171.9
Widow rockfish [a]	Coastwide	11,243.7	.....	10,843.7	.....	400
Yellowtail rockfish	N of 40°10′ N lat	4,263.3	88	3,751.7	12	511.6
Other Flatfish	Coastwide	4,653.2	90	4,187.9	10	465.3
Shelf Rockfish [a]	N of 40°10′ N lat	1,207.1	60.2	726.7	39.8	480.4
Shelf Rockfish [a]	S of 40°10′ N lat	1,331.4	12.2	162.43	87.8	1,169.0
Slope Rockfish	N of 40°10′ N lat	1,450.6	81	1,175.0	19	2750.6
Slope Rockfish [a]	S of 40°10′ N lat	658.1	63	414.6	37	243.5

[a] Allocations decided through the biennial specification process.

[b] The cowcod non-trawl allocation is further split 50:50 between the commercial and recreational sectors. This results in a sector-specific ACT of 22 mt for the commercial sector and 22 mt for the recreational sector.

[c] Consistent with regulations at § 660.55(i)(2), the commercial harvest guideline for Pacific whiting is allocated as follows: 34 percent for the C/P Co-op Program; 24 percent for the MS Co-op Program; and 42 percent for the Shorebased IFQ Program. No more than 5 percent of the Shorebased IFQ Program allocation may be taken and retained south of 42° N lat. before the start of the primary Pacific whiting season north of 42° N lat.

■ 5. In § 660.140, revise paragraph (d)(1)(ii)(D) to read as follows:

§ 660.140 Shorebased IFQ Program.

* * * * *

(d) * * *

(1) * * *

(ii) * * *

(D) *Shorebased trawl allocations.* For the trawl fishery, NMFS will issue QP based on the following shorebased trawl allocations:

TABLE 1 TO PARAGRAPH (d)(1)(ii)(D)

IFQ species	Area	2023 Shorebased trawl allocation (mt)	2024 Shorebased trawl allocation (mt)
YELLOWEYE ROCKFISH	Coastwide	4.42	4.42
Arrowtooth flounder	Coastwide	15,640.17	11,408.87
Bocaccio	South of 40°10′ N lat	700.33	694.87
Canary rockfish	Coastwide	842.50	830.22
Chilipepper	South of 40°10′ N lat	1,563.80	1517.60
Cowcod	South of 40°10′ N lat	24.80	24.42
Darkblotched rockfish	Coastwide	646.78	613.53
Dover sole	Coastwide	45,972.75	45,972.75
English sole	Coastwide	8,320.56	8,265.46
Lingcod	North of 40°10′ N lat	1,829.27	1,593.47
Lingcod	South of 40°10′ N lat	284.20	282.60
Longspine thornyhead	North of 34°27′ N lat	2,129.23	2,002.88
Pacific cod	Coastwide	1,039.30	1,039.30
Pacific halibut (IBQ)	North of 40°10′ N lat	TBD	TBD
Pacific ocean perch	North of 40°10′ N lat	2,956.14	2,832.64
Pacific whiting	Coastwide	159,681.38	141,761.78
Petrale sole	Coastwide	3,063.76	2,863.76
Sablefish	North of 36° N lat	3,893.50	3,559.38
Sablefish	South of 36° N lat	970.00	889.00
Shortspine thornyhead	North of 34°27′ N lat	1,146.67	1,117.22
Shortspine thornyhead	South of 34°27′ N lat	50	50
Splitnose rockfish	South of 40°10′ N lat	1,494.70	1,457.60
Starry flounder	Coastwide	171.86	171.86
Widow rockfish	Coastwide	11,509.68	10,367.68
Yellowtail rockfish	North of 40°10′ N lat	3,761.84	3,668.56
Other Flatfish complex	Coastwide	4,142.09	4,152.89
Shelf Rockfish complex	North of 40°10′ N lat	694.70	691.65
Shelf Rockfish complex	South of 40°10′ N lat	163.02	163.02
Slope Rockfish complex	North of 40°10′ N lat	894.43	874.99
Slope Rockfish complex	South of 40°10′ N lat	417.1	414.58

* * * * *

[FR Doc. 2024–09220 Filed 4–29–24; 8:45 am]

BILLING CODE 3510–22–P

Notices

Federal Register
Vol. 89, No. 84
Tuesday, April 30, 2024

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments are required 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 30, 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.

Farm Service Agency

Title: County Committee Election.

OMB Control Number: 0560–0229.

Summary of Collection: This information collection is necessary to effectively allow farmers and ranchers to nominate potential candidates using the form FSA–669A for the FSA county committee election in accordance with the requirements as authorized by the Soil Conservation and Domestic Allotment Act, as amended. Specifically, FSA uses the information provided by the nominee annually or, if needed, throughout the year for special elections to create ballots for FSA county committee elections. Elections for FSA county committees are held each year; therefore, nominations for eligible nominees are requested each year. Any individual who meets the qualifications mentioned in form FSA–669A may be nominated by another person or by themselves. The form FSA–669A is used to collect the information for nominations; it requires the name and address of the nominee and the signatures of both the nominee and the person nominating the individual to be a nominee (only one signature is required for self-nominated individuals). Nominee must be eligible to vote in the designated FSA county committee election, eligible to hold the office of FSA county committee member, and willing to serve, if elected. For more information about FSA county committees, including elections, nominations, eligible voters, eligibility, and other related information, see the regulations in *7 CFR part 7.* In addition, the form also includes a voluntary request for race, ethnicity, and gender information from the nominee. FSA is also using the form FSA–669A–3, Nomination Form for Urban Agriculture FSA Committee Election, to establish Urban Agriculture FSA County Committees in some cities. Completion of the form is voluntary.

Need and Use of the Information: FSA will collect information on race, ethnicity and gender of each nominee as provided through the voluntary self-identification of each nominee agreeing to run for a position. The information will be sent to FSA (Kansas City) for preparation of the upcoming election. FSA will review the information annually. If the information is not collected in any given year, FSA would not be able to prepare the report as required by the regulations.

Description of Respondents: Individuals or households.

Number of Respondents: 10,500.

Frequency of Responses: Reporting: Annually.

Total Burden Hours: 2,625.

Rachelle Ragland-Greene,

Acting Departmental Information Collection Clearance Officer.

[FR Doc. 2024–09241 Filed 4–29–24; 8:45 am]

BILLING CODE 3410–05–P

DEPARTMENT OF AGRICULTURE

Forest Service

Rio Grande National Forest Over Snow Travel Management Project

AGENCY: Forest Service, Agriculture (USDA).

ACTION: Notice of intent to prepare an environmental impact statement.

SUMMARY: The Forest Service, U.S. Department of Agriculture, will prepare an environmental impact statement (EIS) to inform a decision about the designation of roads, trails, and areas of the Rio Grande National Forest (RGNF) which would be open to motorized over-snow use. The environmental impact statement will inform a decision about the classes of vehicles and times of year for which motorized over-snow use will be allowed on designated roads, trails, and areas. Roads, trails, and areas designated for motorized over-snow vehicle (OSV) use will be identified on an Over-Snow Vehicle Use Map which will specify the classes of vehicles and time of year for which use is designated on the Rio Grande National Forest. An additional map displaying the Desired Winter Recreation Opportunity Spectrum (ROS) settings will also be produced. The RGNF anticipates this travel management analysis based on the proposed action as presently described and the resulting decision may require an amendment to the Land Management Plan for the Forest.

DATES: Comments concerning the scope of the analysis must be received by June 14, 2024. The draft environmental impact statement is expected in the fall of 2025, and the final environmental impact statement is expected in the fall of 2026.

ADDRESSES: Send written comments to the Rio Grande National Forest, 1055 9th Street, Del Norte, Colorado 81132. Comments may also be sent electronically to *https://cara.fs2c.usda.gov/Public/CommentInput?project=65529* or via facsimile to 719–657–5280.

FOR FURTHER INFORMATION CONTACT: Judi Perez, Forest Planner, by phone at 719–872–4008 or by email at *judith.perez@usda.gov.* Individuals who use telecommunications devices for the hearing impaired may call 711 to reach the Telecommunications Relay Service, 24 hours a day, every day of the year, including holidays.

SUPPLEMENTARY INFORMATION:

Purpose and Need for Action

There is a need to provide a manageable, designated system of National Forest System roads, National Forest System trails, and areas for OSV use across the Rio Grande National Forest that is consistent with and achieves the purposes of the Forest Service Travel Management Rule at 36 CFR part 212.

The purpose of this project is to effectively manage OSV use on the Rio Grande National Forest to:

- Provide high quality over-snow access and experiences.
- Ensure that OSV use occurs when there is adequate snow to protect underlying resources.
- Promote the safety of all Forest visitors and users.
- Enhance public enjoyment.
- Minimize impacts to natural and cultural resources.
- Minimize conflicts among the various uses.
- Identify roads and trails where the Forest Service or its contractors would conduct snow grooming for OSV use.

Proposed Action

The Rio Grande National Forest proposes to designate roads, trails, and areas on National Forest System land for public OSV use. These designations would be consistent with the requirements of the Travel Management Rule at 36 CFR 212 and will specifically address the requirements of Subpart C of those regulations.

The proposed action includes the following:

- Approximately 1,342,162 acres (73 percent) of the Rio Grande National Forest lands are proposed to be designated for public cross-country over-snow vehicle use.
- Approximately 260 miles of currently permitted groomed motorized routes are proposed for designation.
- Approximately 23 miles of non-motorized trail groomed for Nordic skiing using motorized equipment are proposed for designation.
- To reduce potential damage to resources, an unpacked minimum snow depth of 12 inches is required for OSV use on designated roads, trail,s and areas.
- Grooming on permitted routes may occur on unpacked snow depths equal to or greater than 18 inches.
- Grooming designated roads and trails will occur using a variety of methods including but not limited to special use permits, partnerships, and/or grants and agreements.
- Public OSV use in Special Designation Management Areas (MA) is restricted. This includes MA 4.1—Special Designation-Special Interest Areas, MA 4.2—Special Designation-Research Natural Areas, and MA 4.8—Ski-Based Areas. Some of these areas are currently permitted for over-snow use. Depending on the project decision, existing permits could be adjusted following completion of this analysis.
- Existing Forest Closure Orders in or around Wolf Creek Pass and Cumbres Pass are incorporated into the proposed action, as is the restriction of motorized use in congressionally designated wilderness.

A more detailed version of the proposed action and draft ROS maps are available on the RNGF website at *https://www.fs.usda.gov/detail/riogrande/landmanagement/planning/?cid=fseprd1154726.*

Minimization Criteria

Travel Management Regulations (36 CFR 212.55(b)) require the development of project specific minimization criteria. These minimization criteria will be developed and applied to each National Forest System Road, trail, and area designated for OSV use.

Desired Recreational Opportunity Spectrum

Recreation on national forests encompasses more than just the activities. The range of opportunities, access, use, and setting is the Recreation Opportunity Spectrum (ROS). Recreation Opportunity Spectrum describes the settings available across a landscape and the attributes associated with those settings. Initial winter ROS maps were developed as part of the proposal and are available on the Rio Grande National Forest website at: *https://www.fs.usda.gov/detail/riogrande/landmanagement/planning/?cid=fseprd1154726.*

Expected Impacts

Anticipated impacts could include the following:

(1) Reduce adverse resource impacts caused by unauthorized vehicle use and illegal travel off designated routes and areas.

(2) Reduce disturbance to wildlife caused by OSV use in important or critical wildlife habitat and disturbance during critical lifecycle period.

(3) Potential loss of recreational opportunity should existing routes be closed to motorized travel.

(4) Potential conflicts in accommodating increasing numbers and types of motorized users.

Responsible Official

The Responsible Official is Andrew Kelher, Deputy Forest Supervisor of the Rio Grande National Forest.

Scoping Comments and the Objection Process

This Notice of Intent initiates the formal scoping process that guides the development of the environmental impact statement. In this process the Forest Service is requesting comments on potential alternatives and impacts, and identification of any relevant information, studies, or analyses of any kind concerning impacts affecting the quality of the human environment. Additional public engagement opportunities will be held and will be announced on the RGNF website at *https://www.fs.usda.gov/detail/riogrande/landmanagement/planning/?cid=fseprd1154726.*

It is important that reviewers provide their comments at such times and in such manner that they are useful to the Forest Service's preparation of the final EIS; therefore, comments should be provided prior to the close of the comment period and should clearly articulate the reviewer's concerns and contentions.Commenting during scoping and any other designated opportunity to comment provided by the Responsible Official as prescribed by the applicable regulations will also govern eligibility to object once the final EIS and draft Record of Decision have been published.Comments received in response to this solicitation, including names and addresses of those who comment, will be part of the public record for this proposed action. Comments submitted anonymously will be accepted and considered; however, they will not be used to establish eligibility for the objection process.

Any decision about this project may be subject to 36 CFR 218 and/or 36 CFR 219 pre-decisional review (objection).

Issues raised in objections must be based on previously submitted timely, specific written comments regarding the proposed project unless based on new information arising after designated opportunities.

Nature of Decision To Be Made

The project will designate National Forest System roads, trails, and areas where OSV use is permitted; these will be documented on an Over-snow Vehicle Use Map. This map will also specify the classes of vehicles and the time of year for which the use is designated. A map displaying the Desired Winter ROS settings will also be produced.

Dated: April 22, 2024.

Troy Heithecker,

Associate Deputy Chief, National Forest System.

[FR Doc. 2024–08932 Filed 4–29–24; 8:45 am]

BILLING CODE 3411–15–P

DEPARTMENT OF AGRICULTURE

Forest Service

Black Hills National Forest Advisory Board

AGENCY: Forest Service, Agriculture USDA.

ACTION: Notice of meeting.

SUMMARY: The Black Hills National Forest Advisory Board will hold a public meeting according to the details shown below. The committee is authorized under the Forest and Rangeland Renewable Resources Planning Act of 1974, the National Forest Management Act of 1976, the Federal Public Lands Recreation Enhancement Act, and operates in compliance with the Federal Advisory Committee Act (FACA). The purpose of the Committee is to provide advice and recommendations on a broad range of forest issues such as: forest plan revisions or amendments, forest health including fire, insect and disease, travel management, forest monitoring and evaluation, recreation fees, and site-specific projects having forest-wide implications.

DATES: An in-person meeting will be held on May 15, 2024, 1:00 p.m.–4:30 p.m. Mountain Standard Time (MST).

Written and Oral Comments: Anyone wishing to provide in-person oral comments must pre-register by 11:59 p.m. MST on May 10, 2024. Written public comments will be accepted by 11:59 p.m. MST on May 10, 2024. Comments submitted after this date will be provided to the Agency, but the Committee may not have adequate time to consider those comments prior to the meeting.

All board meetings are subject to cancellation. For status of the meeting prior to attendance, please contact the person listed under **FOR FURTHER INFORMATION CONTACT**.

ADDRESSES: This meeting will be held in person, at the U.S. Forest Service, Mystic Ranger District Office, 8221 Mount Rushmore Road, Rapid City, South Dakota 57702. Board information and meeting details can be found at the following website: *https://www.fs.usda.gov/main/blackhills/workingtogether/advisorycommittees* or by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**.

Written Comments: Written comments must be sent by email to *scott.j.jacobson@usda.gov* or via mail (postmarked) to Scott Jacobson, 8221 Mount Rushmore Road, Rapid City, South Dakota 57702. The Forest Service strongly prefers comments be submitted electronically.

Oral Comments: Persons or organizations wishing to make oral comments must pre-register by 11:59 p.m. MST, May 10, 2024, and speakers can only register for one speaking slot. Oral comments must be sent by email to *scott.j.jacobson@usda.gov* or via mail (postmarked) to Scott Jacobson, 8221 Mount Rushmore Road, Rapid City, South Dakota 57702.

FOR FURTHER INFORMATION CONTACT: Shawn Cochran, Designated Federal Officer (DFO), by phone at 605–673–9201, or email at *shawn.cochran@usda.gov,* or Scott Jacobson, Committee Coordinator at 605–440–1409 or email at *scott.j.jacobson@usda.gov.*

SUPPLEMENTARY INFORMATION: The meeting agenda will include:

1. Fire Season Preparedness;
2. Recreation and Tourism Economics; and
3. Forest Plan Revision update.

The agenda will include time for individuals to make oral statements of three minutes or less. Individuals wishing to make an oral statement should make a request in writing at least three days prior to the meeting date to be scheduled on the agenda. Written comments may be submitted to the Forest Service up to 7 days after the meeting date listed under **DATES**.

Please contact the person listed under **FOR FURTHER INFORMATION CONTACT**, by or before the deadline, for all questions related to the meeting. All comments, including names and addresses when provided, are placed in the record and are available for public inspection and copying. The public may inspect comments received upon request.

Meeting Accommodations: The meeting location is compliant with the Americans with Disabilities Act, and the USDA provides reasonable accommodation to individuals with disabilities where appropriate. If you are a person requiring reasonable accommodation, please make requests in advance for sign language interpretation, assistive listening devices, or other reasonable accommodation to the person listed under the **FOR FURTHER INFORMATION CONTACT** section or contact USDA's TARGET Center at (202) 720–2600 (voice and TTY) or USDA through the Federal Relay Service at (800) 877–8339. Additionally, program information may be made available in languages other than English.

USDA programs are prohibited from discriminating based on race, color, national origin, religion, sex, gender identity (including gender expression), sexual orientation, disability, age, marital status, family/parental status, income derived from a public assistance program, political beliefs, or reprisal or retaliation for prior civil rights activity, in any program or activity conducted or funded by USDA (not all bases apply to all programs). Remedies and complaint filing deadlines vary by program or incident.

Equal opportunity practices in accordance with USDA's policies will be followed in all appointments to the Committee. To ensure that the recommendations of the Committee have taken into account the needs of the diverse groups served by USDA, membership shall include to the extent possible, individuals with demonstrated ability to represent minorities, women, and person with disabilities. USDA is an equal opportunity provider, employer, and lender.

Dated: April 4, 2024.

Cikena Reid,

USDA Committee Management Officer.

[FR Doc. 2024–07622 Filed 4–29–24; 8:45 am]

BILLING CODE 3411–15–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[B–3–2024]

Foreign-Trade Zone (FTZ) 89; Authorization of Production Activity; Lithion Battery, Inc.; (Battery Packs and Accessories); Henderson, Nevada

On December 27, 2023, Lithion Battery, Inc. submitted a notification of proposed production activity to the FTZ

Board for its facility within FTZ 89 in Henderson, Nevada.

The notification was processed in accordance with the regulations of the FTZ Board (15 CFR part 400), including notice in the **Federal Register** inviting public comment (89 FR 1519, January 10, 2024). On April 25, 2024, the applicant was notified of the FTZ Board's decision that no further review of the activity is warranted at this time. The production activity described in the notification was authorized, subject to the FTZ Act and the FTZ Board's regulations, including section 400.14.

Dated: April 25, 2024.

Camille R. Evans,

Acting Executive Secretary.

[FR Doc. 2024–09273 Filed 4–29–24; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[B–1–2024]

Foreign-Trade Zone (FTZ) 297; Authorization of Production Activity; Twin Disc, Inc.; (Power Transmission Products); Lufkin, Texas

On December 27, 2023, Twin Disc, Inc. submitted a notification of proposed production activity to the FTZ Board for its facility within Subzone 297A, in Lufkin, Texas.

The notification was processed in accordance with the regulations of the FTZ Board (15 CFR part 400), including notice in the **Federal Register** inviting public comment (89 FR 1063, January 9, 2024). On April 25, 2024, the applicant was notified of the FTZ Board's decision that no further review of the activity is warranted at this time. The production activity described in the notification was authorized, subject to the FTZ Act and the FTZ Board's regulations, including section 400.14.

Dated: April 25, 2024.

Camille R. Evans,

Acting Executive Secretary.

[FR Doc. 2024–09272 Filed 4–29–24; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–160, A–533–922]

2,4-Dichlorophenoxyacetic Acid From the People's Republic of China and India: Initiation of Less-Than-Fair-Value Investigations

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

DATES: Applicable April 23, 2024.

FOR FURTHER INFORMATION CONTACT: Alexander Cipolla (the People's Republic of China (China)) at (202) 482–4956; and Melissa Porpotage (India) at (202) 482–1413; AD/CVD Operations, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230.

SUPPLEMENTARY INFORMATION:

The Petitions

On March 14, 2024, the U.S. Department of Commerce (Commerce) received antidumping duty (AD) petitions concerning imports of 2,4-dichlorophenoxyacetic acid (2,4-D) from China and India filed in proper form on behalf of Corteva Agriscience LLC (the petitioner) [1] a domestic producer of 2,4-D. These AD Petitions were accompanied by countervailing duty (CVD) petitions concerning imports of 2,4-D from China and India.[2] On April 3, 2024, after considering comments regarding industry support, Commerce extended the initiation deadline by 20 days to further examine the issue of industry support, because it was not clear from the Petitions whether the industry support criteria had been met.[3]

Between March 18 and April 4, 2024, Commerce requested supplemental information pertaining to certain aspects of the Petitions in separate supplemental questionnaires.[4] The petitioner filed responses to the supplemental questionnaires between March 20 and April 9, 2024.[5]

In accordance with section 732(b) of the Tariff Act of 1930, as amended (the Act), the petitioner alleges that imports of 2,4-D from China and India are being, or are likely to be, sold in the United States at less than fair value (LTFV) within the meaning of section 731 of the Act, and that imports of such products are materially injuring, or threatening material injury to, the 2,4-D industry in the United States. Consistent with section 732(b)(1) of the Act, the Petitions were accompanied by information reasonably available to the petitioner supporting its allegations.

Commerce finds that the petitioner filed the Petitions on behalf of the domestic industry, because the petitioner is an interested party, as defined in section 771(9)(C) of the Act. Commerce also finds that the petitioner demonstrated sufficient industry support for the initiation of the requested LTFV investigations.[6]

Periods of Investigation

Because the Petitions were filed on March 14, 2024, pursuant to 19 CFR 351.204(b)(1), the period of investigation (POI) for the India LTFV investigation is January 1, 2023, through December 31, 2023. Because China is a non-market economy (NME) country, pursuant to 19 CFR 351.204(b)(1), the POI for the China LTFV investigation is July 1, 2023, through December 31, 2023.

Scope of the Investigations

The product covered by these investigations is 2,4-D from China and India. For a full description of the scope of these investigations, *see* the appendix to this notice.

Comments on the Scope of the Investigations

Between March 18 and April 4, 2024, Commerce requested information and clarification from the petitioner regarding the proposed scope to ensure

[1] *See* Petitioner's Letter, ''Petitions for the Imposition of Antidumping and Countervailing Duties,'' dated March 14, 2024 (the Petitions).

[2] *Id.*

[3] *See Notice of Extension of the Deadline for Determining the Adequacy of the Antidumping and Countervailing Duty Petitions: 2,4-Dichlorophenoxyacetic Acid from the People's Republic of China and India,* 89 FR 24431, 24432 (April 8, 2024).

[4] *See* Commerce's Letter, ''Supplemental Questions,'' dated March 18, 2024 (General Issues Questionnaire); *see also* Commerce's Letters, ''Supplemental Questions,'' dated March 18, 2024 (Country-Specific Supplemental Questionnaires); Memoranda, ''Phone Call,'' dated March 26, 2024 (March 26 Memorandum), and April 4, 2024, respectively; and Commerce's Letter, ''Supplemental Questions Pertaining to Industry Support,'' dated April 4, 2024 (Industry Support Supplemental Questionnaire).

[5] *See* Petitioner's Letter, ''General Issues and Injury Questionnaire Response,'' dated March 20, 2024 (First General Issues Supplement); *see also* Petitioner's Letter, ''China Antidumping Supplemental Questionnaire Response,'' dated March 20, 2024; Petitioner's Letter, ''India Antidumping Supplemental Questionnaire Response,'' dated March 20, 2024; Petitioner's Letter, ''Scope Supplemental Questionnaire Response,'' dated March 27, 2024 (Second General Issues Supplement); and Petitioner's Letter, ''Supplemental Questions on Industry Support,'' dated April 9, 2024 (Industry Support Supplement).

[6] *See* ''Determination of Industry Support for the Petitions'' section, *infra.*

that the scope language in the Petitions is an accurate reflection of the products for which the domestic industry is seeking relief.[7] Between March 20 and April 9, 2024, the petitioner provided clarifications and/or revised the scope.[8] The description of merchandise covered by these investigations, as described in the appendix to this notice, reflects these clarifications.

As discussed in the *Preamble* to Commerce's regulations, we are setting aside a period for interested parties to raise issues regarding product coverage (*i.e.,* scope).[9] Commerce will consider all scope comments received from interested parties and, if necessary, will consult with interested parties prior to the issuance of the preliminary determinations. If scope comments include factual information,[10] all such factual information should be limited to public information. To facilitate preparation of its questionnaires, Commerce requests that scope comments be submitted by 5:00 p.m. Eastern Time (ET) on May 13, 2024, which is 20 calendar days from the signature date of this notice.[11] Any rebuttal comments, which may include factual information, must be filed by 5:00 p.m. ET on May 23, 2024, which is 10 calendar days from the initial comment deadline.

Commerce requests that any factual information that parties consider relevant to the scope of these investigations be submitted during that period. However, if a party subsequently finds that additional factual information pertaining to the scope of the investigations may be relevant, the party must contact Commerce and request permission to submit the additional information. All scope comments must be filed simultaneously on the records of the concurrent LTFV and CVD investigations.

Filing Requirements

All submissions to Commerce must be filed electronically via Enforcement and Compliance's Antidumping Duty and Countervailing Duty Centralized Electronic Service System (ACCESS), unless an exception applies.[12] An electronically filed document must be received successfully in its entirety by the time and date it is due.

Comments on Product Characteristics

Commerce is providing interested parties an opportunity to comment on the appropriate physical characteristics of 2,4-D to be reported in response to Commerce's AD questionnaires. This information will be used to identify the key physical characteristics of the subject merchandise in order to report the relevant factors of production (FOP) or cost of production (COP) accurately, as well as to develop appropriate product comparison criteria.

Interested parties may provide any information or comments that they feel are relevant to the development of an accurate list of physical characteristics. Specifically, they may provide comments as to which characteristics are appropriate to use as: (1) general product characteristics; and (2) product comparison criteria. We note that it is not always appropriate to use all product characteristics as product comparison criteria. We base product comparison criteria on meaningful commercial differences among products. In other words, although there may be some physical product characteristics utilized by manufacturers to describe 2,4-D, it may be that only a select few product characteristics take into account commercially meaningful physical characteristics. In addition, interested parties may comment on the order in which the physical characteristics should be used in matching products. Generally, Commerce attempts to list the most important physical characteristics first and the least important characteristics last.

In order to consider the suggestions of interested parties in developing and issuing the AD questionnaires, all product characteristics comments must be filed by 5:00 p.m. ET on May 13, 2024, which is 20 calendar days from the signature date of this notice.[13] Any rebuttal comments must be filed by 5:00 p.m. ET on May 23, 2024, which is 10 calendar days from the initial comment deadline. All comments and submissions to Commerce must be filed electronically using ACCESS, as explained above, on the record of each of the LTFV investigations.

Determination of Industry Support for the Petitions

Section 732(b)(1) of the Act requires that a petition be filed on behalf of the domestic industry. Section 732(c)(4)(A) of the Act provides that a petition meets this requirement if the domestic producers or workers who support the petition account for: (i) at least 25 percent of the total production of the domestic like product; and (ii) more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for, or opposition to, the petition. Moreover, section 732(c)(4)(D) of the Act provides that, if the petition does not establish support of domestic producers or workers accounting for more than 50 percent of the total production of the domestic like product, Commerce shall: (i) poll the industry or rely on other information in order to determine if there is support for the petition, as required by subparagraph (A); or (ii) determine industry support using a statistically valid sampling method to poll the ''industry.''

Section 771(4)(A) of the Act defines the ''industry'' as the producers as a whole of a domestic like product. Thus, to determine whether a petition has the requisite industry support, the statute directs Commerce to look to producers and workers who produce the domestic like product. The U.S. International Trade Commission (ITC), which is responsible for determining whether ''the domestic industry'' has been injured, must also determine what constitutes a domestic like product in order to define the industry. While both Commerce and the ITC must apply the same statutory definition regarding the domestic like product,[14] they do so for different purposes and pursuant to a separate and distinct authority. In addition, Commerce's determination is subject to limitations of time and information. Although this may result in different definitions of the like product, such differences do not render the decision of either agency contrary to law.[15]

Section 771(10) of the Act defines the domestic like product as ''a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an

[7] *See* General Issues Questionnaire; *see also* March 26 Memorandum; and Industry Support Supplemental Questionnaire.

[8] *See* First General Issues Supplement at 1–3 and Exhibit S–I–4; *see also* Second General Issues Supplement at 1–2; and Industry Support Supplement at 1.

[9] *See Antidumping Duties; Countervailing Duties, Final Rule,* 62 FR 27296, 27323 (May 19, 1997) (*Preamble*); *see also* 19 CFR 351.312.

[10] *See* 19 CFR 351.102(b)(21) (defining ''factual information'').

[11] *See* 19 CFR 351.303(b)(1).

[12] *See Antidumping and Countervailing Duty Proceedings: Electronic Filing Procedures; Administrative Protective Order Procedures,* 76 FR 39263 (July 6, 2011); *see also Enforcement and Compliance: Change of Electronic Filing System Name,* 79 FR 69046 (November 20, 2014) for details of Commerce's electronic filing requirements, effective August 5, 2011. Information on using ACCESS can be found at *https://access.trade.gov/help.aspx* and a handbook can be found at *https://access.trade.gov/help/Handbook_on_Electronic_Filing_Procedures.pdf.*

[13] *See* 19 CFR 351.303(b)(1).

[14] *See* section 771(10) of the Act.

[15] *See USEC, Inc.* v. *United States,* 132 F. Supp. 2d 1, 8 (CIT 2001) (citing *Algoma Steel Corp., Ltd.* v. *United States,* 688 F. Supp. 639, 644 (CIT 1988), *aff'd* 865 F.2d 240 (Fed. Cir. 1989)).

investigation under this title.'' Thus, the reference point from which the domestic like product analysis begins is ''the article subject to an investigation'' (*i.e.,* the class or kind of merchandise to be investigated, which normally will be the scope as defined in the petition).

With regard to the domestic like product, the petitioner does not offer a definition of the domestic like product distinct from the scope of the investigations.[16] Based on our analysis of the information submitted on the record, we have determined that 2,4-D, as defined in the scope, constitutes a single domestic like product, and we have analyzed industry support in terms of that domestic like product.[17]

In determining whether the petitioner has standing under section 732(c)(4)(A) of the Act, we considered the industry support data contained in the Petitions, and supplements thereto, with reference to the domestic like product as defined in the ''Scope of the Investigations,'' in the appendix to this notice. To establish industry support, the petitioner provided its own production of the domestic like product in 2023 and compared this to the estimated total production of the domestic like product for the entire domestic industry.[18] We relied on data provided by the petitioner for purposes of measuring industry support.[19]

On March 29, 2024, we received comments on industry support from Nufarm Americas Inc. (Nufarm), a U.S. importer and converter of 2,4-D.[20] On April 2, 2024, the petitioner responded to the letter from Nufarm.[21] On April 11, 2024, we received comments on industry support from Drexel Chemical Company (Drexel), a U.S. importer and converter of 2,4-D.[22]

Our review of the data provided in the Petitions, the First General Issues Supplement, the Second General Issues Supplement, the letters from Nufarm and Drexel, the Petitioner's Response, the Industry Support Supplement, and other information readily available to Commerce indicates that the petitioner has established industry support for the Petitions.[23] First, the Petitions established support from domestic producers (or workers) accounting for more than 50 percent of the total production of the domestic like product and, as such, Commerce is not required to take further action in order to evaluate industry support (*e.g.,* polling).[24] Second, the domestic producers (or workers) have met the statutory criteria for industry support under section 732(c)(4)(A)(i) of the Act because the domestic producers (or workers) who support the Petitions account for at least 25 percent of the total production of the domestic like product.[25] Finally, the domestic producers (or workers) have met the statutory criteria for industry support under section 732(c)(4)(A)(ii) of the Act because the domestic producers (or workers) who support the Petitions account for more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for, or opposition to, the Petitions.[26] Accordingly, Commerce determines that the Petitions were filed on behalf of the domestic industry within the meaning of section 732(b)(1) of the Act.[27]

Allegations and Evidence of Material Injury and Causation

The petitioner alleges that the U.S. industry producing the domestic like product is being materially injured, or is threatened with material injury, by reason of the imports of the subject merchandise sold at LTFV. In addition, the petitioner alleges that subject imports exceed the negligibility threshold provided for under section 771(24)(A) of the Act.[28]

The petitioner contends that the industry's injured condition is illustrated by a significant and increasing volume of subject imports; underselling and price depression and/or suppression; declining profitability; declines in volume of production and capacity utilization; lost sales and revenues; lost market share; and the magnitude of the alleged dumping margins.[29] We assessed the allegations and supporting evidence regarding material injury, threat of material injury, causation, as well as negligibility, and we have determined that these allegations are properly supported by adequate evidence and meet the statutory requirements for initiation.[30]

Allegations of Sales at LTFV

The following is a description of the allegations of sales at LTFV upon which Commerce based its decision to initiate LTFV investigations of imports of 2,4-D from China and India. The sources of data for the deductions and adjustments relating to U.S. price and normal value (NV) are discussed in greater detail in the Country-Specific AD Initiation Checklists.

U.S. Price

For China and India, the petitioner based export price (EP) on the average unit values derived from official import statistics for imports of 2,4-D from these countries into the United States during the POI.[31] For each country, the petitioner made certain adjustments to U.S. price to calculate a net ex-factory U.S. price, where applicable.[32]

Normal Value[33]

For India, the petitioner stated that it was unable to obtain home market or third country pricing information for 2,4-D to use as a basis for NV.[34] Therefore, for India, the petitioner calculated NV based on CV.[35] For further discussion of CV, *see* the section

[16] *See* Petitions at Volume I (pages 11–16 and Exhibits I–5, I–6 and I–9); *see also* First General Issues Supplement at 3–6.

[17] For a discussion of the domestic like product analysis as applied to these cases and information regarding industry support, *see* Checklists, ''Antidumping Duty Investigation Initiation Checklists: 2,4-Dichlorophenoxyacetic Acid from the People's Republic of China and India,'' dated concurrently with, and hereby adopted by, this notice (Country-Specific AD Initiation Checklists) at Attachment II, Analysis of Industry Support for the Antidumping and Countervailing Duty Petitions Covering 2,4-Dichlorophenoxyacetic Acid from the People's Republic of China and India (Attachment II). These checklists are on file electronically via ACCESS.

[18] *See* Industry Support Supplement at 1–6 and Exhibits S–I–21, S–I–23, S–I–24, and S–I–29.

[19] *Id.* at 1–6 and Exhibits S–I–21, S–I–23, S–I–24, and S–I–29. For further discussion, *see* Attachment II of the Country-Specific AD Initiation Checklists.

[20] *See* Nufarm's Letter, ''Nufarm's Request for the Department to Defer Initiation for Lack of Standing and Poll the Industry,'' dated March 29, 2024.

[21] *See* Petitioner's Letter, ''Petitioner's Response to Industry Comments,'' dated April 2, 2024 (Petitioner's Response).

[22] *See* Drexel's Letter, ''Information Submitted by Drexel Chemical Company to Rebut, Clarify or Correct Corteva's April 9, 2024 Response to Supplemental Questions on Industry Support,'' dated April 11, 2024.

[23] *See* Attachment II of the Country-Specific AD Initiation Checklists.

[24] *Id.; see also* section 732(c)(4)(D) of the Act.

[25] *See* Attachment II of the Country-Specific AD Initiation Checklists.

[26] *Id.*

[27] *Id.*

[28] *See* Petitions at Volume I (page 17 and Exhibit I–11); *see also* First General Issues Supplement at 6 and Exhibit S–I–16.

[29] *See* Petitions at Volume I (pages 17–37 and Exhibits I–10 through I–19); *see also* First General Issues Supplement at 6 and Exhibits S–I–16 and S–I–17.

[30] *See* Country-Specific AD Initiation Checklists at Attachment III, Analysis of Allegations and Evidence of Material Injury and Causation for the Antidumping and Countervailing Duty Petitions Covering 2,4-Dichlorophenoxyacetic Acid from the People's Republic of China and India.

[31] *See* Country-Specific AD Initiation Checklists.

[32] *Id.*

[33] In accordance with section 773(b)(2) of the Act, for the India investigation, Commerce will request information necessary to calculate the constructed value (CV) and COP to determine whether there are reasonable grounds to believe or suspect that sales of the foreign like product have been made at prices that represent less than the COP of the product.

[34] *See* India AD Initiation Checklist.

[35] *Id.*

''Normal Value Based on Constructed Value,'' below.

Commerce considers China to be an NME country.[36] In accordance with section 771(18)(C)(i) of the Act, any determination that a foreign country is an NME country shall remain in effect until revoked by Commerce. Therefore, we continue to treat China as an NME country for purposes of the initiation of these investigations. Accordingly, we base NV on FOPs valued in a surrogate market economy country, in accordance with section 773(c) of the Act.

The petitioner claims that Türkiye is an appropriate surrogate country for China because it is a market economy that is at a level of economic development comparable to that of China and is a significant producer of comparable merchandise.[37] The petitioner provided publicly available information from Türkiye to value all FOPs.[38] Based on the information provided by the petitioner, we believe it is appropriate to use Türkiye as a surrogate country for China to value all FOPs for initiation purposes.

Interested parties will have the opportunity to submit comments regarding surrogate country selection and, pursuant to 19 CFR 351.301(c)(3)(i), will be provided an opportunity to submit publicly available information to value FOPs within 30 days before the scheduled date of the preliminary determination.

Factors of Production

Because information regarding the volume of inputs consumed by Chinese producers/exporters was not reasonably available, the petitioner used product-specific consumption rates from a U.S. producer of 2,4-D as a surrogate to value Chinese manufacturers' FOPs.[39] Additionally, the petitioner calculated factory overhead, selling, general, and administrative expenses (SG&A), and profit based on the experience of a Turkish producer of comparable merchandise for China.[40]

Normal Value Based on Constructed Value

As noted above for India, the petitioner stated that it was unable to obtain home market or third-country prices for 2,4-D to use as a basis for NV. Therefore, for India, the petitioner calculated NV based on CV.[41]

Pursuant to section 773(e) of the Act, the petitioner calculated CV as the sum of the cost of manufacturing, SG&A, financial expenses, and profit.[42] In calculating the cost of manufacturing, the petitioner relied on the production experience and input consumption rates of a U.S. producer of 2,4-D, valued using publicly available information applicable to India.[43] In calculating SG&A, financial expenses, and profit ratios, the petitioner relied on the 2022–2023 financial statements of a producer of identical merchandise in India.[44]

Fair Value Comparisons

Based on the data provided by the petitioner, there is reason to believe that imports of 2,4-D from China and India are being, or are likely to be, sold in the United States at LTFV. Based on comparisons of EP to NV in accordance with sections 772 and 773 of the Act, the estimated dumping margins for 2,4-D for the countries covered by this initiation are as follows: (1) China—127.21 percent; and (2) India—36.41 percent.[45]

Initiation of LTFV Investigations

Based upon the examination of the Petitions and supplemental responses, we find that they meet the requirements of section 732 of the Act. Therefore, we are initiating LTFV investigations to determine whether imports of 2,4-D from China and India are being, or are likely to be, sold in the United States at LTFV. In accordance with section 733(b)(1)(A) of the Act and 19 CFR 351.205(b)(1), unless postponed, we will make our preliminary determinations no later than 140 days after the date of these initiations.

Respondent Selection

India

In the Petitions, the petitioner identified four companies in India as producers/exporters of 2,4-D.[46] Following standard practice in LTFV investigations involving market economy countries, in the event Commerce determines that the number of companies is large and it cannot individually examine each company based upon Commerce's resources, where appropriate, Commerce intends to select mandatory respondents based on U.S. Customs and Border Protection (CBP) data for imports under the appropriate Harmonized Tariff Schedule of the United States (HTSUS) subheading(s) listed in the ''Scope of the Investigations,'' in the appendix.

On March 29, 2024, Commerce released CBP data on imports of 2,4-D from India under administrative protective order (APO) to all parties with access to information protected by APO and indicated that interested parties wishing to comment on CBP data and/or respondent selection must do so within three business days of the publication date of the notice of initiation of these investigations.[47] Comments must be filed electronically using ACCESS. An electronically filed document must be received successfully in its entirety via ACCESS by 5:00 p.m. ET on the specified deadline. Commerce will not accept rebuttal comments regarding the CBP data or respondent selection.

Interested parties must submit applications for disclosure under APO in accordance with 19 CFR 351.305(b). Instructions for filing such applications may be found on Commerce's website at *https://www.trade.gov/administrative-protective-orders.*

China

In the Petitions, the petitioner named 12 companies in China as producers and/or exporters of 2,4–D.[48] Our standard practice for respondent selection in AD investigations involving NME countries is to select respondents based on quantity and value (Q&V) questionnaires in cases where it has determined that the number of companies is large and it cannot individually examine each company based upon its resources. Therefore, considering the number of producers and/or exporters identified in the Petitions, Commerce will solicit Q&V information that can serve as a basis for

[36] *See, e.g., Certain Freight Rail Couplers and Parts Thereof from the People's Republic of China: Preliminary Affirmative Determination of Sales at Less Than Fair Value and Preliminary Affirmative Determination of Critical Circumstances,* 88 FR 15372 (March 13, 2023), and accompanying Preliminary Decision Memorandum at 5, unchanged in *Certain Freight Rail Couplers and Parts Thereof from the People's Republic of China: Final Affirmative Determination of Sales at Less-Than-Fair Value and Final Affirmative Determination of Critical Circumstances,* 88 FR 34485 (May 30, 2023); and *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Final Results, and Final Results of No Shipments of the Antidumping Duty Administrative Review; 2016–2017,* 84 FR 18007 (April 29, 2019).

[37] *See* China AD Initiation Checklist.

[38] *Id.*

[39] *See* China AD Initiation Checklist.

[40] *Id.*

[41] *See* India AD Initiation Checklist.

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *See* Country-Specific AD Initiation Checklists.

[46] *See* Petitions at Volume I (page 9 and Exhibit I–2); *see also* First General Issues Supplement at Exhibit S–I–2.

[47] *See* Memorandum, ''Release of Data from U.S. Customs and Border Protection,'' dated March 29, 2024.

[48] *See* Petitions at Volume I (page 9 and Exhibit I–2); *see also* First General Issues Supplement at 1 and Exhibit S–I–2.

selecting exporters for individual examination in the event that Commerce determines that the number is large and decides to limit the number of respondents individually examined pursuant to section 777A(c)(2) of the Act. Because there are 12 Chinese producers and/or exporters identified in the Petitions, Commerce has determined that it will issue Q&V questionnaires to each potential respondent for which the petitioner has provided a complete address.

Commerce will post the Q&V questionnaire along with filing instructions on Commerce's website at *https://www.trade.gov/ec-adcvd-case-announcements.* Producers/exporters of 2,4-D from China that do not receive Q&V questionnaires may still submit a response to the Q&V questionnaire and can obtain a copy of the Q&V questionnaire from Commerce's website. Responses to the Q&V questionnaire must be submitted by the relevant Chinese producers/exporters no later than 5:00 p.m. ET on May 7, 2024, which is two weeks from the signature date of this notice. All Q&V questionnaire responses must be filed electronically via ACCESS. An electronically filed document must be received successfully, in its entirety, by ACCESS no later than 5:00 p.m. ET on the deadline noted above.

Interested parties must submit applications for disclosure under APO in accordance with 19 CFR 351.305(b). As stated above, instructions for filing such applications may be found on Commerce's website at *https://www.trade.gov/administrative-protective-orders.*

Separate Rates

In order to obtain separate rate status in an NME investigation, exporters and producers must submit a separate rate application. The specific requirements for submitting a separate rate application in an NME investigation are outlined in detail in the application itself, which is available on Commerce's website at *https://access.trade.gov/Resources/nme/nme-sep-rate.html.* The separate rate application will be due 30 days after publication of this initiation notice. Exporters and producers must file a timely separate rate application if they want to be considered for individual examination. Exporters and producers who submit a separate rate application and have been selected as mandatory respondents will be eligible for consideration for separate rate status only if they respond to all parts of Commerce's AD questionnaire as mandatory respondents. Commerce requires that companies from China submit a response both to the Q&V questionnaire and to the separate rate application by the respective deadlines to receive consideration for separate rate status. Companies not filing a timely Q&V questionnaire response will not receive separate rate consideration.

Use of Combination Rates

Commerce will calculate combination rates for certain respondents that are eligible for a separate rate in an NME investigation. The Separate Rates and Combination Rates Bulletin states:

> {w}hile continuing the practice of assigning separate rates only to exporters, all separate rates that {Commerce} will now assign in its NME investigation will be specific to those producers that supplied the exporter during the period of investigation. Note, however, that one rate is calculated for the exporter and all of the producers which supplied subject merchandise to it during the period of investigation. This practice applies both to mandatory respondents receiving an individually calculated separate rate as well as the pool of non-investigated firms receiving the {weighted average} of the individually calculated rates. This practice is referred to as the application of ''combination rates'' because such rates apply to specific combinations of exporters and one or more producers. The cash-deposit rate assigned to an exporter will apply only to merchandise both exported by the firm in question *and* produced by a firm that supplied the exporter during the period of investigation.[49]

Distribution of Copies of the Petitions

In accordance with section 732(b)(3)(A) of the Act and 19 CFR 351.202(f), copies of the public version of the Petitions have been provided to the governments of China and India via ACCESS. To the extent practicable, we will attempt to provide a copy of the public version of the Petitions to each exporter named in the Petitions, as provided under 19 CFR 351.203(c)(2).

ITC Notification

Commerce will notify the ITC of our initiation, as required by section 732(d) of the Act.

Preliminary Determinations by the ITC

Typically, the ITC will preliminarily determine, within 45 days after the date on which the Petitions were filed, whether there is a reasonable indication that subject imports are materially injuring, or threatening material injury to, a U.S. industry.[50] Here, due to Commerce's extension of the initiation decision deadline to further examine the issue of industry support for the Petitions, the ITC has extended the time for issuance of its preliminary determination for imports of 2,4-D from China and India. At this time, the ITC has indicated it will make its preliminary determination on or about May 20, 2024. A negative ITC determination for either country will result in the investigation being terminated with respect to that country.[51] Otherwise, these LTFV investigations will proceed according to statutory and regulatory time limits.

Submission of Factual Information

Factual information is defined in 19 CFR 351.102(b)(21) as: (i) evidence submitted in response to questionnaires; (ii) evidence submitted in support of allegations; (iii) publicly available information to value factors under 19 CFR 351.408(c) or to measure the adequacy of remuneration under 19 CFR 351.511(a)(2); (iv) evidence placed on the record by Commerce; and (v) evidence other than factual information described in (i)–(iv). Section 351.301(b) of Commerce's regulations requires any party, when submitting factual information, to specify under which subsection of 19 CFR 351.102(b)(21) the information is being submitted [52] and, if the information is submitted to rebut, clarify, or correct factual information already on the record, to provide an explanation identifying the information already on the record that the factual information seeks to rebut, clarify, or correct.[53] Time limits for the submission of factual information are addressed in 19 CFR 351.301, which provides specific time limits based on the type of factual information being submitted. Interested parties should review the regulations prior to submitting factual information in these investigations.

Particular Market Situation Allegation

Section 773(e) of the Act addresses the concept of particular market situation (PMS) for purposes of CV, stating that ''if a particular market situation exists such that the cost of materials and fabrication or other processing of any kind does not accurately reflect the cost of production in the ordinary course of trade, the administering authority may use another calculation methodology under this subtitle or any other calculation methodology.'' When an interested

[49] *See* Enforcement and Compliance's Policy Bulletin No. 05.1, regarding, ''Separate-Rates Practice and Application of Combination Rates in Antidumping Investigation involving NME Countries,'' (April 5, 2005) at 6 (emphasis added), available on Commerce's website at *https://access.trade.gov/Resources/policy/bull05-1.pdf.*

[50] *See* section 733(a) of the Act.

[51] *Id.*

[52] *See* 19 CFR 351.301(b).

[53] *See* 19 CFR 351.301(b)(2).

party submits a PMS allegation pursuant to section 773(e) of the Act (*i.e.,* a cost-based PMS allegation), Commerce will respond to such a submission consistent with 19 CFR 351.301(c)(2)(v). If Commerce finds that a cost-based PMS exists under section 773(e) of the Act, then it will modify its margin calculations appropriately.

Neither section 773(e) of the Act, nor 19 CFR 351.301(c)(2)(v), set a deadline for the submission of cost-based PMS allegations and supporting factual information. However, in order to administer section 773(e) of the Act, Commerce must receive PMS allegations and supporting factual information with enough time to consider the submission. Thus, should an interested party wish to submit a cost-based PMS allegation and supporting new factual information pursuant to section 773(e) of the Act, it must do so no later than 20 days after submission of a respondent's initial section D questionnaire response.

We note that a PMS allegation filed pursuant to sections 773(a)(1)(B)(ii)(III) or 773(a)(1)(C)(iii) of the Act (*i.e.,* a sales-based PMS allegation) must be filed within 10 days of submission of a respondent's initial section B questionnaire response, in accordance with 19 CFR 301(c)(2)(i) and 19 CFR 351.404(c)(2).

Extensions of Time Limits

Parties may request an extension of time limits before the expiration of a time limit established under 19 CFR 351.301, or as otherwise specified by Commerce. In general, an extension request will be considered untimely if it is filed after the expiration of the time limit established under 19 CFR 351.301, or as otherwise specified by Commerce.[54] For submissions that are due from multiple parties simultaneously, an extension request will be considered untimely if it is filed after 10:00 a.m. ET on the due date.[55] Under certain circumstances, Commerce may elect to specify a different time limit by which extension requests will be considered untimely for submissions which are due from multiple parties simultaneously. In such a case, we will inform parties in a letter or memorandum of the deadline (including a specified time) by which extension requests must be filed to be considered timely. An extension request must be made in a separate, standalone submission; under limited circumstances we will grant untimely filed requests for the extension of time limits, where we determine, based on 19 CFR 351.302, that extraordinary circumstances exist. Parties should review Commerce's regulations concerning the extension of time limits and the *Time Limits Final Rule* prior to submitting factual information in these investigations.[56]

Certification Requirements

Any party submitting factual information in an AD or CVD proceeding must certify to the accuracy and completeness of that information.[57] Parties must use the certification formats provided in 19 CFR 351.303(g).[58] Commerce intends to reject factual submissions if the submitting party does not comply with the applicable certification requirements.

Notification to Interested Parties

Interested parties must submit applications for disclosure under APO in accordance with 19 CFR 351.305. Parties wishing to participate in these investigations should ensure that they meet the requirements of 19 CFR 351.103(d) (*e.g.,* by filing the required letter of appearance). Note that Commerce has modified certain of its requirements for serving documents containing business proprietary information and has made additional clarifications and corrections to its AD/CVD regulations.[59]

This notice is issued and published pursuant to sections 732(c)(2) and 777(i) of the Act and 19 CFR 351.203(c).

Dated: April 23, 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

Scope of the Investigations

The merchandise covered by these investigations is 2,4-dichlorophenoxyacetic acid (2,4-D) and its derivative products, including salt and ester forms of 2,4-D. 2,4-D has the Chemical Abstracts Service (CAS) registry number of 94–75–7 and the chemical formula C_8H_6 Cl_2O_3.

Salt and ester forms of 2,4-D include 2,4-D sodium salt (CAS 2702–72–9), 2,4-D diethanolamine salt (CAS 5742–19–8), 2,4-D dimethyl amine salt (CAS 2008–39–1), 2,4-D isopropylamine salt (CAS 5742–17–6), 2,4-D tri-isopropanolamine salt (CAS 3234180–3), 2,4-D choline salt (CAS 1048373–72–3), 2,4-D butoxyethyl ester (CAS 1929–733), 2,4-D 2-ethylhexylester (CAS 1928–43–4), and 2,4-D isopropylester (CAS 94–11–1). All 2,4-D, as well as the salt and ester forms of 2,4-D, is covered by the scope irrespective of purity, particle size, or physical form.

The conversion of a 2,4-D salt or ester from 2,4-D acid, or the formulation of nonsubject merchandise with the subject 2,4-D, its salts, and its esters in the country of manufacture or in a third country does not remove the subject 2,4-D, its salts, or its esters from the scope. For any such formulations, only the 2,4-D, 2,4-D salt, and 2,4-D ester components of the mixture is covered by the scope of the investigations. Formulations of 2,4-D are products that are registered for end-use applications with the Environmental Protection Agency and contain a dispersion agent.

The country of origin of any 2,4-D derivative salt or ester is determined by the country in which the underlying 2,4-D acid is produced. 2,4-D, its salts, and its esters are classified under Harmonized Tariff Schedule of the United States (HTSUS) subheading 2918.99.2010. Subject merchandise, including the abovementioned formulations, may also be classified under HTSUS subheadings 2922.12.0001, 2921.11.0000, 2921.19.6195, 2922.19.9690, 3808.93.0050, and 3808.93.1400. The HTSUS subheadings and CAS registry numbers are provided for convenience and customs purposes. The written description of the scope of the investigations is dispositive.

[FR Doc. 2024–09271 Filed 4–29–24; 8:45 am]

BILLING CODE 3510–DS–P

[54] *See* 19 CFR 351.301; *see also Extension of Time Limits; Final Rule,* 78 FR 57790 (September 20, 2013) (*Time Limits Final Rule*), available at *https://www.gpo.gov/fdsys/pkg/FR-2013-09-20/html/2013-22853.htm.*

[55] See Time Limits Final Rule at 57792.

[56] *See* 19 CFR 351.302; *see also, e.g., Time Limits Final Rule.*

[57] *See* section 782(b) of the Act.

[58] *See Certification of Factual Information to Import Administration During Antidumping and Countervailing Duty Proceedings,* 78 FR 42678 (July 17, 2013) (*Final Rule*). Additional information regarding the *Final Rule* is available at *https://access.trade.gov/Resources/filing/index.html.*

[59] *See Administrative Protective Order, Service, and Other Procedures in Antidumping and Countervailing Duty Proceedings,* 88 FR 67069 (September 29, 2023).

DEPARTMENT OF COMMERCE

International Trade Administration

[C–570–161, C–533–923]

2,4-Dichlorophenoxyacetic Acid From the People's Republic of China and India: Initiation of Countervailing Duty Investigations

AGENCY: Enforcement and Compliance, International Trade Administration, Department of Commerce.

DATES: Applicable April 23, 2024.

FOR FURTHER INFORMATION CONTACT: Claudia Cott (the People's Republic of China) and Frank Schmitt (India), AD/CVD Operations, Offices I and VI, Enforcement and Compliance, International Trade Administration, U.S. Department of Commerce, 1401 Constitution Avenue NW, Washington, DC 20230; telephone: (202) 482- 4270 and (202) 482–4880, respectively.

SUPPLEMENTARY INFORMATION:

The Petitions

On March 14, 2024, the U.S. Department of Commerce (Commerce) received countervailing duty (CVD) petitions concerning imports of 2,4-dichlorophenoxyacetic acid (2,4-D) from the People's Republic of China (China) and India filed in proper form on behalf of Corteva Agriscience LLC (the petitioner),[1] a domestic producer of 2,4-D. The CVD petitions were accompanied by antidumping duty (AD) petitions concerning imports of 2,4-D from China and India.[2] On April 3, 2024, after considering comments regarding industry support, Commerce extended the initiation deadline by 20 days to further examine the issue of industry support, because it was not clear from the Petitions whether the industry support criteria had been met.[3]

Between March 18 and April 4, 2024, Commerce requested supplemental information pertaining to certain aspects of the Petitions.[4] Between March 20 and April 9, 2024, the petitioner filed responses to these requests for additional information.[5]

In accordance with section 702(b)(1) of the Tariff Act of 1930, as amended (the Act), the petitioner alleges that the Government of China (GOC) and the Government of India (GOI) are providing countervailable subsidies, within the meaning of sections 701 and 771(5) of the Act, to producers of 2,4-D from China and India, respectively, and that such imports are materially injuring, or threatening material injury to, the domestic industry producing 2,4-D in the United States. Consistent with section 702(b)(1) of the Act and 19 CFR 351.202(b), for those alleged programs on which we are initiating CVD investigations, the Petitions are supported by information reasonably available to the petitioner.

Commerce finds that the petitioner filed the Petitions on behalf of the domestic industry because the petitioner is an interested party as defined in section 771(9)(C) of the Act. Commerce also finds that the petitioner demonstrated sufficient industry support with respect to the initiation of the requested CVD investigations.[6]

Periods of Investigation

Because the Petitions were filed on March 14, 2024, the periods of investigation (POI) for China and India are January 1, 2023, through December 31, 2023.[7]

Scope of the Investigations

The product covered by these investigations is 2,4-D from China and India. For a full description of the scope of these investigations, *see* the appendix to this notice.

Comments on Scope of the Investigations

Between March 18 and April 4, 2024, Commerce requested information from the petitioner regarding the proposed scope to ensure that the scope language in the Petitions is an accurate reflection of the products for which the domestic industry is seeking relief.[8] Between March 20 and April 9, 2024, the petitioner provided clarifications and/or revised the scope language.[9] The description of merchandise covered by these investigations, as described in the appendix to this notice, reflects these clarifications.

As discussed in the *Preamble* to Commerce's regulations, we are setting aside a period for parties to raise issues regarding product coverage (*i.e.,* scope).[10] Commerce will consider all scope comments received from interested parties and, if necessary, will consult with interested parties prior to the issuance of the preliminary determinations. If scope comments include factual information, all such factual information should be limited to public information.[11] To facilitate preparation of its questionnaires, Commerce requests that scope comments be submitted by 5:00 p.m. Eastern Time (ET) on May 13, 2024, which is 20 calendar days from the signature date of this notice. Any rebuttal comments, which may include factual information, must be filed by 5:00 p.m. ET on May 23, 2024, which is ten calendar days from the initial comment deadline.

Commerce requests that any factual information that the parties consider relevant to the scope of the investigations be submitted during that time period. However, if a party subsequently finds that additional factual information pertaining to the scope of the investigations may be relevant, the party may contact Commerce and request permission to submit the additional information. All scope comments must also be filed on the record of each of the concurrent AD and CVD investigations.

Filing Requirements

All submissions to Commerce must be filed electronically via Enforcement and Compliance's Antidumping Duty and Countervailing Duty Centralized Electronic Service System (ACCESS), unless an exception applies.[12] An electronically filed document must be received successfully in its entirety by the time and date it is due.

Consultations

Pursuant to sections 702(b)(4)(A)(i) and (ii) of the Act, Commerce notified the GOC and the GOI of the receipt of the Petitions and provided each an opportunity for consultations with respect to the Petitions.[13] Commerce held consultations with the GOC and

[1] *See* Petitioner's Letter, ''Petition for the Imposition of Antidumping and Countervailing Duties: 2,4-dichlorophenoxyacetic acid from the People's Republic of China and India,'' dated March 14, 2024 (the Petitions).

[2] *Id.*

[3] *See Notice of Extension of the Deadline for Determining the Adequacy of the Antidumping and Countervailing Duty Petitions: 2,4-Dichlorophenoxyacetic Acid from the People's Republic of China and India,* 89 FR 24431, 24432 (April 8, 2024).

[4] *See* Commerce's Letters, ''Supplemental Questions,'' dated March 18, 2024 (General Issues Questionnaire); ''Supplemental Questions,'' dated March 19, 2024; and ''Supplemental Questions,'' dated March 20, 2024; *see also* Memoranda, ''Phone Call,'' dated March 26, 2024 (March 26 Memorandum), and ''Phone Call,'' dated April 5, 2024, respectively; and Commerce's Letter, ''Supplemental Questions Pertaining to Industry Support,'' dated April 4, 2024 (Industry Support Supplemental Questionnaire).

[5] *See* Petitioner's Letters, ''General Issues and Injury Questionnaire Response,'' dated March 20, 2024 (First General Issues Supplement); ''China Countervailing Supplemental Questionnaire Response,'' dated March 25, 2024; ''India Countervailing Supplemental Questionnaire Response,'' dated March 26, 2024; ''Scope Supplemental Questionnaire Response,'' dated March 27, 2024 (Second General Issues Supplement); and ''Supplemental Questions on Industry Support,'' dated April 9, 2024 (Industry Support Supplement); *see also* Memorandum, ''Acceptance of Petitioner's Submission,'' dated March 27, 2024.

[6] *See* ''Determination of Industry Support for the Petitions,'' *infra.*

[7] *See* 19 CFR 351.204(b)(2).

[8] *See* General Issues Questionnaire; *see also* March 26 Memorandum; and Industry Support Supplemental Questionnaire.

[9] *See* First General Issues Supplement at 1–3; *see also* Second General Issues Supplement at 1–2; and Industry Support Supplement at 1.

[10] *See Antidumping Duties; Countervailing Duties,* 62 FR 27296, 27323 (May 19, 1997) (*Preamble*); *see also* 19 CFR 351.312.

[11] *See* 19 CFR 351.102(b)(21) (defining ''factual information'').

[12] *See Antidumping and Countervailing Duty Proceedings: Electronic Filing Procedures; Administrative Protective Order Procedures,* 76 FR 39263 (July 6, 2011); *see also Enforcement and Compliance; Change of Electronic Filing System Name,* 79 FR 69046 (November 20, 2014), for details of Commerce's electronic filing requirements, effective August 5, 2011. Information on using ACCESS can be found at: *https://access.trade.gov/help.aspx* and a handbook can be found at: *https://access.trade.gov/help/Handbook_on_Electronic_Filing_Procedures.pdf.*

[13] *See* Commerce's Letters, ''Countervailing Duty Petition on 2,4-Dichlorophenoxyacetic Acid from the People's Republic of China,'' dated March 15, 2024; and ''Invitation for Consultation to Discuss the Countervailing Duty Petition on 2,4-Dichlorophenoxyacetic Acid from India,'' dated March 15, 2024.

the GOI, on March 26, and 28, 2024, respectively.[14]

Determination of Industry Support for the Petitions

Section 702(b)(1) of the Act requires that a petition be filed on behalf of the domestic industry. Section 702(c)(4)(A) of the Act provides that a petition meets this requirement if the domestic producers or workers who support the petition account for: (i) at least 25 percent of the total production of the domestic like product; and (ii) more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for, or opposition to, the petition. Moreover, section 702(c)(4)(D) of the Act provides that, if the petition does not establish support of domestic producers or workers accounting for more than 50 percent of the total production of the domestic like product, Commerce shall: (i) poll the industry or rely on other information in order to determine if there is support for the petition, as required by subparagraph (A); or (ii) determine industry support using a statistically valid sampling method to poll the ''industry.''

Section 771(4)(A) of the Act defines the ''industry'' as the producers as a whole of a domestic like product. Thus, to determine whether a petition has the requisite industry support, the statute directs Commerce to look to producers and workers who produce the domestic like product. The U.S. International Trade Commission (ITC), which is responsible for determining whether ''the domestic industry'' has been injured, must also determine what constitutes a domestic like product in order to define the industry. While both Commerce and the ITC apply the same statutory definition regarding the domestic like product,[15] they do so for different purposes and pursuant to a separate and distinct authority. In addition, Commerce's determination is subject to limitations of time and information. Although this may result in different definitions of the like product, such differences do not render the decision of either agency contrary to law.[16]

Section 771(10) of the Act defines the domestic like product as ''a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation under this title.'' Thus, the reference point from which the domestic like product analysis begins is ''the article subject to an investigation'' (*i.e.,* the class or kind of merchandise to be investigated, which normally will be the scope as defined in the petition).

With regard to the domestic like product, the petitioner does not offer a definition of the domestic like product distinct from the scope of the investigations.[17] Based on our analysis of the information submitted on the record, we have determined that 2,4-D, as defined in the scope, constitutes a single domestic like product, and we have analyzed industry support in terms of that domestic like product.[18]

In determining whether the petitioner has standing under section 702(c)(4)(A) of the Act, we considered the industry support data contained in the Petitions, and supplements thereto, with reference to the domestic like product as defined in the ''Scope of the Investigations,'' in the appendix to this notice.

To establish industry support, the petitioner provided its own production of the domestic like product in 2023 and compared this to the estimated total production of the domestic like product for the entire domestic industry.[19] We relied on data provided by the petitioner for purposes of measuring industry support.[20]

On March 29, 2024, we received comments on industry support from Nufarm Americas Inc. (Nufarm), a U.S. importer and converter of 2,4-D.[21] On April 2, 2024, the petitioner responded to the letter from Nufarm.[22] On April 11, 2024, we received comments on industry support from Drexel Chemical Company (Drexel), a U.S. importer and converter of 2,4-D.[23]

Our review of the data provided in the Petitions, the First General Issues Supplement, the Second General Issues Supplement, the letters from Nufarm and Drexel, the Petitioner's Response, the Industry Support Supplement, and other information readily available to Commerce indicates that the petitioner has established industry support for the Petitions.[24] First, the Petitions established support from domestic producers (or workers) accounting for more than 50 percent of the total production of the domestic like product and, as such, Commerce is not required to take further action in order to evaluate industry support (*e.g.,* polling).[25] Second, the domestic producers (or workers) have met the statutory criteria for industry support under section 702(c)(4)(A)(i) of the Act because the domestic producers (or workers) who support the Petition account for at least 25 percent of the total production of the domestic like product.[26] Finally, the domestic producers (or workers) have met the statutory criteria for industry support under section 702(c)(4)(A)(ii) of the Act because the domestic producers (or workers) who support the Petitions account for more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for, or opposition to, the Petitions.[27] Accordingly, Commerce determines that the Petitions were filed on behalf of the domestic industry within the meaning of section 702(b)(1) of the Act.[28]

Injury Test

Because China and India are ''Subsidies Agreement Countries'' within the meaning of section 701(b) of the Act, section 701(a)(2) of the Act applies to these investigations. Accordingly, the ITC must determine whether imports of the subject merchandise from China and/or India materially injure, or threaten material injury to, a U.S. industry.

[14] *See* Memorandum, ''Consultations with the People's Republic of China,'' dated March 26, 2024; and Memorandum, ''Consultations with Officials from the Government of India,'' dated March 28, 2024.

[15] *See* section 771(10) of the Act.

[16] *See USEC, Inc.* v. *United States,* 132 F. Supp. 2d 1, 8 (CIT 2001) (citing *Algoma Steel Corp., Ltd.* v. *United States,* 688 F. Supp. 639, 644 (CIT 1988), *aff'd* 865 F.2d 240 (Fed. Cir. 1989)).

[17] *See* Petitions at Volume I (pages 11–16 and Exhibits I–5, I–6 and I–9); *see also* First General Issues Supplement at 3–6.

[18] For a discussion of the domestic like product analysis as applied to these cases and information regarding industry support, *see* Checklists, ''Countervailing Duty Investigation Initiation Checklist: 2,4-D from the People's Republic of China and India,'' dated concurrently with, and hereby adopted by, this notice (Country-Specific CVD Checklists), at Attachment II, ''Analysis of Industry Support for the Antidumping and Countervailing Duty Petitions Covering 2,4-Dichlorophenoxyacetic Acid from the People's Republic of China and India'' (Attachment II). These checklists are on file electronically via ACCESS.

[19] *See* Industry Support Supplement at 1–6 and Exhibits S–I–21, S–I–23, S–I–24, and S–I–29.

[20] *Id.* For further discussion, *see* Attachment II of the Country-Specific CVD Initiation Checklists.

[21] *See* Nufarm's Letter, ''Nufarm's Request for the Department to Defer Initiation for Lack of Standing and Poll the Industry,'' dated March 29, 2024.

[22] *See* Petitioner's Letter, ''Petitioner's Response to Industry Comments,'' dated April 2, 2024 (Petitioner's Response).

[23] *See* Drexel's Letter, ''Information Submitted by Drexel Chemical Company to Rebut, Clarify or Correct Corteva's April 9, 2024 Response to Supplemental Questions on Industry Support,'' dated April 11, 2024.

[24] *See* Attachment II of the Country-Specific CVD Initiation Checklists.

[25] *Id.; see also* section 702(c)(4)(D) of the Act.

[26] *See* Attachment II of the Country-Specific CVD Initiation Checklists.

[27] *Id.*

[28] *Id.*

Allegations and Evidence of Material Injury and Causation

The petitioner alleges that imports of the subject merchandise are benefitting from countervailable subsidies and that such imports are causing, or threaten to cause, material injury to the U.S. industry producing the domestic like product. In addition, the petitioner alleges that subject imports exceed the negligibility threshold provided for under section 771(24)(A) of the Act.[29]

The petitioner contends that the industry's injured condition is illustrated by a significant and increasing volume of subject imports; underselling and price depression and/or suppression; declining profitability; declines in volume of production and capacity utilization; lost sales and revenues; and lost market share.[30] We assessed the allegations and supporting evidence regarding material injury, threat of material injury, causation, as well as negligibility, and we have determined that these allegations are properly supported by adequate evidence and meet the statutory requirements for initiation.[31]

Initiation of CVD Investigations

Based upon the examination of the Petitions and supplemental responses, we find that they meet the requirements of section 702 of the Act. Therefore, we are initiating CVD investigations to determine whether imports of 2,4-D from China and India benefit from countervailable subsidies conferred by the GOC and the GOI, respectively. In accordance with section 703(b)(1) of the Act and 19 CFR 351.205(b)(1), unless postponed, we will make our preliminary determinations no later than 65 days after the date of these initiations.

China

Based on our review of the Petitions, we find that there is sufficient information to initiate a CVD investigation on six of the nine programs alleged by the petitioner. For a full discussion of the basis for our decision to initiate an investigation of each program, *see* the China CVD Initiation Checklist. A public version of the initiation checklist for this investigation is available on ACCESS.

India

Based on our review of the Petitions, we find that there is sufficient information to initiate a CVD investigation on 34 of the 35 programs alleged by the petitioner. For a full discussion of the basis for our decision to initiate an investigation of each program, *see* the India CVD Initiation Checklist. A public version of the initiation checklist for this investigation is available on ACCESS.

Respondent Selection

The petitioner identified 12 companies in China and four companies in India as producers and/or exporters of 2,4-D.[32] Commerce intends to follow its standard practice in CVD investigations and calculate company-specific subsidy rates in these investigations. In the event that Commerce determines that the number of companies is large, and it cannot individually examine each company based upon Commerce's resources, Commerce intends to select mandatory respondents based on U.S. Customs and Border Protection (CBP) data for U.S. imports of 2,4-D from China and India during the POI under the appropriate Harmonized Tariff Schedule of the United States subheading(s) listed in the ''Scope of the Investigations'' in the appendix.

On April 1, 2024, Commerce released CBP data on imports of 2,4-D from China and India under administrative protective order (APO) to all parties with access to information protected by APO and indicated that interested parties wishing to comment on CBP data and/or respondent selection must do so within three business days of the publication date of the notice of initiation of these investigations.[33] Comments must be filed electronically using ACCESS. An electronically filed document must be received successfully in its entirety via ACCESS by 5:00 p.m. ET on the specified deadline. Commerce will not accept rebuttal comments regarding the CBP data or respondent selection.

Interested parties must submit applications for disclosure under APO in accordance with 19 CFR 351.305(b). Instructions for filing such applications may be found on Commerce's website at *https://www.trade.gov/administrative-protective-orders.*

Distribution of Copies of the Petitions

In accordance with section 702(b)(4)(A) of the Act and 19 CFR 351.202(f), a copy of the public version of the Petitions has been provided to the GOC and the GOI via ACCESS. Furthermore, to the extent practicable, Commerce will attempt to provide a copy of the public version of the Petitions to each exporter named in the Petitions, as provided under 19 CFR 351.203(c)(2).

ITC Notification

Commerce will notify the ITC of its initiation, as required by section 702(d) of the Act.

Preliminary Determination by the ITC

Typically, the ITC will preliminarily determine, within 45 days after the date on which the Petitions were filed, whether there is a reasonable indication that subject imports are materially injuring, or threatening material injury to, a U.S. industry.[34] Here, due to Commerce's extension of the initiation decision deadline to further examine the issue of industry support for the Petitions, the ITC has extended the time for issuance of its preliminary determination for imports of 2,4-D from India and China. At this time, the ITC has indicated it will make its preliminary determination on or about May 20, 2024. A negative ITC determination for either country will result in the investigation being terminated with respect to that country.[35] Otherwise, these CVD investigations will proceed according to statutory and regulatory time limits.

Submission of Factual Information

Factual information is defined in 19 CFR 351.102(b)(21) as: (i) evidence submitted in response to questionnaires; (ii) evidence submitted in support of allegations; (iii) publicly available information to value factors under 19 CFR 351.408(c) or to measure the adequacy of remuneration under 19 CFR 351.511(a)(2); (iv) evidence placed on the record by Commerce; and (v) evidence other than factual information described in (i)–(iv). Section 351.301(b) of Commerce's regulations requires any party, when submitting factual information, to specify under which subsection of 19 CFR 351.102(b)(21) the information is being submitted[36] and, if the information is submitted to rebut,

[29] *See* Petitions at Volume I (page 17 and Exhibit I–11); *see also* First General Issues Supplement at 6 and Exhibit S–I–16.

[30] *See* Petitions at Volume I (pages 17–27 and Exhibits I–10 through I–19); *see also* General Issues Supplement at 6 and Exhibits S–I–16 and S–I–17.

[31] *See* Country-Specific CVD Initiation Checklists at Attachment III, Analysis of Allegations and Evidence of Material Injury and Causation for the Antidumping and Countervailing Duty Petitions Covering 2,4-Dichlorophenoxyacetic Acid from the People's Republic of China and India (Attachment III).

[32] *See* Petitions at Volume I (page 9 and Exhibit I–2); *see also* First General Issues Supplement at 1 and Exhibit S–I–2.

[33] *See* Memorandum, ''Release of Data from U.S. Customs and Border Protection,'' dated April 1, 2024.

[34] *See* section 703(a)(1) of the Act.

[35] *Id.*

[36] *See* 19 CFR 351.301(b).

clarify, or correct factual information already on the record, to provide an explanation identifying the information already on the record that the factual information seeks to rebut, clarify, or correct.[37] Time limits for the submission of factual information are addressed in 19 CFR 351.301, which provides specific time limits based on the type of factual information being submitted. Interested parties should review the regulations prior to submitting factual information in these investigations.

Extensions of Time Limits

Parties may request an extension of time limits before the expiration of a time limit established under 19 CFR 351.301, or as otherwise specified by Commerce. In general, an extension request will be considered untimely if it is filed after the expiration of the time limit established under 19 CFR 351.301.[38] For submissions that are due from multiple parties simultaneously, an extension request will be considered untimely if it is filed after 10:00 a.m. ET on the due date. Under certain circumstances, Commerce may elect to specify a different time limit by which extension requests will be considered untimely for submissions which are due from multiple parties simultaneously. In such a case, Commerce will inform parties in a letter or memorandum of the deadline (including a specified time) by which extension requests must be filed to be considered timely. An extension request must be made in a separate, stand-alone submission; Commerce will grant untimely filed requests for the extension of time limits only in limited cases where we determine, based on 19 CFR 351.302, that extraordinary circumstances exist. Parties should review Commerce's regulations concerning factual information prior to submitting factual information in these investigations.[39]

Certification Requirements

Any party submitting factual information in an AD or CVD proceeding must certify to the accuracy and completeness of that information.[40] Parties must use the certification formats provided in 19 CFR 351.303(g).[41] Commerce intends to reject factual submissions if the submitting party does not comply with the applicable certification requirements.

Notification to Interested Parties

Interested parties must submit applications for disclosure under administrative protective order in accordance with 19 CFR 351.305. Parties wishing to participate in these investigations should ensure that they meet the requirements of 19 CFR 351.103(d), *e.g.,* by filing the required letters of appearance. Note that Commerce has amended certain of its requirements pertaining to the service of documents in 19 CFR 351.303(f).[42]

This notice is issued and published pursuant to sections 702 and 777(i) of the Act and 19 CFR 351.203(c).

Dated: April 23, 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

Scope of the Investigations

The merchandise covered by these investigations is 2,4-dichlorophenoxyacetic acid (2,4-D) and its derivative products, including salt and ester forms of 2,4-D. 2,4-D has the Chemical Abstracts Service (CAS) registry number of 94–75–7 and the chemical formula $C_8H_6Cl_2O_3$.

Salt and ester forms of 2,4-D include 2,4-D sodium salt (CAS 2702–72–9), 2,4-D diethanolamine salt (CAS 5742–19–8), 2,4-D dimethyl amine salt (CAS 2008–39–1), 2,4-D isopropylamine salt (CAS 5742–17–6), 2,4-D tri-isopropanolamine salt (CAS 32341–80–3), 2,4-D choline salt (CAS 1048373–72–3), 2,4-D butoxyethyl ester (CAS 1929–73–3), 2,4-D 2-ethylhexylester (CAS 1928–43–4), and 2,4-D isopropylester (CAS 94–11–1). All 2,4-D, as well as the salt and ester forms of 2,4-D, is covered by the scope irrespective of purity, particle size, or physical form.

The conversion of a 2,4-D salt or ester from 2,4-D acid, or the formulation of nonsubject merchandise with the subject 2,4-D, its salts, and its esters in the country of manufacture or in a third country does not remove the subject 2,4-D, its salts, or its esters from the scope. For any such formulations, only the 2,4-D, 2,4-D salt, and 2,4-D ester components of the mixture is covered by the scope of the investigations. Formulations of 2,4-D are products that are registered for end-use applications with the Environmental Protection Agency and contain a dispersion agent.

The country of origin of any 2,4-D derivative salt or ester is determined by the country in which the underlying 2,4-D acid is produced. 2,4-D, its salts, and its esters are classified under Harmonized Tariff Schedule of the United States (HTSUS) subheading 2918.99.2010. Subject merchandise, including the abovementioned formulations, may also be classified under HTSUS subheadings 2922.12.0001, 2921.11.0000, 2921.19.6195, 2922.19.9690, 3808.93.0050 and 3808.93.1400. The HTSUS subheadings and CAS registry numbers are provided for convenience and customs purposes. The written description of the scope of the investigation is dispositive.

[FR Doc. 2024–09270 Filed 4–29–24; 8:45 am]

BILLING CODE 3510–DS–P

[37] *See* 19 CFR 351.301(b)(2).

[38] *See* 19 CFR 351.302.

[39] *See* 19 CFR 351.301; *see also Extension of Time Limits; Final Rule,* 78 FR 57790 (September 20, 2013), and *Regulations Improving and Strengthening the Enforcement of Trade Remedies Through the Administration of the Antidumping and Countervailing Duty Laws,* 89 FR 20766 (March 25, 2024) (effective April 24, 2024).

[40] *See* section 782(b) of the Act.

[41] *See Certification of Factual Information to Import Administration During Antidumping and Countervailing Duty Proceedings,* 78 FR 42678 (July 17, 2013) (*Final Rule*); *see also* frequently asked questions regarding the *Final Rule,* available at: *https://enforcement.trade.gov/tlei/notices/factual_info_final_rule_FAQ_07172013.pdf.*

[42] *See Administrative Protective Order, Service, and Other Procedures in Antidumping and Countervailing Duty Proceedings,* 88 FR 67069 (September 29, 2023).

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD910]

Mid-Atlantic Fishery Management Council (MAFMC); Public Meeting

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

ACTION: Notice; public meeting.

SUMMARY: The Mid-Atlantic Fishery Management Council (Council) will hold a meeting of the Scientific and Statistical Committee (SSC).

DATES: The meeting will be held on Tuesday, May 14, 2024, starting at 9:30 a.m. and continue through 12:30 p.m. on Wednesday, May 15, 2024. See **SUPPLEMENTARY INFORMATION** for agenda details.

ADDRESSES: This will be an in-person meeting with a virtual option. SSC members, other invited meeting participants, and members of the public will have the option to participate in person at the Royal Sonesta Harbor Court (550 Light Street, Baltimore, MD) or virtually via Webex webinar. Webinar connection instructions and briefing materials will be available at: *www.mafmc.org/ssc.*

Council address: Mid-Atlantic Fishery Management Council, 800 N State Street, Suite 201, Dover, DE 19901; telephone: (302) 674–2331; website: *www.mafmc.org.*

FOR FURTHER INFORMATION CONTACT: Christopher M. Moore, Ph.D., Executive Director, Mid-Atlantic Fishery Management Council, telephone: (302) 526–5255.

SUPPLEMENTARY INFORMATION: During this meeting, the SSC will review the most recent survey and fishery data and the previously recommended 2025 Acceptable Biological Catch (ABC) for Longfin Squid, *Illex* Squid, and Chub Mackerel. The SSC will also receive an introductory overview of the recently peer reviewed Black Sea Bass, Golden Tilefish, and Applying State-Space Models research track stock assessments. The SSC will receive an update on the results of the 2023 South Atlantic Deepwater Longline Survey and the Mid-Atlantic Golden Tilefish Longline Survey. The SSC will have an initial discussion about the Recreational Measures Setting Process Framework/Addenda and the work plan of the SSC sub-group that was formed to provide feedback on this management action to the Council. The SSC will also make recommendations for Council consideration regarding updates to the SSC overfishing limit (OFL) coefficient of variation (CV) guidance document. The SSC may take up any other business as necessary.

A detailed agenda and background documents will be made available on the Council's website (*www.mafmc.org*) prior to the meeting.

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aid should be directed to Shelley Spedden, (302) 526–5251, at least 5 days prior to the meeting date.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: April 24, 2024.

Rey Israel Marquez,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2024–09229 Filed 4–29–24; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD918]

North Pacific Fishery Management Council; Public Meeting

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

ACTION: Notice of web conference.

SUMMARY: The North Pacific Fishery Management Council (Council) Scientific and Statistical Committee meeting will be held on May 17, 2024.

DATES: The meeting will be held on Friday, May 17, 2024, from 9 a.m. to 12 p.m., Alaska Time.

ADDRESSES: The meeting will be a web conference. Join online through the link at *https://meetings.npfmc.org/Meeting/Details/3045.*

Council address: North Pacific Fishery Management Council, 1007 W 3rd Ave, Suite 400, Anchorage, AK 99501–2252; telephone: (907) 271–2809. Instructions for attending the meeting via video conference are given under **SUPPLEMENTARY INFORMATION**, below.

FOR FURTHER INFORMATION CONTACT: Diana Evans, Council staff; phone: (907) 271–2809; email: *diana.evans@noaa.gov.* For technical support, please contact our admin Council staff, email: *npfmc.admin@noaa.gov.*

SUPPLEMENTARY INFORMATION:

Agenda

Friday, May 17, 2024

The SSC will meet to recommend research priorities. The agenda is subject to change, and the latest version will be posted at *https://meetings.npfmc.org/Meeting/Details/3045* prior to the meeting, along with meeting materials.

Connection Information

You can attend the meeting online using a computer, tablet, or smart phone; or by phone only. Connection information will be posted online at: *https://meetings.npfmc.org/Meeting/Details/3045.* The meeting will be recorded and a link to the recording will be posted on the eAgenda once the meeting concludes.

Public Comment

Public comment letters will be accepted in advance of the meeting and should be submitted electronically to *https://meetings.npfmc.org/Meeting/Details/3045.* The deadline to submit public comments is on May 15, 2024, at 5 p.m., Alaska Time.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: April 25, 2024.

Rey Israel Marquez,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2024–09291 Filed 4–29–24; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD908]

New England Fishery Management Council; Public Meeting

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

ACTION: Notice of public meeting.

SUMMARY: The New England Fishery Management Council (Council) is scheduling a public webinar of its Risk Policy Working Group to consider actions affecting New England fisheries in the exclusive economic zone (EEZ). This meeting will be held in-person with a webinar option. Recommendations from this group will be brought to the full Council for formal consideration and action, if appropriate.

DATES: This meeting will be held on Wednesday, May 15, 2024, at 9 a.m.

ADDRESSES: Webinar registration URL information: *https://nefmc-org.zoom.us/meeting/register/tJEocuqgqToiHNAle9lccIP9ylkpw416yoJC.*

Council address: New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950.

FOR FURTHER INFORMATION CONTACT: Cate O'Keefe, Executive Director, New England Fishery Management Council; telephone: (978) 465–0492.

SUPPLEMENTARY INFORMATION:

Agenda

The Risk Policy Working Group (RPWG) will address Term of Reference 2 by continuing to develop a revised Risk Policy Concept. The RPWG will discuss input provided by the Council during the RPWG Report on April 17, 2024. They will review and evaluate a comprehensive list of factors that can be considered as part of the Council's revised Risk Policy. They plan to refine the work plan and consider Terms of Reference for the upcoming meeting with the SSC on June 12, 2024. Other business will be discussed, if necessary.

Although non-emergency issues not contained on the agenda may come before this Council for discussion, those issues may not be the subject of formal action during this meeting. Council action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to

take final action to address the emergency. The public also should be aware that the meeting will be recorded. Consistent with 16 U.S.C. 1852, a copy of the recording is available upon request.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Cate O'Keefe, Executive Director, at (978) 465–0492, at least 5 days prior to the meeting date.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: April 24, 2024.

Rey Israel Marquez,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2024–09228 Filed 4–29–24; 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; Coral Reef Conservation Program

AGENCY: National Oceanic & Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of information collection, request for comment.

SUMMARY: The Department of Commerce, in accordance with the Paperwork Reduction Act of 1995 (PRA), invites the general public and other Federal agencies to comment on proposed, and continuing information collections, which helps us assess the impact of our information collection requirements and minimize the public's reporting burden. This notice pertains to a revision and extension of the approved collection of information for the Coral Reef Conservation Program. The purpose of this notice is to allow for 60 days of public comment preceding submission of the collection to OMB.

DATES: To ensure consideration, comments regarding this proposed information collection must be received on or before July 1, 2024.

ADDRESSES: Interested persons are invited to submit written comments to Adrienne Thomas, NOAA PRA Officer, at *NOAA.PRA@noaa.gov.* Please reference OMB Control Number 0648–0448 in the subject line of your comments. Written comments NOAA receives are considered part of the public record, and the entirety of the comment, including the name of the commenter, email address, attachments, and other supporting materials, will be publicly accessible. Sensitive personally identifiable information, such as account numbers and Social Security numbers or Confidential Business Information, should not be included with the comment.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or specific questions related to collection activities should be directed to Craig Reid, Grant Coordinator, Coral Reef Conservation Program, NOAA National Ocean Service, 1305 East West Highway, 10th Floor, Silver Spring, MD 20910, 202–240–5332, and *Craig.A.Reid@noaa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

This request is for revision and extension to an approved collection of information under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.,* and implementing regulations at 5 CFR part 1320. The Coral Reef Conservation Act of 2000, 16 U.S.C. 6401 *et seq.,* has been amended since the last approval and the revised requirements for information collection are outlined below.

The Coral Reef Conservation Act was enacted to conserve and restore the condition of United States coral reef ecosystems challenged by natural and human-accelerated changes; to promote the science-based management and sustainable use of coral reef ecosystems to benefit local communities and the Nation; to develop sound scientific information on the condition of coral reef ecosystems, continuing and emerging threats to such ecosystems, and the efficacy of innovative tools, technologies, and strategies to mitigate stressors and restore such ecosystems; to assist in the preservation of coral reefs by supporting science-based, consensus-driven, and community-based coral reef management by covered States (Florida, Hawaii, and the territories of American Samoa, the Commonwealth of the Northern Mariana Islands, Guam, Puerto Rico, and the United States Virgin Islands) and covered Native entities (an Indian Tribe, the Department of Hawaiian Home Lands, the Office of Hawaiian Affairs, or a Native Hawaiian organization with interests in a coral reef ecosystem); to provide financial resources, technical assistance, and scientific expertise to supplement, complement, and strengthen community-based management programs and conservation and restoration projects of non-Federal reefs; to establish a formal mechanism for collecting and allocating monetary donations from the private sector to be used for coral reef conservation and restoration projects; to support rapid, effective, and science-based assessment and response to exigent circumstances that pose immediate and long-term threats to coral reefs; and to serve as a model for advancing similar international efforts to monitor, conserve, and restore coral reef ecosystems.

Under section 6406 of the Act (Block Grants), covered States are responsible for documenting and reporting the State's use of Federal funds received under the Act; and expenditures of non-Federal funds made in furtherance of coral reef management and restoration as the NOAA Administrator (Administrator) deems appropriate. The Administrator is responsible for providing guidance on the proper documentation of expenditures.

Under section 6410 of the Act (Ruth D. Gates Coral Reef Conservation Grant Program), the NOAA Administrator, and subject to the availability of appropriations, is authorized to provide up to $3,500,000 annually (per section 6414(c)) in grants for coral reef conservation projects.

Collection activities for this program are outlined below and include: 1. Collection and submission of covered States' non-Federal expenditures under the block grants section; 2. Applicant development and submission of a proposal package to a Notice of Funding Opportunity under the Ruth D. Gates Coral Reef Conservation Grant Program; and 3. If selected and awarded funding, submission of performance progress reports, to include a standard program-specific performance progress report template with a new indicator tracking report for all financial assistance recipients.

NOAA anticipates the first block grants will be awarded in fiscal year 2025 and NOAA is currently drafting guidance for the covered States for the annual collection of their non-Federal expenditures. NOAA expects to supply a simple form to each covered State for an aggregated, high-level report of each covered State's Non-Federal expenditures from the previous fiscal year. NOAA expects the same performance (technical) reports required by 2 CFR 200.329 for all recipients of non-construction Federal financial assistance awards described in detail below will be sufficient to document and report the State's use of Federal funds.

As per section 6410(b) of the Act, NOAA will require that each proposal package submitted to a Ruth D. Gates Coral Reef Conservation Program Notice of Funding Opportunity at minimum include: 1. The name of the individual or entity responsible for conducting the project; 2. A description of the qualifications of the individual or entity; 3. A succinct statement of the purposes of the project; 4. An estimate of the funds and time required to complete the project; 5. Evidence of support for the project by appropriate representatives of States or other government jurisdictions in which the project will be conducted; 6. Information regarding the source and amount of matching funding available to the applicant; 7. A description of how the project meets one or more of the priorities listed in the announcement; and 8. In the case of a proposal submitted by a coral reef stewardship partnership, a description of how the project aligns with the applicable coral reef action plan in effect under section 6404 of this title. Additionally, Federal funds for any coral conservation financial assistance project may not exceed 50 percent of the total cost. However, the Administrator may waive all or part of the matching requirement if the Administrator determines that no reasonable means are available through which an applicant can meet the matching requirement with respect to a coral reef project and the probable benefit of the project outweighs the public interest in the matching requirement. The applicant may choose to also submit a request for this non-Federal matching requirement, if full or in part, at their discretion.

Per 2 CFR 200.329, all recipients of non-construction Federal financial assistance awards are required to provide performance (technical) reports to the agency at intervals no less frequently than annually and no more frequently than quarterly in order for the agency to properly monitor the award and meet oversight responsibilities. The awarding agency must use OMB-approved common forms for this purpose or seek permission for program-specific forms that will collect the required data elements. The Coral Reef Conservation Program obtained OMB approval to revise this information collection to require use of a program-specific form for semi-annual reporting and an annual form for tracking specific indicators but has not been implemented. These indicators align with the new Coral Reef Conservation Program Strategic Plan (2018; *https://www.coris.noaa.gov/activities/strategic_plan2018*) and were to be used to track national progress toward these strategic goals through 2040, however section 6403 of the Act now requires the creation of National Coral Resilience Strategy by December, 2024, and the form may need to be revised to track any changes in indicators. The program-specific form for semi-annual reporting will be a revised version of what is currently approved and will standardize reporting across projects.

II. Method of Collection

Information will be collected electronically via the Department of Commerce's grant management system, eRA Commons, for performance (technical) reports, *Grants.gov* for non-Federal match waiver requests, and email for covered States' submissions of expenditures of non-Federal funds. In the event that electronic submission is not available for non-Federal match waiver requests, paper submissions may be allowable pursuant to the Notice of Funding Opportunity.

III. Data

OMB Control Number: 0648–0448.

Form Number(s): SF–424 series.

Type of Review: Regular (Revision and extension of current information collection).

Affected Public: Business or other for-profit organizations; nonprofit, nongovernmental, and not-for-profit institutions; State or local government; and regional fishery management councils established under the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 *et seq.*).

Estimated Number of Respondents: 42.

Estimated Time per Response: Block grant report of non-Federal expenditures of covered States: to be determined; Ruth D. Gates Grant Program proposal package development and submission: 46.5 hours; performance progress report and indicator report submission: 6 hours.

Estimated Total Annual Burden Hours: 937 hours.

Estimated Total Annual Cost to Public: No cost for electronic responses.

Respondent's Obligation: Required to obtain or retain benefits.

Legal Authority: Coral Reef Conservation Act of 2000, 16 U.S.C. 6401 *et seq.*

IV. Request for Comments

We are soliciting public comments to permit the Department/Bureau to: (a) Evaluate whether the proposed information collection is necessary for the proper functions of the Department, including whether the information will have practical utility; (b) Evaluate the accuracy of our estimate of the time and cost burden for this proposed collection, including the validity of the methodology and assumptions used; (c) Evaluate ways to enhance the quality, utility, and clarity of the information to be collected; and (d) Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Comments that you submit in response to this notice are a matter of public record. We will include or summarize each comment in our request to OMB to approve this information collection request. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you may ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Under Secretary for Economic Affairs, Commerce Department.

[FR Doc. 2024–09206 Filed 4–29–24; 8:45 am]

BILLING CODE P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD912]

Council Coordination Committee Meeting

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

ACTION: Notice of public meeting.

SUMMARY: The Caribbean Fishery Management Council (CFMC) will host a meeting of the Council Coordination Committee (CCC) consisting of eight Regional Fishery Management Council (RFMC) chairs, vice chairs, and executive directors and its subcommittees from May 21 to May 23, 2024. The intent of this meeting is to discuss issues of relevance to the Councils and NMFS, including issues related to the implementation of the Magnuson-Stevens Fishery Conservation and Management Reauthorization Act (MSA), other topics

of concern to the RFMC, and decisions and follow-up activities.

DATES: The meeting will be held from Tuesday, May 21, 2024 to Thursday, May 23, 2024. Registration for the meeting will be from 9 a.m. to 5 p.m., AST on Monday, May 20, 2024. The meeting will begin at 9 a.m. AST on Tuesday, May 21, 2024, and recess at 5 p.m. or when business is complete. There will be a closed session on May 22, 2024, from 8 a.m. to 8:30 a.m., AST. The meeting will reconvene at 9 a.m. AST, and recess at 5 p.m. or when business is complete. The meeting will reconvene on the final day at 9 a.m. AST on Thursday, May 23, 2024, and adjourn by 12 p.m., AST or when business is complete.

ADDRESSES:

Meeting address: The meeting will take place at the Caribe Hilton Hotel, 1 San Geronimo Street San Juan, Puerto Rico 00901; telephone: (787) 721–0303.

You may join the meeting via Zoom, from a computer, tablet or smartphone by entering the following address:

Topic: CCC May 21–23, 2024
Time: This is a recurring meeting Meet anytime
Join Zoom Meeting:
https://us02web.zoom.us/j/83478008823?pwd=ajRsd0NPNHMzQi9BTlh4Mzd5M29rUT09
Meeting ID: 834 7800 8823
Passcode: 942580
One tap mobile:
+17879451488,,83478008823#,,,,*942580# Puerto Rico
+17879667727,,83478008823#,,,,*942580# Puerto Rico
Dial by your location:
- +1 787 945 1488 Puerto Rico
- +1 787 966 7727 Puerto Rico
- +1 939 945 0244 Puerto Rico
- +1 669 900 6833 US (San Jose)
- +1 689 278 1000 US
- +1 719 359 4580 US
- +1 929 205 6099 US (New York)
- +1 253 205 0468 US
- +1 253 215 8782 US (Tacoma)
- +1 301 715 8592 US (Washington DC)
- +1 305 224 1968 US
- +1 309 205 3325 US
- +1 312 626 6799 US (Chicago)
- +1 346 248 7799 US (Houston)
- +1 360 209 5623 US
- +1 386 347 5053 US
- +1 507 473 4847 US
- +1 564 217 2000 US
- +1 646 931 3860 US
- +1 669 444 9171 US

Meeting ID: 834 7800 8823
Passcode: 942580
Find your local number: *https://us02web.zoom.us/u/kcXP2b3XGB*

FOR FURTHER INFORMATION CONTACT: Miguel Rolón, Executive Director, Caribbean Fishery Management Council, 270 Muñoz Rivera Avenue, Suite 401, San Juan, Puerto Rico 00918–1903, telephone: (787) 398–3717.

SUPPLEMENTARY INFORMATION: The Magnuson-Stephens Fishery Conservation and Management Act (MSA) and 2007 Reauthorization Act (MSRA) established the CCC by amending section 302 (16 U.S.C. 1852) of the MSA. The Committee consists of the chairs, vice-chairs, and executive directors of each of the eight Regional Fishery Management Councils authorized by the MSA, or their proxies, other Council members or staff. All sessions are open to the public and time will be set aside for public comments at the end of each day and after specific sessions at the discretion of the meeting Chair. The meeting Chair will announce public comment times and instructions to provide comment at the start of each meeting day. There will be opportunities for public comments to be provided in-person and remotely via webinar. Updates to this meeting, briefing materials, public comment instructions and additional information will be posted when available at *http://www.fisherycouncils.org/ccc-meetings/may-2024.*

Proposed Agenda

Monday, May 20, 2024

9 a.m.–5 p.m.: Meeting Registration—Gran Salón Los Rosales

Tuesday, May 21, 2024

9 a.m.: CCC Convenes

I. *9 a.m.–9:10 a.m.:* Welcome and Introductions—*Mr. Carlos F. Farchette*
- Adoption of Agenda

II. *9:10 a.m.–9:30 a.m.:* Opening Remarks and FY24/25 Priorities—*Ms. Janet Coit*

III. *9:30 a.m.–10:45 a.m.:* NOAA Fisheries Update and FY 24/25 Priorities—*Mr. Sam Rauch/Ms. Emily Menashes*
- Confidentiality Rule Update
- CEQ NEPA Regulations
- National Seafood Strategy
- America the Beautiful/30x30 & Marine and Coastal Area-Based Management Federal Advisory Committee (FAC) Update
- Sanctuary Regulations and Guidance

—— Break 10:45 a.m.–11 a.m. ——

IV. *11 a.m.–12:15 p.m.:* NOAA Fisheries Science Updates
- CEFI Regional Implementation: Results From the 1st Summit—*Dr. Cisco Werner*
- Marine Recreational Information Program (MRIP) & Fishing Effort Survey (FES)—*Dr. Evan Howell*

—— Lunch *12:15 p.m.–1:45 p.m.* ——

V. *1:45 p.m.–2:45 p.m.:* ESA/MSA Integration Policy Draft
- ESA/MSA Integration Policy Draft—*Mr. Sam Rauch*

VI. *2:45 p.m.–3:15 p.m.:* MSA 304(f) Policy—*Ms. Kelly Denit*

—— Break *3:15 p.m.–3:30 p.m.* ——

VII. *3:30 p.m.–4:15 p.m.:* National Standards 4, 8, and 9—*Ms. Kelly Denit*

VIII. *4:15 p.m.–4:45 p.m.:* Public Comments—*Mr. Carlos F. Farchette*

—— Recess ——

Wednesday, May 22, 2024

8 a.m.–8:30 a.m. CLOSED SESSION

IX. *9 a.m.–10 a.m.:* Budget
- 2024 Outlook, Including 5-year Administrative Awards—*Ms. Emily Menashes*
- Long Term Funding for Council Operation

X. *10 a.m.–10:30 a.m.:* Anti-Harassment Policies and Addressing Unprofessional Behavior—*Mr. Merrick J. Burden*

—— Break *10:30 a.m.–10:45 a.m.* ——

XI. *10:45 a.m.–11 a.m.:* Caribbean Fishery Management Highlights—*Mr. Carlos F. Farchette*

XII. *11 a.m.–11:15 a.m.:* 8th Scientific Coordination Subcommittee (SCS) 2024, Planning Report—*Dr. Lisa Kerr*

XIII. *11:15 a.m.–11:30 a.m.:* CMOD Planning Update—*Ms. Diana Evans*

XIV. *11:30 a.m.–12 p.m.:* International Fisheries Issues—*Mr. Carlos F. Farchette*

—— Lunch *12 p.m.–1:30 p.m.* ——

XV. *1:30 p.m.–2:45 p.m.:* Inflation Reduction Act (IRA) Climate-Ready Fishery Funding
- Update on IRA Funding Overall—*Dr. Evan Howell*
- Council-specific Funding Update—*Ms. Kelly Denit*

XVI. *2:45 p.m.–3:45 p.m.:* National Academies of Sciences (NAS) Equity Report and Equity and Environmental Justice (EEJ) Regional Strategic Plans—*Mr. Sam Rauch*

—— Break *3:45 p.m.–4 p.m.* ——

XVII. *4 p.m.–4:30 p.m.:* Legislative Outlook—*Mr. Dave Whaley*

XVIII. *4:30 p.m.–5 p.m.:* Public Comments—*Mr. Carlos F. Farchette*

—— Recess ——

Thursday, May 23, 2024

XIX. *9 a.m.–10 a.m.:* CCC Workgroups/ Subcommittees

9 a.m.–9:15 a.m.

- Communications Committee Councils MSA 50-year Anniversary Update

9:15 a.m.–9:30 a.m.

- Habitat Working Group—*Dr. Lisa Hollensead/Dr. Graciela García-Moliner*

9:30 a.m.–9:45 a.m.

- NEPA Working Group Report—*Dr. Graciela García-Moliner*

9:45 a.m.–10:15 a.m.

- EEJ Working Group Report—*Mr. Zach Yamada/Dr. Graciela García-Moliner*

—— Break *10:15 a.m.–10:30 a.m.* ——

XX. 10:30 a.m.–11 a.m.: Public Comments—*Mr. Carlos F. Farchette*

XXI. 11 a.m.–11:15 a.m.: 2025 CCC Meetings—*Dr. Cate O'keefe*

XXII. *11:15 a.m.–12 p.m.:* Other Business and Wrap-Up—*Mr. Carlos F. Farchette*

- CCC Outcomes and Action Items

—— ADJOURN ——

The timing and order in which agenda items are addressed may change as required to effectively address the issues. The CCC will meet as late as necessary to complete scheduled business.

Although non-emergency issues not contained in the meeting agenda may be discussed, those issues may not be the subject of formal action during these meetings. Action will be restricted to those issues specifically listed in this document and any issues arising after publication of this document that require emergency action under section 305 (c) of the Magnuson-Stephens Fishery Conservation and Management Act, provided the public has been notified of the intent to take final action to address the emergency.

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Diana Martino, Caribbean Fishery Management Council, 270 Muñoz Rivera Avenue, Suite 401, San Juan, Puerto Rico, 00918–1903, telephone: (787) 226–8849, at least 5 working days prior to the meeting.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: April 24, 2024.

Rey Israel Marquez,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2024–09213 Filed 4–29–24; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD881]

Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to Geophysical Surveys Related to Oil and Gas Activities in the Gulf of Mexico

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

ACTION: Notice of modification to expiration date of letter of authorization.

SUMMARY: In accordance with the Marine Mammal Protection Act (MMPA), as amended, its implementing regulations, and NMFS' MMPA Regulations for Taking Marine Mammals Incidental to Geophysical Surveys Related to Oil and Gas Activities in the Gulf of Mexico (GOM), notification is hereby given that NMFS has modified the expiration date of a Letter of Authorization (LOA) issued to WesternGeco for the take of marine mammals incidental to geophysical survey activity in the GOM.

DATES: This LOA is effective through July 31, 2024.

ADDRESSES: The LOA, LOA request, and supporting documentation are available online at: *https://www.fisheries.noaa.gov/marine-mammal-protection/issued-letters-authorization-oil-and-gas-industry-geophysical-survey.* In case of problems accessing these documents, please call the contact listed below (**FOR FURTHER INFORMATION CONTACT**).

FOR FURTHER INFORMATION CONTACT: Jenna Harlacher, Office of Protected Resources, NMFS, (301) 427–8401.

SUPPLEMENTARY INFORMATION:

Background

Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed authorization is provided to the public for review.

An authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (where relevant), and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such takings are set forth. NMFS has defined ''negligible impact'' in 50 CFR 216.103 as an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.

Except with respect to certain activities not pertinent here, the MMPA defines ''harassment'' as: any act of pursuit, torment, or annoyance which: (i) has the potential to injure a marine mammal or marine mammal stock in the wild (Level A harassment); or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering (Level B harassment).

On January 19, 2021, we issued a final rule with regulations to govern the unintentional taking of marine mammals incidental to geophysical survey activities conducted by oil and gas industry operators, and those persons authorized to conduct activities on their behalf (collectively ''industry operators''), in U.S. waters of the GOM over the course of 5 years (86 FR 5322, January 19, 2021). The rule was based on our findings that the total taking from the specified activities over the 5-year period will have a negligible impact on the affected species or stock(s) of marine mammals and will not have an unmitigable adverse impact on the availability of those species or stocks for subsistence uses. The rule became effective on April 19, 2021.

Our regulations at 50 CFR 217.180 *et seq.* allow for the issuance of LOAs to industry operators for the incidental take of marine mammals during geophysical survey activities and prescribe the permissible methods of taking and other means of effecting the least practicable adverse impact on marine mammal species or stocks and their habitat (often referred to as mitigation), as well as requirements pertaining to the monitoring and

reporting of such taking. Under 50 CFR 217.186(e), issuance of an LOA shall be based on a determination that the level of taking will be consistent with the findings made for the total taking allowable under these regulations and a determination that the amount of take authorized under the LOA is of no more than small numbers.

NMFS issued a LOA to WesternGeco on October 17, 2023, for the take of marine mammals incidental to a three-dimensional ocean bottom node survey in the Green Canyon and Walker Ridge protraction areas, including approximately 795 lease blocks, effective October 16, 2023, through April 30, 2024. Please see the **Federal Register** notice of issuance (88 FR 72739, October 23, 2023) for additional detail regarding the LOA and the survey activity.

WesternGeco has requested a modification of the April 30, 2024, expiration date, extending it to July 31, 2024, due to survey delays. There are no other changes to WesternGeco's planned activity.

Authorization

NMFS has changed the expiration date of the LOA from April 30, 2024, to July 31, 2024. There are no other changes to the LOA as described in the October 23, 2023, **Federal Register** notice of issuance (88 FR 72739): the specified survey activity; estimated take by incidental harassment; and small numbers analysis and determination remain unchanged and are incorporated here by reference.

Dated: April 23, 2024.

Kimberly Damon-Randall,

Director, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 2024–09223 Filed 4–29–24; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD902]

Fisheries of the Exclusive Economic Zone Off Alaska; Cook Inlet Salmon; Public Outreach Meetings

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

ACTION: Meeting notice.

SUMMARY: NMFS will hold two in person public meetings and one webinar regarding Amendment 16 to the Fishery Management Plan for the Salmon Fisheries in the Exclusive Economic Zone (EEZ) Off Alaska (Salmon FMP). Amendment 16 establishes Federal management for the salmon fishery in the Federal (*i.e.,* EEZ) waters of upper Cook Inlet.

DATES: The first meeting will take place on May 15, 2024, in Kenai, Alaska, starting at 5:30 p.m. AKDT and concluding no later than 7:30 p.m. AKDT. The second public meeting will take place on May 16, 2024, in Homer, Alaska, starting at 5:30 p.m. AKDT and concluding no later than 7:30 p.m. AKDT. The webinar will take place on May 22, 2024, starting at 10 a.m. AKDT and concluding no later than 12 p.m. AKDT.

ADDRESSES:

- May 15, 2024: Kenai, Alaska
  - Quality Inn—Conference room
  - 10352 Kenai Spur Highway
- May 16, 2024: Homer, Alaska
  - Best Western Bidarka Inn—Upstairs conference room
  - 575 Sterling Highway
- May 22, 2024: Webinar
  - Cook Inlet Public Webinar
  - Wednesday, May 22 · 10:00 a.m.–12:00 p.m.
  - Time zone: America/Anchorage
  - Google Meet joining info
  - Video call link: *https://meet.google.com/qbp-wpqo-mkw*
  - Or dial: (US) +1 929–324–9506 PIN: 148 365 993#

FOR FURTHER INFORMATION CONTACT: Amy Hadfield, 907–586–7376.

SUPPLEMENTARY INFORMATION: Public meetings will be held in Kenai, Homer and via webinar to discuss the permitting, recordkeeping and reporting requirements for commercial drift gillnet salmon fishing in the federally managed Cook Inlet drift EEZ salmon fishery.

In response to a 2016 decision of the Ninth Circuit of Appeals and the 2022 summary judgment opinion of the U.S. District Court for the District of Alaska in *United Cook Inlet Drift Association* v. *NMFS,* beginning in 2024 NMFS is establishing Federal management over all salmon fishing in the EEZ waters of upper Cook Inlet, consistent with all Magnuson-Stevens Fishery Conservation and Management Act requirements. Because NMFS has not previously managed salmon fishing in the Cook Inlet EEZ, NMFS is conducting public meetings to explain the regulatory requirements for fishermen, processors and fish transporter participants and answer questions pertaining to these requirements.

Staff will provide information and the public will have the opportunity to ask questions. The schedule is as follows:

- Wednesday, May 15, 2024, in-person at 5:30 p.m., located at the following address: Kenai Quality Inn, 10352 Kenai Spur Highway, Kenai, Alaska.
- Thursday, May 16, 2024, in-person at 5:30 p.m., located at the following address: Best Western Bidarka Inn, 575 Sterling Highway, Homer, Alaska.
- Wednesday May 22, 2024, virtual webinar at 10 a.m., located at the following address: *https://meet.google.com/qbp-wpqo-mkw.* Registration is not required.

Special Accommodations

Requests for sign language interpretation or other auxiliary aids should be directed to Amy Hadfield, 907–586–7376, at least 5 working days prior to the meeting date.

Dated: April 25, 2024.

Everett Wayne Baxter,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2024–09298 Filed 4–29–24; 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; National Marine Sanctuary Nominations

AGENCY: National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice of information collection, request for comment.

SUMMARY: The Department of Commerce, in accordance with the Paperwork Reduction Act of 1995 (PRA), invites the general public and other Federal agencies to comment on proposed, and continuing information collections, which helps us assess the impact of our information collection requirements and minimize the public's reporting burden. This notice pertains to a requested renewal of the approved collection of information for national marine sanctuary nominations. The purpose of this notice is to allow for 60 days of public comment preceding submission of the collection to OMB.

DATES: To ensure consideration, comments regarding this proposed information collection must be received on or before July 1, 2024.

ADDRESSES: Interested persons are invited to submit written comments to

Adrienne Thomas, NOAA PRA Officer, at *NOAA.PRA@noaa.gov.* Please reference OMB Control Number 0648–0682 in the subject line of your comments. Do not submit Confidential Business Information or otherwise sensitive or protected information.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to Jessica Kondel, National Oceanic and Atmospheric Administration, 1305 East-West Highway, Silver Spring, (240) 533–0647, or *Jessica.Kondel@noaa.gov.*

SUPPLEMENTARY INFORMATION:

I. Abstract

This is a request for extension of an existing information collection.

National marine sanctuary regulations provide that the public can submit areas of the marine and Great Lakes environments for consideration by NOAA as a national marine sanctuary through the sanctuary nomination process (15 CFR part 922). Persons wanting to submit nominations for consideration should submit information on the qualifying criteria and management considerations for the site to be nominated. The Office of National Marine Sanctuaries reviews the submissions, which could result in the nomination being added to an inventory of areas that NOAA may consider for sanctuary designation at some point in the future. Sanctuary designation is a separate public process that would be conducted pursuant to the requirements of the National Marine Sanctuaries Act, and all other applicable laws. This proposed information collection is for national marine sanctuary nominations received pursuant to NOAA regulations that provide that the public may nominate special places of the marine environment through the sanctuary nomination process (15 CFR part 922).

II. Method of Collection

Electronic applications submitted via email and paper nominations submitted via regular mail.

III. Data

OMB Control Number: 0648–0682.

Form Number(s): None.

Type of Review: Regular submission, extension of a current information collection.

Affected Public: Individuals or households; Business or other for-profit organizations; Not-for-profit institutions; State, Local, or Tribal government; Federal government.

Estimated Number of Respondents: 7.

Estimated Time per Response: 115 hours.

Estimated Total Annual Burden Hours: 591.

Estimated Total Annual Cost to Public: $120.

Respondent's Obligation: Required to Obtain or Retain Benefits.

Legal Authority: 16 U.S.C. 1431 *et seq.*

IV. Request for Comments

We are soliciting public comments to permit the Department/Bureau to: (a) Evaluate whether the proposed information collection is necessary for the proper functions of the Department, including whether the information will have practical utility; (b) Evaluate the accuracy of our estimate of the time and cost burden for this proposed collection, including the validity of the methodology and assumptions used; (c) Evaluate ways to enhance the quality, utility, and clarity of the information to be collected; and (d) Minimize the reporting burden on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Comments that you submit in response to this notice are a matter of public record. We will include or summarize each comment in our request to OMB to approve this ICR. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you may ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

Sheleen Dumas,

Department PRA Clearance Officer, Office of the Under Secretary for Economic Affairs, Commerce Department.

[FR Doc. 2024–09313 Filed 4–29–24; 8:45 am]

BILLING CODE 3510–NK–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD909]

New England Fishery Management Council; Public Meeting

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

ACTION: Notice of a public meeting.

SUMMARY: The New England Fishery Management Council's is convening its Scientific and Statistical Committee (SSC) via webinar to consider actions affecting New England fisheries in the exclusive economic zone (EEZ). Recommendations from this group will be brought to the full Council for formal consideration and action, if appropriate.

DATES: This webinar will be held on Tuesday, May 14, 2024, beginning at 9 a.m.

ADDRESSES:

Webinar Registration information: https://nefmc-org.zoom.us/webinar/register/WN_xtQ5ngK_RHmKIliFk8HgTw.

Council address: New England Fishery Management Council, 50 Water Street, Mill 2, Newburyport, MA 01950.

FOR FURTHER INFORMATION CONTACT: Cate O'Keefe, Executive Director, New England Fishery Management Council; telephone: (978) 465–0492.

SUPPLEMENTARY INFORMATION:

Agenda

The Scientific and Statistical Committee will meet to review roles and responsibilities of the SSC. Review SSC work plan for 2024. They will comment on the update to the Council's research priorities and data needs. They plan to receive an update on and discuss plans for the 8th national workshop of the Scientific Coordination Subcommittee. Also, receive update on and discuss the Council's Atlantic Cod Management Transition Plan. They will discuss other business as necessary.

Although non-emergency issues not contained on the agenda may come before this Council for discussion, those issues may not be the subject of formal action during this meeting. Council action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take final action to address the emergency. The public also should be aware that the meeting will be recorded. Consistent with 16 U.S.C. 1852, a copy of the recording is available upon request.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Cate O'Keefe, Executive Director, at (978) 465–0492, at least 5 days prior to the meeting date.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: April 24, 2024.

Rey Israel Marquez,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2024–09230 Filed 4–29–24; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648–XD919]

Mid-Atlantic Fishery Management Council (MAFMC); Public Meeting

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

ACTION: Notice; public meeting.

SUMMARY: The MAFMC will hold a public meeting (webinar) of its Mackerel, Squid, and Butterfish (MSB) Monitoring Committee. See **SUPPLEMENTARY INFORMATION** for agenda details.

DATES: The meeting will be held on Thursday, May 16, 2024, from 2:30 p.m. to 4 p.m.

ADDRESSES: Webinar connection information will be posted to the MAFMC's website calendar prior to the meeting, at *www.mafmc.org.*

Council address: Mid-Atlantic Fishery Management Council, 800 N State Street, Suite 201, Dover, DE 19901; telephone: (302) 674–2331; *www.mafmc.org.*

FOR FURTHER INFORMATION CONTACT: Christopher M. Moore, Ph.D., Executive Director, Mid-Atlantic Fishery Management Council, telephone: (302) 526–5255.

SUPPLEMENTARY INFORMATION: The main purpose of the meeting is for the MSB Monitoring Committee to develop recommendations for future MSB specifications to ensure that annual catch limits are not exceeded. Public comments will also be taken.

Special Accommodations

The meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aid should be directed to Shelley Spedden, (302) 526–5251, at least 5 days prior to the meeting date.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: April 25, 2024.

Rey Israel Marquez,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2024–09292 Filed 4–29–24; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

Patent and Trademark Office

[Docket No. PTO–P–2023–0044]

Request for Comments Regarding the Impact of the Proliferation of Artificial Intelligence on Prior Art, the Knowledge of a Person Having Ordinary Skill in the Art, and Determinations of Patentability Made in View of the Foregoing

AGENCY: United States Patent and Trademark Office, Department of Commerce.

ACTION: Request for comments.

SUMMARY: The United States Patent and Trademark Office (USPTO or Office) seeks public comments regarding the impact of the proliferation of artificial intelligence (AI) on prior art, the knowledge of a person having ordinary skill in the art (PHOSITA), and determinations of patentability made in view of the foregoing. The increasing power and deployment of AI has the potential to provide tremendous societal and economic benefits and foster a new wave of innovation and creativity while also posing novel challenges and opportunities for intellectual property (IP) policy. Through the AI and Emerging Technologies Partnership (AI/ET Partnership), the USPTO has been actively engaging with the innovation community and AI experts on IP policy in view of AI. To build on these efforts, the USPTO is requesting written public comments on how the proliferation of AI could affect certain evaluations made by the Office, including what qualifies as prior art, the assessment of the level of skill of a PHOSITA, and determinations of patentability made in view of these evaluations. The USPTO expects that the responses received will help the Office evaluate the need for further guidance on these matters, aid in the development of any such guidance, and help inform the USPTO's work in the courts and in providing technical advice to Congress.

DATES: Written comments must be received on or before July 29, 2024, to ensure consideration.

ADDRESSES: Comments must be submitted through the Federal eRulemaking Portal at *www.regulations.gov.* To submit comments via the portal, enter docket number PTO–P–2023–0044 on the homepage and click ''Search.'' The site will provide a search results page listing all documents associated with this docket. Find a reference to this document and select the ''Comment'' icon, complete the required fields, and enter or attach your comments. Attachments to electronic comments will be accepted in ADOBE® portable document format (PDF) or Microsoft Word® format. Because comments will be made available for public inspection, information that the submitter does not desire to make public, such as an address or phone number, should not be included in the comments.

Visit the Federal eRulemaking Portal for additional instructions on providing comments via the portal. If electronic submission of comments is not feasible due to a lack of access to a computer and/or the internet, please contact the USPTO using the contact information below for special instructions.

FOR FURTHER INFORMATION CONTACT: Steven J. Fulk, Legal Advisor, at 571–270–0072; Nalini Mummalaneni, Senior Legal Advisor, at 571–270–1647; or Matthew Sked, Senior Legal Advisor, at 571–272–7627, all with the Office of Patent Legal Administration, Office of the Deputy Commissioner for Patents.

SUPPLEMENTARY INFORMATION:

I. Background

The USPTO has held several stakeholder interaction sessions and has issued requests for comments (RFCs) to seek public feedback regarding AI's impact on patent policy issues.[1] In August 2019, the USPTO issued an RFC on patenting AI inventions.[2] Among the various policy questions raised in this previous RFC, the USPTO requested comments on AI's impact on a PHOSITA and prior art considerations unique to AI inventions.[3] In October 2020, the USPTO published a report titled ''Public Views on Artificial Intelligence and Intellectual Property Policy,'' which provided a comprehensive look at the stakeholder feedback received in response to the questions posed in the August 2019 RFC.[4] That report explained that stakeholders had varying views on how AI would impact obviousness determinations and how to assess a PHOSITA's level of skill.[5] Some commenters stated that AI machines are not ''persons,'' and therefore, AI would

[1] See USPTO Artificial Intelligence web page at *www.uspto.gov/initiatives/artificial-intelligence.*

[2] Request for Comments on Patenting Artificial Intelligence Inventions, 84 FR 44889 (August 27, 2019). Question 1 of this RFC noted, ''Inventions that utilize AI, as well as inventions that are developed by AI, have commonly been referred to as 'AI inventions.' ''

[3] *Id.*

[4] The full report is available at *www.uspto.gov/sites/default/files/documents/USPTO_AI-Report_2020-10-07.pdf* (October 2020 AI Report).

[5] October 2020 AI Report at 11–13.

not affect the PHOSITA assessment.[6] Additional commenters believed the present framework for assessing a PHOSITA's level of skill is sufficient to determine the impact of AI in a particular field.[7] Many commenters agreed that the increasing use of AI would affect how the USPTO and the courts assess the legal hypothetical standard of a PHOSITA.[8] Others indicated ''the level of skill in any art has traditionally grown over time based on the introduction of new technologies and that 'once conventional AI systems become widely available . . . such accessibility would be expected to enhance the abilities of a [PHOSITA].' '' [9] However, some commenters noted that ''such wide prevalence of AI systems has not yet permeated all fields and counseled against declaring that all fields of innovation are now subject to the application of 'conventional AI.' '' [10] Additionally, while most commenters believed there were no prior art considerations unique to AI, some commenters indicated there may be some unique considerations, such as the difficulty in finding prior art related to the AI technology itself (*e.g.,* finding source code for AI technology) and the proliferation of AI-generated prior art.[11] Overall, commenters confirmed that more engagement with the USPTO was needed regarding how AI impacts prior art and the level of skill of a PHOSITA.

In June 2022, the USPTO launched the AI/ET Partnership.[12] At the June 29, 2022, inaugural AI/ET Partnership meeting,[13] panelists commented that the level of skill of a PHOSITA for obviousness determinations would be higher in view of the availability of AI.[14] One panelist argued that it may be appropriate to raise the bar for the level of skill of a PHOSITA particularly where the use of AI is common practice. That panelist also noted that AI might be able to make use of prior art from fields that humans may not have been expected to find or use, and that the universe of prior art would expand as AI advances. Another panelist commented that obviousness is always determined in view of prior art references and that the extent to which AI developments should affect the obviousness standard was unclear. After this June 2022 inaugural event, the Office held several additional AI/ET Partnership events in 2022 and 2023.[15]

In February 2023, the USPTO issued an RFC on AI and inventorship.[16] This request focused on questions of inventorship, but it also asked what other areas of focus the USPTO should prioritize in future engagements. Many commenters indicated that the USPTO should investigate how AI impacts obviousness determinations and the PHOSITA assessment.[17] For example, some commenters stated that an invention developed with the use of AI should not render that invention obvious or more likely to be obvious.[18] Conversely, other commenters indicated that AI contributions to an invention should be *per se* obvious or that the AI contribution should have a rebuttable presumption of obviousness.[19] Commenters also indicated that AI has the potential to generate a vast amount of prior art, which may have an impact on the Office's anticipation and obviousness determinations.[20]

The increasing power and deployment of AI has the potential to provide tremendous societal and economic benefits and foster a new wave of innovation and creativity while also posing novel challenges and opportunities for IP policy. Based on the feedback that the USPTO has received from our stakeholders on the importance of AI's impact on prior art, on the knowledge of a PHOSITA, and on other patentability considerations, the Office plans to more deeply engage with stakeholders and is requesting further comments in these areas. This RFC builds on the USPTO's recent AI-related efforts associated with Executive Order 14110,[21] including the ''Inventorship Guidance for AI-Assisted Inventions'' [22] published on February 13, 2024.

Section II of this notice provides an overview of prior art considerations and discusses some concerns relevant to AI-generated prior art. Section III discusses the current PHOSITA assessment as it is applied by the USPTO and the courts. Sections II and III are intended only to provide context for the questions presented in this notice. This RFC is not a guidance document and does not announce any new Office practice or procedure. Section IV presents questions to the public on the impact of AI on prior art and the PHOSITA assessment.

II. Considerations for the Impact of AI on Prior Art

''A claimed invention may be rejected under 35 U.S.C. 102 when the invention is anticipated (or is 'not novel') over a disclosure that is available as prior art. To reject a claim as anticipated by a [prior art] reference, the disclosure must teach every element required by the claim under its broadest reasonable interpretation.'' [23] Under 35 U.S.C. 102(a)(1), a person is not entitled to a patent if the claimed invention was disclosed—including being patented; described in a printed publication; or in public use, on sale, or otherwise available to the public—before the effective filing date of the claimed invention (*i.e.,* the disclosure is a ''prior art disclosure''). Under 35 U.S.C. 102(a)(2), a person is not entitled to a patent if ''the claimed invention was described in a patent issued under [35 U.S.C. 151], or in an application for patent published or deemed published under [35 U.S.C. 122(b)], in which the patent or application, as the case may be, names another inventor and was effectively filed before the effective filing date of the claimed invention.'' A disclosure that is a prior art reference under 35 U.S.C. 102 may also serve as a basis for obviousness under 35 U.S.C. 103.[24]

To qualify as a ''printed publication'' under 35 U.S.C. 102(a)(1), a prior art reference must have been publicly accessible, *i.e.,* ''available to the extent that persons interested and ordinarily skilled in the subject matter or art, exercising reasonable diligence, can

[6] *Id.* at 13.

[7] *Id.* at 12.

[8] *Id.* at iii.

[9] *Id.*

[10] *Id.* at 13.

[11] *Id.* at 13–14.

[12] Events for the Artificial Intelligence and Emerging Technologies Partnership, 87 FR 34669 (June 7, 2022).

[13] A video of the meeting is available at *www.uspto.gov/about-us/events/aiet-partnership-series-1-kickoff-uspto-aiet-activities-and-patent-policy.*

[14] A higher level of ordinary skill in the art would more likely support the conclusion that a PHOSITA would recognize that the differences between a claimed invention and the prior art are such that the claimed invention would have been obvious. *See, e.g., In re GPAC Inc.,* 57 F.3d 1573 (Fed. Cir. 1995) (*GPAC*); *see also* Section III of this notice.

[15] See AI and Emerging Technology Partnership engagement and events web page at *www.uspto.gov/initiatives/artificial-intelligence/ai-and-emerging-technology-partnership-engagement-and-events.*

[16] Request for Comments Regarding Artificial Intelligence and Inventorship, 88 FR 9492 (February 14, 2023) (February 2023 AI RFC).

[17] Comments in response to the February 2023 AI RFC are available at *www.regulations.gov/docket/PTO-P-2022-0045.*

[18] See, *e.g.,* Comment PTO–P2022–0045–0052 (AUTM).

[19] See, *e.g.,* Comment PTO–P2022–0045–0057 (Alliance for Automotive Innovation), and Comment PTO–P2022–0045–0063 (The Computer & Communications Industry Association and The Public Innovation Project).

[20] See, *e.g.,* Comment PTO–P2022–0045–0013 (James Gatto).

[21] Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence, Executive Order 14110, 88 FR 75191 (November 1, 2023).

[22] Inventorship Guidance for AI-Assisted Inventions, 89 FR 10043 (February 13, 2024).

[23] Manual of Patent Examining Procedure (MPEP) 2131.

[24] MPEP 2141.01, subsection I; MPEP 2141.01(a).

locate [the reference].'' [25] AI may be used to create vast numbers of disclosures that may have been generated without any human contribution, supervision, or review. Because a PHOSITA is ''a hypothetical person who is presumed to have known the relevant art at the relevant time,'' [26] the proliferation of AI-generated disclosures may question the soundness of presuming that a PHOSITA knew of relevant AI-generated art when the vast amount of AI-generated disclosures was never reviewed by a human. Further, as suggested by stakeholders, there is a question whether AI-generated disclosures, especially those with no human input, review, or validation, should qualify as prior art disclosures and potentially preclude human-created inventions from being patented.

Additionally, ''[w]hen the [prior art] reference relied on expressly anticipates or makes obvious all of the elements of the claimed invention, the reference is presumed to be operable,'' regardless of the type of prior art (*e.g.,* patent, printed publication, or other prior art disclosure), and the burden is on the applicant to rebut the presumption of operability.[27] The presumption is that a public disclosure provides a description that enables the public to make and use the disclosure. The presumption does not (at least currently) distinguish between who or what made the disclosure, which prompts the question whether AI-generated disclosures (that have not been prepared and reviewed by a human) should be afforded the same rebuttable presumption that they are operable and enabled. In view of the above issues, the proliferation of AI-generated prior art raises questions on which the Office seeks input from stakeholders.

III. Considerations for the Impact of AI on the Knowledge of a PHOSITA

''A patent for a claimed invention may not be obtained . . . if the differences between the claimed invention and the prior art are such that the claimed invention as a whole would have been obvious before the effective filing date of the claimed invention *to a person having ordinary skill in the art to which the claimed invention pertains.*'' [28] Thus, obviousness is to be determined with regard to a PHOSITA.[29] As reiterated by the Supreme Court in *KSR International Co.* v. *Teleflex Inc.*[30] (*KSR*), obviousness is a question of law based on underlying factual inquiries established in *Graham* v. *John Deere Co.* (*Graham*).[31] The *Graham* factual inquiries are: (1) determining the scope and content of the prior art, (2) ascertaining the differences between the claimed invention and the prior art, (3) resolving the level of ordinary skill in the art, and (4) evaluating any objective evidence of nonobviousness.[32] Once these factual findings are made, a determination of obviousness should focus on ''what a person of ordinary skill in the pertinent art would have known at the relevant time, and on what such a person would have reasonably expected to have been able to do in view of that knowledge.'' [33]

Likewise, a patent ''specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any *person skilled in the art to which it pertains* . . . to make and use the same.'' [34] The courts have analyzed written description and enablement issues from the vantage point of a PHOSITA.[35] However, the role of a PHOSITA goes beyond these statutory considerations for obviousness under 35 U.S.C. 103 and the requirements under 35 U.S.C. 112. For example, claim terms are construed in the manner in which a PHOSITA would understand them.[36] Additionally, claims can be anticipated by prior art inherently if ''the missing descriptive matter is necessarily present in the thing described in the reference, and that it would be so recognized by persons of ordinary skill.'' [37]

The Court of Appeals for the Federal Circuit has identified several factors to consider when determining a PHOSITA's level of skill, including the type of problems encountered in the art, prior art solutions to those problems, the rapidity with which innovations are made, the sophistication of the technology, and the education level of active workers in the field.[38] Each case may vary, not every one of the aforementioned factors may be present, and one or more factors may predominate the analysis.[39]

Accordingly, it is often critical in a patentability inquiry to assess the PHOSITA's level of skill in the relevant art,[40] including for claim construction, anticipation, obviousness, written description, and enablement. In view of the above issues, the proliferation of AI as a tool for a PHOSITA raises questions on which the Office seeks input.

IV. Questions for Public Comment

The questions enumerated below should not be taken as an indication that the USPTO has taken a position on or is predisposed to any particular views. The USPTO welcomes comments from the public on any issues that are relevant to this topic, and is particularly interested in answers to the following questions:

A. The Impact of AI on Prior Art

1. In what manner, if any, does 35 U.S.C. 102 presume or require that a prior art disclosure be authored and/or published by humans? In what manner, if any, does non-human authorship of a disclosure affect its availability as prior art under 35 U.S.C. 102?

2. What types of AI-generated disclosures, if any, would be pertinent to patentability determinations made by the USPTO? How are such disclosures currently being made available to the public? In what other ways, if any, should such disclosures be made available to the public?

3. If a party submits to the Office a printed publication or other evidence that the party knows was AI-generated, should that party notify the USPTO of this fact, and if so, how? What duty, if any, should the party have to determine whether a disclosure was AI-generated?

4. Should an AI-generated disclosure be treated differently than a non-AI-

[25] MPEP 2128, subsection I (quoting *In re Wyer,* 655 F.2d 221, 210 USPQ 790 (C.C.P.A. 1981) (quoting *I.C.E. Corp.* v. *Armco Steel Corp.,* 250 F. Supp. 738, 743, 148 USPQ 537, 540 (SDNY 1966))).

[26] MPEP 2141.03, subsection I.

[27] MPEP 2121, subsections I and II. Note, however, ''[e]ven if a reference discloses an inoperative device, it is prior art for all that it teaches'' and ''may qualify as prior art for the purpose of determining obviousness under 35 U.S.C. 103.'' MPEP 2121.01, subsection II.

[28] 35 U.S.C. 103 (emphasis added).

[29] MPEP 2141.

[30] 550 U.S. 398, 406 (2007).

[31] 383 U.S. 1, 17–18 (1966). The Office recently published ''Updated Guidance for Making a Proper Determination of Obviousness'' (89 FR 14449 (February 27, 2024)), which provides a review of the flexible approach to determining obviousness required by *KSR.*

[32] MPEP 2141, subsection II.

[33] *Id.*

[34] 35 U.S.C. 112(a) (emphasis added).

[35] MPEP 2163.02 (''An objective standard for determining compliance with the written description requirement is, 'does the description clearly allow persons of ordinary skill in the art to recognize that he or she invented what is claimed.' *In re Gosteli,* 872 F.2d 1008, 1012, 10 USPQ2d 1614, 1618 (Fed. Cir. 1989)''); MPEP 2164.02 (''*Allergan, Inc.* v. *Sandoz Inc.,* 796 F.3d 1293, 1310, 115 USPQ2d 2012, 2023 (Fed. Cir. 2015) ('Only a sufficient description enabling a person of ordinary skill in the art to carry out an invention is needed.')'').

[36] MPEP 2111.

[37] MPEP 2131.01, subsection III (citing *Continental Can Co.* v. *Monsanto Co.,* 948 F.2d 1264, 1268 (Fed. Cir. 1991)).

[38] MPEP 2141.03, subsection I (citing *GPAC,* 57 F.3d at 1579).

[39] *Id.*

[40] MPEP 2141.03.

generated disclosure for prior art purposes? For example:

a. Should the treatment of an AI-generated disclosure as prior art depend on the extent of human contribution to the AI-generated disclosure?

b. How should the fact that an AI-generated disclosure could include incorrect information (*e.g.,* hallucinations) affect its consideration as a prior art disclosure?

c. How does the fact that a disclosure is AI-generated impact other prior art considerations, such as operability, enablement, and public accessibility?

5. At what point, if ever, could the volume of AI-generated prior art be sufficient to create an undue barrier to the patentability of inventions? At what point, if ever, could the volume of AI-generated prior art be sufficient to detract from the public accessibility of prior art (*i.e.,* if a PHOSITA exercising reasonable diligence may not be able to locate relevant disclosures)?

B. The Impact of AI on a PHOSITA

6. Does the term ''person'' in the PHOSITA assessment presume or require that the ''person'' is a natural person, *i.e.,* a human? How, if at all, does the availability of AI as a tool affect the level of skill of a PHOSITA as AI becomes more prevalent? For example, how does the availability of AI affect the analysis of the PHOSITA factors, such as the rapidity with which innovations are made and the sophistication of the technology?

7. How, if at all, should the USPTO determine which AI tools are in common use and whether these tools are presumed to be known and used by a PHOSITA in a particular art?

8. How, if at all, does the availability to a PHOSITA of AI as a tool impact:

a. Whether something is well-known or common knowledge in the art?

b. How a PHOSITA would understand the meaning of claim terms?

9. In view of the availability to a PHOSITA of AI as a tool, how, if at all, is an obviousness determination affected, including when:

a. Determining whether art is analogous to the claimed invention, given AI's ability to search across art fields? Does the ''analogous'' art standard still make sense in view of AI's capabilities?

b. Determining whether there is a rationale to modify the prior art, including the example rationales suggested by *KSR* (MPEP 2143, subsection I) (*e.g.,* ''obvious to try'') or the scientific principle or legal precedent rationales (MPEP 2144)?

c. Determining whether the modification yields predictable results with a reasonable expectation of success (*e.g.,* how to evaluate the predictability of results in view of the stochasticity (or lack of predictability) of an AI system)?

d. Evaluating objective indicia of obviousness or nonobviousness (*e.g.,* commercial success, long felt but unsolved needs, failure of others, simultaneous invention, unexpected results, copying, etc.)?

10. How, if at all, does the recency of the information used to train an AI model or that ingested by an AI model impact the PHOSITA assessment when that assessment may focus on an earlier point in time (*e.g.,* the effective filing date of the claimed invention for an application examined under the First-Inventor-to-File provisions of the America Invents Act)?

11. How, if at all, does the availability to a PHOSITA of AI as a tool impact the enablement determination under 35 U.S.C. 112(a)? Specifically, how does it impact the consideration of the *In re Wands* factors (MPEP 2164.01(a)) in ascertaining whether the experimentation required to enable the full scope of the claimed invention is reasonable or undue?

C. The Implications of AI That Could Require Updated Examination Guidance and/or Legislative Change

12. What guidance from the USPTO on the impact of AI on prior art and on the knowledge of a PHOSITA, in connection with patentability determinations made by the Office, would be helpful?

13. In addition to the considerations discussed above, in what other ways, if any, does the proliferation of AI impact patentability determinations made by the Office (*e.g.,* under 35 U.S.C. 101, 102, 103, 112, etc.)?

14. Are there any laws or practices in other countries that effectively address any of the questions above? If so, please identify them and explain how they can be adapted to fit within the framework of U.S. patent law.

15. Should title 35 of the U.S. Code be amended to account for any of the considerations set forth in this notice, and if so, what specific amendments do you propose, and why?

Katherine K. Vidal,

Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.

[FR Doc. 2024–08969 Filed 4–29–24; 8:45 am]

BILLING CODE 3510–16–P

DEPARTMENT OF DEFENSE

Department of the Army

[Docket ID: USA–2024–HQ–0003]

Submission for OMB Review; Comment Request

AGENCY: U.S. Army Corps of Engineers (USACE), Department of the Army, Department of Defense (DoD).

ACTION: 30-Day information collection notice.

SUMMARY: The DoD has submitted to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act.

DATES: Consideration will be given to all comments received 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.

FOR FURTHER INFORMATION CONTACT: Reginald Lucas, (571) 372–7574, *whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.*

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: Flood and Coastal Storm Damage Surveys; OMB Control Number 0710–0017.

Type of Request: Extension.

Number of Respondents: 3,000.

Responses per Respondent: 1.

Annual Responses: 3,000.

Average Burden per Response: 23 minutes.

Annual Burden Hours: 1,150.

Needs and Uses: Information collection via the survey instruments is necessary to formulate and evaluate alternative water resources development plans in accordance with the Principles and Guidelines for Water Related Land Resources Implementation Studies (PR&G), promulgated by the U.S. Water Resources Council, 1983, which specifically identifies personal interviews as a method of gathering primary flood damage data. The PR&G were most recently updated in 2013 at the direction of Section 2031 of the Water Resources Development Act of 2007 (Pub. L. 110–114). The information collection is also needed to determine the effectiveness and evaluate the impacts of Army Corps of Engineers projects (Pub. L. 74–738); and, in the

case of flood damage mitigation, obtain information on flood damages incurred, whether or not a project is being considered or exists (Pub. L. 74–738). The information to be gathered under this collection also supports the mandate from the Flood Control Act of 1936 (Pub. L. 74–734), which established the criterion for Federal action that ''the benefits, to whomsoever they may accrue are in excess of the estimated costs.'' The Engineer Regulation (ER) 1105–2–100, Planning Guidance Notebook (April, 2000) defines benefits for the project under consideration, with flood damages avoided comprising the primary category of benefits used in project justification. Secondary benefits include reductions in emergency costs, unrecoverable and non-transferrable income losses, clean-up and other costs associated with flooding.

The U.S. Army Corps of Engineers (USACE) provides flood risk management structural and nonstructural mitigation, planning and tech services to communities, residents, and businesses at risk of flooding. Flood damage surveys are administered by USACE and its contractors to determine the impacts and potential impacts of flooding and to determine how communities, residents, and businesses respond to flooding. The data are used for estimating damage for factors such as depth of flooding, construction types, and different occupancies of use, which influences project formulation and budgeting. Damage estimation models are then calculated and used to estimate the cost of flooding and to evaluate the benefits of alternative flood mitigation plans, which are critical to determining the feasibility of flood risk management projects. Results of surveys will help communities to better determine and communicate their flood risks. The models are also used for programmatic evaluation of the Army Corps of Engineers' National Flood Risk Management Program.

Affected Public: Business or other for-profit; individuals or households; not-for-profit institutions; State, local, or Tribal government.

Frequency: On occasion.

Respondent's Obligation: Voluntary.

OMB Desk Officer: Mr. Matthew Oreska.

You may also submit comments and recommendations, identified by Docket ID number and title, by the following method:

• *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

Instructions: All submissions received must include the agency name, Docket ID 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.

DOD Clearance Officer: Mr. Reginald Lucas.

Requests for copies of the information collection proposal should be sent to Mr. Lucas at *whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.*

Dated: April 19, 2024.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2024–08822 Filed 4–29–24; 8:45 am]

BILLING CODE 6001–FR–P

DEPARTMENT OF DEFENSE

Office of the Secretary

[Docket ID: DoD–2024–OS–0018]

Submission for OMB Review; Comment Request

AGENCY: Washington Headquarters Services (WHS), Department of Defense (DoD).

ACTION: 30-Day information collection notice.

SUMMARY: The DoD has submitted to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act.

DATES: Consideration will be given to all comments received by May 30, 2024.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Reginald Lucas, (571) 372–7574, *whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.*

SUPPLEMENTARY INFORMATION:

Title; Associated Form; and OMB Number: Fast Track Generic Clearance for the Collection of Qualitative Feedback on Agency Service Delivery—the Interactive Customer Evaluation System; OMB Control Number: 0704–0420.

Type of Request: Revision.

Number of Respondents: 500,000.

Responses per Respondent: 1.

Annual Responses: 500,000.

Average Burden per Response: 3 minutes.

Annual Burden Hours: 25,000.

Needs and Uses: The proposed information collection activity provides a means to garner qualitative customer and stakeholder feedback in an efficient, timely manner, in accordance with the Administration's commitment to improving service delivery. By qualitative feedback we mean information that provides useful insights on perceptions and opinions but are not statistical surveys that yield quantitative results that can be generalized to the population of study. This feedback will provide insights into customer or stakeholder perceptions, experiences, and expectations, provide an early warning of issues with service, or focus attention on areas where communication, training or changes in operations might improve delivery of products or services. These collections will allow for ongoing, collaborative, and actionable communications between the Agency and its customers and stakeholders. It will also allow feedback to contribute directly to the improvement of program management.

The solicitation of feedback will target areas such as: Timeliness, appropriateness, accuracy of information, courtesy, efficiency of service delivery, and resolution of issues with service delivery. Responses will be assessed to plan and inform efforts to improve or maintain the quality of service offered to the public. If this information is not collected, vital feedback from customers and stakeholders on the Agency's services will be unavailable. The Agency will only submit a collection for approval under this generic clearance if it meets the following conditions:

• The collections are voluntary.

• The collections are low-burden for respondents (based on considerations of total burden hours, total number of respondents, or burden-hours per respondent) and are low-cost for both the respondents and the Federal Government.

• The collections are non-controversial and do not raise issues of concern to other Federal agencies.

• Any collection is targeted to the solicitation of opinions from respondents who have experience with the program or may have experience with the program in the near future.

• Personally identifiable information is collected only to the extent necessary and is not retained.

• Information gathered will be used only internally for general service improvement and program management purposes and is not intended for release outside of the agency.

• Information gathered will not be used for the purpose of substantially informing influential policy decisions; and

• Information gathered will yield qualitative information; the collections will not be designed or expected to yield statistically reliable results or used as though the results are generalizable to the population of study.

Feedback collected under this generic clearance provides useful information, but it does not yield data that can be generalized to the overall population. This type of generic clearance for qualitative information will not be used for quantitative information collections that are designed to yield reliably actionable results, such as monitoring trends over time or documenting program performance. Such data uses require more rigorous designs that address: The target population to which generalizations will be made, the sampling frame, the sample design (including stratification and clustering), the precision requirements or power calculations that justify the proposed sample size, the expected response rate, methods for assessing potential non-response bias, the protocols for data collection, and any testing procedures that were or will be undertaken prior to fielding the study. Depending on the degree of influence the results are likely to have, such collections may still be eligible for submission for other generic mechanisms that are designed to yield quantitative results.

As a general matter, information collections will not result in any new system of records containing privacy information and will not ask questions of a sensitive nature, such as sexual behavior and attitudes, religious beliefs, and other matters that are commonly considered private.

Affected Public: Individuals and households.

Frequency: As needed.

Respondent's Obligation: Voluntary.

OMB Desk Officer: Ms. Jasmeet Seehra.

You may also submit comments and recommendations, identified by Docket ID number and title, by the following method:

• *Federal eRulemaking Portal: http://www.regulations.gov.* Follow the instructions for submitting comments.

Instructions: All submissions received must include the agency name, Docket ID 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.

DOD Clearance Officer: Mr. Reginald Lucas.

Requests for copies of the information collection proposal should be sent to Mr. Lucas at *whs.mc-alex.esd.mbx.dd-dod-information-collections@mail.mil.*

Dated: April 16, 2024.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2024–08481 Filed 4–29–24; 8:45 am]

BILLING CODE 6001–FR–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Renewal of Department of Defense Federal Advisory Committees—Defense Advisory Committee on Military Personnel Testing

AGENCY: Department of Defense (DoD).

ACTION: Renewal of Federal advisory committee.

SUMMARY: The DoD is publishing this notice to announce that it is renewing the Defense Advisory Committee on Military Personnel Testing (DAC–MPT).

FOR FURTHER INFORMATION CONTACT: Jim Freeman, DoD Advisory Committee Management Officer, 703–692–5952.

SUPPLEMENTARY INFORMATION: The DAC–MPT is being renewed in accordance with chapter 10 of title 5 United States Code (U.S.C.) commonly known as the Federal Advisory Committee Act (FACA) (5 U.S.C., App.)) and 41 CFR 102–3.50(d). The charter and contact information for the DAC–MPT's Designated Federal Officer (DFO) are found at *https://www.facadatabase.gov/FACA/apex/FACAPublicAgencyNavigation.*

The DAC–MPT provides the Secretary of Defense and Deputy Secretary of Defense independent advice and recommendations on matters and policies related to the military personnel testing for selection and classification. The DAC–MPT provided advice on issues related to the research, development, implementation, and maintenance of enlisted and officer accession tests and career exploration programs. Technical issues addressed include, but are not limited to, processes and policies related to administration and security of testing and theoretical development of constructs, measurement precision, validity, reliability, equating, efficiency, fairness, and other operational and policy considerations.

The DAC–MPT shall consist of no more than seven members, appointed in accordance with DoD policy and procedures and who are eminent authorities in the fields of educational and psychological testing and career development. Members must have expertise in the following, or similar areas, psychometrics, test development, statistical measurement, big-data analytics, industrial/organization psychology, selection and classification, educational measurement, career development and counseling, and diversity and inclusion.

The appointment of DAC–MPT members shall be approved by the Secretary of Defense or the Deputy Secretary of Defense (''the DoD Appointing Authority''), for a term of service of one-to-four years, with annual renewals, in accordance with DoD policy and procedures. No member, unless approved by the DoD Appointing Authority, may serve more than two consecutive terms of service on the DAC–MPT, to include its subcommittees, or serve on more than two DoD Federal advisory committees at one time.

DAC–MPT members who are not full-time or permanent part-time Federal civilian officers or employees, or active duty members of the Uniformed Services, shall be appointed as experts or consultants pursuant to 5 U.S.C. 3109 to serve as special government employee members. DAC–MPT members who are full-time or permanent part-time Federal civilian officers or employees, or active duty members of the Uniformed Services, shall be appointed pursuant to 41 CFR 102–3.130(a) to serve as regular government employee members.

The DoD Appointing Authorities shall appoint the DAC–MPT's leadership from among the membership previously approved to serve on the DAC–MPT in accordance with DoD policy and procedures, for a term of service of one-to-two years, with annual renewal, which shall not exceed the member's approved DAC–MPT appointment.

All DAC–MPT members are appointed to exercise their own best judgment on behalf of the DoD, without representing any particular points of view, and to discuss and deliberate in a manner that is free from conflicts of interest. With the exception of reimbursement of official DAC–MPT-related travel and per diem, DAC–MPT members serve without compensation.

The public or interested organizations may submit written statements to the DAC–MPT membership about the DAC–MPT's mission and functions. Written statements may be submitted at any time or in response to the stated agenda of planned meeting of the DAC–MPT. All written statements shall be submitted to the DFO for the DAC–MPT, and this individual will ensure that the written statements are provided to the membership for their consideration.

Dated: April 23, 2024.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2024–09245 Filed 4–29–24; 8:45 am]

BILLING CODE 6001–FR–P

DEPARTMENT OF DEFENSE

Office of the Secretary

Renewal of Department of Defense Federal Advisory Committees—Defense Advisory Committee on Women in the Services

AGENCY: Department of Defense (DoD).

ACTION: Federal advisory committee renewal.

SUMMARY: The DoD is publishing this notice to announce that it is renewing the charter of the Defense Advisory Committee on Women in the Services (DACOWITS).

FOR FURTHER INFORMATION CONTACT: Jim Freeman, Advisory Committee Management Officer for the Department of Defense, 703–692–5952.

SUPPLEMENTARY INFORMATION: The DACOWITS charter is being renewed in accordance with chapter 10 of title 5, United States Code (U.S.C.) (commonly known as the ''Federal Advisory Committee Act'' or ''FACA''). The charter and contact information for the DACOWITS' Designated Federal Officer (DFO) are found at *https://www.facadatabase.gov/FACA/apex/FACAPublicAgencyNavigation.*

The DACOWITS provides independent advice and recommendations on matters and policies relating to recruitment, retention, employment, integration, well-being, and treatment of servicewomen in the Armed Forces of the United States. All DACOWITS work, including subcommittee work, is in response to written terms of reference or taskings approved by the Secretary of Defense or the Deputy Secretary of Defense (''the DoD Appointing Authority''), or the Under Secretary of Defense for Personnel and Readiness unless otherwise provided by statute or Presidential directive.

The DACOWITS is composed of no more than 20 members who have prior experience in the military or with women-related workforce issues. Members will include leaders with diverse and inclusive backgrounds, experience, and thought relating to the recruitment and retention, the employment and integration, and the well-being and treatment of women. These members will come from varied backgrounds including academia, industry, private and public sector, and other professions.

The appointment of DACOWITS members is approved by the DoD Appointing Authority for a term of service of one-to-four years, with annual renewals, in accordance with DoD policy and procedures. No member, unless approved by the DoD Appointing Authority, may serve more than two consecutive terms of service on the DACOWITS, to include its subcommittees, or serve on more than two DoD Federal Advisory Committees at one time. DACOWITS members who are not full-time or permanent part-time Federal civilian officers or employees, or active-duty members of the Uniformed Services, are appointed as experts or consultants pursuant to 5 U.S.C. 3109 to serve as special government employee members. DACOWITS members who are full-time or permanent part-time Federal civilian officers or employees, or active-duty members of the Uniformed Services, are appointed pursuant to 41 CFR 102–3.130(a) to serve as regular government employee members. The DoD Appointing Authority appoints the DACOWITS' leadership from among the membership previously appointed in accordance with DoD policy and procedures, for a term of service of one-to-two years, with annual renewal, not to exceed the member's approved appointment.

All members of the DACOWITS are appointed to exercise their own best judgment, without representing any particular point of view, and to discuss and deliberate and in a manner that is free from conflict of interest. With the exception of reimbursement of official DACOWITS-related travel and per diem, DACOWITS members serve without compensation.

The public or interested organizations may submit written statements to the DACOWITS membership about the DACOWITS' mission and functions. Written statements may be submitted at any time or in response to the stated agenda of planned meeting of the DACOWITS.

All written statements shall be submitted to the DFO for the DACOWITS, and this individual will ensure that the written statements are provided to the membership for their consideration.

Dated: April 24, 2024.

Aaron T. Siegel,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 2024–09244 Filed 4–29–24; 8:45 am]

BILLING CODE 6001–FR–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2023–SCC–0063]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Early Childhood Longitudinal Study, Kindergarten Class of 2023–24 (ECLS–K:2024) April 2024 Materials Revision Request

AGENCY: Institute of Education Sciences (IES), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act (PRA) of 1995, the Department is proposing a revision of a currently approved information collection request (ICR).

DATES: Interested persons are invited to submit comments on or before May 30, 2024.

ADDRESSES: Written comments and recommendations for proposed information collection requests should be submitted within 30 days of publication of this notice. Click on this link *www.reginfo.gov/public/do/PRAMain* to access the site. Find this information collection request (ICR) by selecting ''Department of Education'' under ''Currently Under Review,'' then check the ''Only Show ICR for Public Comment'' checkbox. *Reginfo.gov* provides two links to view documents related to this information collection request. Information collection forms and instructions may be found by clicking on the ''View Information Collection (IC) List'' link. Supporting statements and other supporting documentation may be found by clicking on the ''View Supporting Statement and Other Documents'' link.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Carrie Clarady, 202–245–6347.

SUPPLEMENTARY INFORMATION: The Department is especially interested in public comment addressing the

following issues: (1) is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: Early Childhood Longitudinal Study, Kindergarten Class of 2023–24 (ECLS–K:2024) April 2024 Materials Revision Request.

OMB Control Number: 1850–0750.

Type of Review: A revision of a currently approved ICR.

Respondents/Affected Public: Individuals and Households.

Total Estimated Number of Annual Responses: 157,586.

Total Estimated Number of Annual Burden Hours: 84,093.

Abstract: The Early Childhood Longitudinal Study (ECLS) program, conducted by the National Center for Education Statistics (NCES) within the Institute of Education Sciences (IES) of the U.S. Department of Education (ED), draws together information from multiple sources to provide rich, descriptive data on child development, early learning, and school progress. The ECLS program studies deliver national data on children's status at birth and at various points thereafter; children's transitions to nonparental care, early care and education programs, and school; and children's experiences and growth through the elementary grades. The Early Childhood Longitudinal Study, Kindergarten Class of 2023–24 (ECLS–K:2024) is the fourth cohort in the series of early childhood longitudinal studies. The study will advance research in child development and early learning by providing a detailed and comprehensive source of current information on children's early learning and development, transitions into kindergarten and beyond, and progress through school. The ECLS–K:2024 will provide data about the population of children who will be kindergartners in the 2023–24 school year. The ECLS–K:2024 will focus on children's early school experiences continuing through the fifth grade, and will include collection of data from children, parents, teachers, and school administrators.

The request to conduct the first three national data collection rounds for the ECLS–K:2024 was approved in April 2023 (OMB# 1850–0750 v.26). Revisions to procedures and materials for the first two rounds of data collection were approved in subsequent revisions (OMB# 1850–0750 v.27–29). The ECLS–K:2024 fall kindergarten data collection was conducted August 2023 to January 2024. It will be followed by the spring (March–July 2024) kindergarten round, and the spring (March–July 2025) first-grade round. Each of these rounds of data collection will involve advance school contacts, for example to conduct student sampling activities, collect teacher and school information, and locate families whose children may have moved schools. Future OMB packages are planned for the third-and fifth-grade field test (to be conducted in March–July 2026), as well as for all future currently-planned rounds.

This current revision request (accompanied by 30 days of public comment) is to update study respondent materials, web surveys, and website designs that will be used in the spring 2025 first-grade data collection activities. Many of the revisions in this package were made based on analyses of the fall 2022 field test data (OMB# 1850–0750 v.25), as well as additional discussions with design experts. Other changes occurred after further discussion on operational procedures. An additional revision request will be submitted to OMB in August 2024 for revisions to the spring first-grade materials as the surveys and study website move into programming. Additionally, this August 2024 revision request will address the new federal statistical standard for race/ethnicity items (Statistical Policy Directive No. 15: Standards for Maintaining, Collecting, and Presenting Federal Data on Race and Ethnicity (SPD 15)). NCES is at work on its action plan for compliance with the new SPD15 standards, and early discussions suggest that implementation of these standards will be particularly complex and delicate in data collections where race and ethnicity data is reported both by individuals about themselves and also provided by third parties. Compliance for ECLS involves revising multiple race/ethnicity items *e.g.,* adult self-reports, adult reports of others, school reports of the school composition, teacher reports of the classroom composition, field staff collection of school reports of sampled children.

The requested changes in this revision request do not affect the approved total cost to the federal government for conducting this study but do result in a small increase in respondent burden.

Dated: April 25, 2024.

Juliana Pearson,

PRA Coordinator, Strategic Collections and Clearance, Governance and Strategy Division, Office of Chief Data Officer, Office of Planning, Evaluation and Policy Development.

[FR Doc. 2024–09312 Filed 4–29–24; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

[Docket No.: ED–2024–SCC–0035]

Agency Information Collection Activities; Submission to the Office of Management and Budget for Review and Approval; Comment Request; Annual Report on Appeals Process (RSA–722)

AGENCY: Office of Special Education and Rehabilitative Services (OSERS), Department of Education (ED).

ACTION: Notice.

SUMMARY: In accordance with the Paperwork Reduction Act (PRA) of 1995, the Department is proposing an extension without change of a currently approved information collection request (ICR).

DATES: Interested persons are invited to submit comments on or before May 30, 2024.

ADDRESSES: Written comments and recommendations for proposed information collection requests should be submitted within 30 days of publication of this notice. Click on this link *www.reginfo.gov/public/do/PRAMain* to access the site. Find this information collection request (ICR) by selecting ''Department of Education'' under ''Currently Under Review,'' then check the ''Only Show ICR for Public Comment'' checkbox. *Reginfo.gov* provides two links to view documents related to this information collection request. Information collection forms and instructions may be found by clicking on the ''View Information Collection (IC) List'' link. Supporting statements and other supporting documentation may be found by clicking on the ''View Supporting Statement and Other Documents'' link.

FOR FURTHER INFORMATION CONTACT: For specific questions related to collection activities, please contact Caneshia McAlister, 202–987–1927.

SUPPLEMENTARY INFORMATION: The Department is especially interested in public comment addressing the following issues: (1) is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner;

(3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology. Please note that written comments received in response to this notice will be considered public records.

Title of Collection: Annual Report on Appeals Process (RSA–722).

OMB Control Number: 1820–0563.

Type of Review: An extension without change of a currently approved ICR.

Respondents/Affected Public: State, local, and Tribal governments.

Total Estimated Number of Annual Responses: 78.

Total Estimated Number of Annual Burden Hours: 156.

Abstract: Pursuant to Subsection 102(c)(8)(A) and (B) of the Rehabilitation Act of 1973, as amended by title IV of the Workforce Innovation and Opportunity Act, the RSA–722 is needed to meet specific data collection requirements on the number of requests for mediations, hearings, administrative reviews, and other methods of dispute resolution requested and the manner in which they were resolved. The information collected is used to evaluate the types of complaints made by applicants and eligible individuals of the vocational rehabilitation program and the final resolution of appeals filed. Respondents are State agencies that administer the Federal/State Program for Vocational Rehabilitation.

Dated: April 24, 2024.

Juliana Pearson,

PRA Coordinator, Strategic Collections and Clearance, Governance and Strategy Division, Office of Chief Data Officer, Office of Planning, Evaluation and Policy Development.

[FR Doc. 2024–09212 Filed 4–29–24; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Extension of the Application Deadline Dates; Applications for New Awards; School-Based Mental Health Services Grant Program and Mental Health Service Professional Demonstration Grant Program

AGENCY: Office of Elementary and Secondary Education, Department of Education.

ACTION: Notice.

SUMMARY: On March 1, 2024, we published in the **Federal Register** a notice inviting applications (NIA) for the fiscal year (FY) 2024 School-Based Mental Health Services (SBMH) Grant Program competition, Assistance Listing Number (ALN) 84.184H, and the Mental Health Service Professional (MHSP) Demonstration Grant Program competition, ALN 84.184X. The NIA established a deadline date for the transmittal of applications of April 30, 2024 for the SBMH program and May 15, 2024 for the MHSP program. This notice extends the deadline date for transmittal of applications for all eligible applicants for both programs until May 31, 2024 and extends the date of intergovernmental review until July 30, 2024.

DATES:

Deadline for Transmittal of Applications: May 31, 2024.

Deadline for Intergovernmental Review: July 30, 2024.

FOR FURTHER INFORMATION CONTACT: For the SBMH program, contact Amy Banks, U.S. Department of Education, 400 Maryland Avenue SW, 4th Floor, Washington, DC 20202–6450. Telephone: (202) 453–6704. Email: *OESE.School.Mental.Health@ed.gov.*

For the MHSP program, contact Nicole White, U.S. Department of Education, 400 Maryland Avenue SW, 4th Floor, Washington, DC 20202–6450. Telephone: (202) 453–6729. Email: *Mental.Health@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: On March 1, 2024, we published the NIAs for the FY 2024 SBMH and MHSP competitions in the **Federal Register** (89 FR 15173 and 89 FR 15180, respectively). The NIAs established a deadline of April 30, 2024, for eligible applicants to submit applications for the SBMH competition and a deadline of May 15, 2024, for eligible applicants to submit applications for the MHSP competition. We are extending the deadline for transmittal of applications for all eligible applicants under both competitions until May 31, 2024. We are extending the deadline in order to allow all applicants more time to prepare and submit their applications. Applicants that have already submitted applications under these competitions may resubmit applications, but are not required to do so. If a new application is not submitted, the Department will use the application that was submitted by the original deadline. If a new application is submitted, the Department will consider the application that is last submitted and timely received.

Note: All information in the NIAs, including eligibility criteria, remains the same, except for the deadlines for the transmittal of applications and the deadlines for intergovernmental review.

Information about SBMH and MHSP is available on the Department's website at *https://oese.ed.gov/offices/office-of-formula-grants/safe-supportive-schools/school-based-mental-health-services-grant-program/* and *https://oese.ed.gov/offices/office-of-formula-grants/safe-supportive-schools/mental-health-service-professional-demonstration-grant-program/.*

Program Authority: 20 U.S.C. 7281.

Accessible Format: On request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT**, individuals with disabilities can obtain this document and a copy of the application package in an accessible format. The Department will provide the requestor with an accessible format that may include Rich Text Format (RTF) or text format (txt), a thumb drive, an MP3 file, Braille, large print, audiotape, or compact disc or other accessible format.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. You may access the official edition of the **Federal Register** and the Code of Federal Regulations at *www.govinfo.gov.* At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Portable Document Format (PDF). To use PDF you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at *www.federalregister.gov.* Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

Adam Schott,

Deputy Assistant Secretary for Policy and Programs, Delegated the Authority to Perform the Functions and Duties of the Assistant Secretary, Office Elementary and Secondary Education.

[FR Doc. 2024–09304 Filed 4–29–24; 11:15 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Authorization of Subgrants for the Congressionally Funded Community Projects for Fiscal Year 2024

AGENCY: Office of Elementary and Secondary Education and Office of

Postsecondary Education, Department of Education.

ACTION: Notice.

SUMMARY: Pursuant to the Education Department General Administrative Regulations, the Department of Education (Department) authorizes grantees receiving awards under the Congressionally Funded Community Projects (CFCP) (Assistance Listing Numbers 84.116Z, 84.215K) to make subgrants, subject to the limitations described in this notice.

DATES: This authorization is effective April 30, 2024.

FOR FURTHER INFORMATION CONTACT: For K–12 Earmarks: Erin Shackel, U.S. Department of Education, 400 Maryland Avenue SW, 4th Floor, Washington, DC 20202. Telephone: (202) 453–6423. Email: *k12earmarks@ed.gov.*

For Higher Education Earmarks: Candace Lee, U.S. Department of Education, 400 Maryland Avenue SW, 5th Floor, Washington, DC 20202. Telephone: (202) 453–5787. Email: *CongressionallyDirectedGrants-OPE@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: *Purpose of Program:* Title III of Division D of the Further Consolidated Appropriations Act, 2024 authorizes funding for CFCP. The funds will support identified organizations throughout the country to conduct community project activities. The list of identified organizations may be found in Book II of the March 22, 2024 issue of the Congressional Record of the House of Representatives.

Subgrant Authorization: The Department's regulations in 34 CFR 75.708(a) prohibit subgranting, in the absence of statutory authority, unless authorized by a notice in the **Federal Register**. The Department has determined that to effectively conduct some of the Congressionally Funded Community Projects and meet the purposes of the program, subgrants may be appropriate and necessary. Accordingly, through this notice, we authorize the fiscal year 2024 CFCP grantees to make subgrants on the terms outlined in this notice.

Under 34 CFR 75.708(b), if the grantee uses this subgranting authority, the grantee has the authority to award subgrants only to eligible entities, and the subgrants must be used only to directly carry out project activities described in the grantee's approved application and be consistent with the purpose of the program, which is described in the Further Consolidated Appropriations Act, 2024. CFCP grantees may make subgrants to the following eligible entities: a local educational agency, an educational service agency, an institution of higher education, or a nonprofit organization as defined in 34 CFR 77.1.

Further, under 34 CFR 75.708(d), grantees must ensure that (1) subgrants are awarded on the basis of the approved budget that is consistent with the grantee's approved application and all applicable Federal statutory, regulatory, and other requirements; (2) every subgrant includes all conditions required by Federal statutes and Executive orders and their implementing regulations; and (3) subgrantees are aware of the requirements of Federal statutes and regulations, including the Federal anti-discrimination laws listed in 34 CFR 75.500, enforced by the Department. Additionally, as is true with any expenditures incurred under the Department's grant programs, CFCP expenditures must satisfy the Federal cost principles in 2 CFR part 200, subpart E. Therefore, any subgrant and subgrantee expenditures must comply with the Federal cost principles, and grantees, as pass-through entities, must comply with the procedures for making subawards described in 2 CFR 200.332.

Note: This notice does not solicit applications.

Program Authority: Title III of Division D of the Further Consolidated Appropriations Act, 2024 (Pub. L. 118–47).

Accessible Format: On request to one of the program contact persons listed under **FOR FURTHER INFORMATION CONTACT**, individuals with disabilities can obtain this document in an accessible format. The Department will provide the requestor with an accessible format that may include Rich Text Format (RTF) or text format (txt), a thumb drive, an MP3 file, braille, large print, audiotape, or compact disc, or other accessible format.

Electronic Access to This Document: The official version of this document is the document published in the **Federal Register**. You may access the official edition of the **Federal Register** and the Code of Federal Regulations at *www.govinfo.gov.* At this site you can view this document, as well as all other documents of this Department published in the **Federal Register**, in text or Adobe Portable Document Format (PDF). To use PDF, you must have Adobe Acrobat Reader, which is available free on Adobe's website.

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.

Adam Schott,

Principal Deputy Assistant Secretary, Delegated the Authority to Perform the Functions and Duties of the Assistant Secretary, Office of Elementary and Secondary Education.

Nasser H. Paydar,

Assistant Secretary for Postsecondary Education.

[FR Doc. 2024–09211 Filed 4–29–24; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Carbon Dioxide Capture, Utilization, and Sequestration Federal Lands Permitting Task Force Carbon Dioxide Capture, Utilization, and Sequestration Non-Federal Lands Permitting Task Force

AGENCY: Office of Fossil Energy and Carbon Management, Department of Energy.

ACTION: Notice of open meeting.

SUMMARY: This notice announces a joint meeting of the Carbon Dioxide Capture, Utilization, and Sequestration Federal Lands Permitting Task Force and the Carbon Dioxide Capture, Utilization, and Sequestration Non-Federal Lands Permitting Task Force (CCUS Permitting Task Forces). The Federal Advisory Committee Act (FACA) requires that public notice of these meetings be announced in the **Federal Register**.

DATES: Tuesday, May 21, 2024: 9 a.m.–4:30 p.m. ET; Wednesday, May 22, 2024: 9 a.m.–12 p.m. ET.

ADDRESSES: This joint meeting of the CCUS Permitting Task Forces will be held in person at the U.S. Geologic Survey National Center, 12201 Sunrise Valley Drive, Reston, Virginia 20192, with the option of virtual attendance. Members of the public are encouraged to participate virtually, as physical space to attend onsite is limited to members. The website for the CCUS Permitting Task Forces will be updated with announcements about the meeting, including instructions for registering to attend virtually: *https://www.energy.gov/fecm/use-it-act-carbon-dioxide-capture-utilization-and-sequestration-ccus-permitting-task-forces.*

FOR FURTHER INFORMATION CONTACT: Christina Waldron, Designated Federal Officer, Fossil Energy and Carbon

Management, U.S. Department of Energy, Washington, DC 20585; Telephone: (771) 217–0877 or Email: *doe.ccus.permitting.task.force@hq.doe.gov.*

SUPPLEMENTARY INFORMATION:

In April 2024, Department of Energy (DOE) and the Council on Environmental Quality (CEQ) chartered and appointed members for the two new CCUS Permitting Task Forces as required by the USE IT Act and in accordance with FACA. The purpose of each Task Force is the same, but the scope is to differ by geographical area—one Task Force will focus on Federal lands and the Outer Continental Shelf, and the other will focus on non-Federal lands.

Purpose of the Committee: The purpose of the Task Forces is to identify permitting and other challenges and successes that permitting authorities and project developers and operators face in permitting projects in an efficient, orderly, and responsible manner; and improve the performance of the permitting process and regional coordination for the purpose of promoting the efficient, orderly, and responsible development of carbon capture, utilization, and sequestration projects and carbon dioxide pipelines.

To accomplish these objectives, the USE IT Act requires each Task Force to undertake the following activities with respect to its geographic scope: (1) inventory existing or potential Federal and State approaches to facilitate reviews associated with the deployment of carbon capture, utilization, and sequestration projects and carbon dioxide pipelines, including best practices that avoid duplicative reviews to the extent permitted by law, engage stakeholders early in the permitting process, and make the permitting process efficient, orderly, and responsible; (2) develop common models for State-level carbon dioxide pipeline regulation and oversight guidelines that can be shared with States in the geographical area covered by the Task Force; (3) provide technical assistance to States in the geographical area covered by the Task Force in implementing regulatory requirements and any models developed under (b) above; (4) inventory current or emerging activities that transform captured carbon dioxide into a product of commercial value, or as an input to products of commercial value; (5) identify any priority carbon dioxide pipelines needed to enable efficient, orderly, and responsible development of carbon capture, utilization, and sequestration projects at increased scale; (6) identify gaps in the current Federal and State regulatory framework and in existing data for the deployment of carbon capture, utilization, and sequestration projects and carbon dioxide pipelines; (7) identify Federal and State financing mechanisms available to project developers; and (8) develop recommendations for relevant Federal agencies on how to develop and research technologies that can capture carbon dioxide and would be able to be deployed within the region covered by the Task Force, including any projects that have received technical or financial assistance for research under paragraph (6) of section 103(g) of the Clean Air Act (42 U.S.C. 7403(g)).

In carrying out these activities to support the efficient, effective, and responsible permitting of CCUS projects, the Task Forces shall also consider and develop recommendations to address community concerns regarding the climate benefits and environmental justice implications, including public health and safety, of CCUS. In the development of these recommendations, the Task Forces shall consider and identify recommended mechanisms to ensure just treatment and meaningful involvement of impacted communities.

Tentative Agenda

- Opening remarks
- Ethics briefing
- Presentations relevant to the USE IT Act duties
- Public comment period

To view the final agenda when available, or for additional information about the Task Forces and the meeting, see the CCUS Permitting Task Forces website at: *https://www.energy.gov/fecm/use-it-act-carbon-dioxide-capture-utilization-and-sequestration-ccus-permitting-task-forces.*

Public Participation: The two-day meeting is open to the public via webcast using Zoom. The website will be updated with instructions and links to register for the meeting. All attendees are required to register in advance. If you would like to file a written statement with either Task Force, you may do so either before or after the meeting. If you would like to make oral statements regarding any of the items on the agenda, please send an email request to Christina Waldron at *doe.ccus.permitting.task.force@hq.doe.gov.* You must make your request for an oral statement by Tuesday, May 14, 2024 at 11:59 a.m. ET. Reasonable provision will be made to include the scheduled oral statements on the agenda. Time allotted per speaker will depend on the number who wish to speak but is not expected to exceed three minutes. The Chairpersons of the Task Forces will conduct the meeting to facilitate the orderly conduct of business.

Minutes: The minutes of this meeting will be available for public review within 45 days at the website of the CCUS Permitting Task Forces at: *https://www.energy.gov/fecm/use-it-act-carbon-dioxide-capture-utilization-and-sequestration-ccus-permitting-task-forces.* They can also be obtained by contacting Ms. Christina Waldron using the contact information above.

Signing Authority: This document of the Department of Energy was signed on April 24, 2024, by Alyssa Petit, Alternate 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 25, 2024.

Treena V. Garrett,

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

[FR Doc. 2024–09246 Filed 4–29–24; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2445–028]

Green Mountain Power Corporation of Availability of Environmental Assessment

In accordance with the National Environmental Policy Act of 1969 and the Federal Energy Regulatory Commission's (Commission) regulations, 18 CFR part 380, the Office of Energy Projects has reviewed the application for a subsequent license to continue to operate and maintain the Center Rutland Hydroelectric Project No. 2445 (project). The project is located on Otter Creek in Rutland County, Vermont. Commission staff has prepared an Environmental Assessment (EA) for the project.

The EA contains staff's analysis of the potential environmental impacts of the project and concludes that licensing the project, with appropriate environmental protective measures, would not constitute a major federal action that would significantly affect the quality of the human environment.

The Commission provides all interested persons with an opportunity to view and/or print the EA via the internet through the Commission's Home Page (*http://www.ferc.gov/*), using the ''eLibrary'' link. Enter the docket number, excluding the last three digits in the docket number field, to access the document. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov,* or toll-free at (866) 208–3676, or for TTY, (202) 502–8659.

You may also register online at *https://ferconline.ferc.gov/FERCOnline.aspx* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members and others, access publicly available information and navigate Commission processes. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202) 502–6595 or *OPP@ferc.gov*.

Any comments should be filed within 45 days from the date of this notice.

The Commission strongly encourages electronic filing. Please file comments using the Commission's eFiling system at *https://ferconline.ferc.gov/FERCOnline.aspx.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *https://ferconline.ferc.gov/QuickComment.aspx.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support. In lieu of electronic filing, you may submit a paper copy. Submissions sent via the U.S. Postal Service must be addressed to: Debbie-Anne A. Reese, Acting Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Debbie-Anne A. Reese, Acting Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852. The first page of any filing should include docket number P–2445–028.

If you have process questions, contact Steve Kartalia at (202) 502–6131 or by email at *stephen.kartalia@ferc.gov.*

Dated: April 24, 2024.

Debbie-Anne A. Reese,

Acting Secretary.

[FR Doc. 2024–09285 Filed 4–29–24; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2466–037]

Appalachian Power Company; Notice of Availability of Environmental Assessment

In accordance with the National Environmental Policy Act of 1969 and the Federal Energy Regulatory Commission's (Commission) regulations, 18 CFR part 380, the Office of Energy Projects has reviewed the application for a new license to continue to operate and maintain the Niagara Hydroelectric Project No. 2466 (project). The project is located on the Roanoke River in Roanoke County, Virginia. Commission staff has prepared an Environmental Assessment (EA) for the project.

The EA contains the staff's analysis of the potential environmental impacts of the project and concludes that licensing the project, with appropriate environmental protective measures, would not constitute a major federal action that would significantly affect the quality of the human environment.

The Commission provides all interested persons with an opportunity to view and/or print the EA via the internet through the Commission's Home Page (*http://www.ferc.gov/*), using the ''eLibrary'' link. Enter the docket number, excluding the last three digits in the docket number field, to access the document. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov,* or at (866) 208–3676 (toll-free), or (202) 502–8659 (TTY).

You may also register online at *https://ferconline.ferc.gov/FERCOnline.aspx* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

Any comments should be filed within 45 days from the date of this notice.

The Commission strongly encourages electronic filing. Please file comments using the Commission's eFiling system at *https://ferconline.ferc.gov/FERCOnline.aspx.* Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at *https://ferconline.ferc.gov/QuickComment.aspx.* You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support. In lieu of electronic filing, you may submit a paper copy. Submissions sent via the U.S. Postal Service must be addressed to: Debbie-Anne A. Reese, Acting Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Debbie-Anne A. Reese, Acting Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852. The first page of any filing should include docket number P–2466–037.

The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members and others, access publicly available information and navigate Commission processes. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202) 502–6595, or *OPP@ferc.gov.*

For further information, contact Laurie Bauer at 202–502–6519 or *Laurie.Bauer@ferc.gov.*

Dated: April 23, 2024.

Debbie-Anne A. Reese,

Acting Secretary.

[FR Doc. 2024–09198 Filed 4–29–24; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RM98–1–000]

Records Governing Off-the-Record Communications; Public Notice

This constitutes notice, in accordance with 18 CFR 385.2201(b), of the receipt of prohibited and exempt off-the-record communications.

Order No. 607 (64 FR 51222, September 22, 1999) requires Commission decisional employees, who make or receive a prohibited or exempt off-the-record communication relevant to the merits of a contested proceeding,

to deliver to the Secretary of the Commission, a copy of the communication, if written, or a summary of the substance of any oral communication.

Prohibited communications are included in a public, non-decisional file associated with, but not a part of, the decisional record of the proceeding. Unless the Commission determines that the prohibited communication and any responses thereto should become a part of the decisional record, the prohibited off-the-record communication will not be considered by the Commission in reaching its decision. Parties to a proceeding may seek the opportunity to respond to any facts or contentions made in a prohibited off-the-record communication and may request that the Commission place the prohibited communication and responses thereto in the decisional record. The Commission will grant such a request only when it determines that fairness so requires. Any person identified below as having made a prohibited off-the-record communication shall serve the document on all parties listed on the official service list for the applicable proceeding in accordance with Rule 2010, 18 CFR 385.2010.

Exempt off-the-record communications are included in the decisional record of the proceeding, unless the communication was with a cooperating agency as described by 40 CFR 1501.6, made under 18 CFR 385.2201(e)(1)(v).

The following is a list of off-the-record communications recently received by the Secretary of the Commission. This filing may be viewed on the Commission's website at *http://www.ferc.gov* using the eLibrary link. Enter the docket number, excluding the last three digits, in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll free at (866) 208–3676, or for TTY, contact (202) 502–8659.

Docket Nos.	File date	Presenter or requester
Prohibited:		
1. P–15332–000	4–11–2024	FERC Staff.[1]
2. P–14083–000	4–12–2024	FERC Staff.[2]
3. CP17–101–000 CP17–101–005. CP17–101–006.	4–12–2024	FERC Staff.[3]
4. CP17–40–000	4–16–2024	FERC Staff.[4]
5. P–9709–071	4–16–2024	FERC Staff.[5]
6. P–9709–071	4–16–2024	FERC Staff.[6]
Exempt:		
1. P–14513–003	4–15–2024	FERC Staff.[7]
2. P–2333–094	4–18–2024	FERC Staff.[8]
3. CP22–2–000	4–19–2024	U.S. Congress.[9]
4. ER24–1583–000	4–19–2024	U.S. Senate.[10]

[1] Emailed comments dated 4/8/24 from Joelene Thiele.
[2] Emailed comments dated 4/10/24 from William E. Simpson II.
[3] Emailed comments dated 4/10/24 from Nick Kirkhorn.
[4] Emailed comments dated 4/05/24 from Cletus Kampmann.
[5] Emailed comments dated 4/05/24 from Paul Nolan.
[6] Emailed comments dated 4/12/24 from Paul Nolan.
[7] Emailed letter dated 4/12/24 from the Advisory Council on Historic Preservation.
[8] Emailed letter dated 4/16/24 from the Advisory Council on Historic Preservation.
[9] Senators James E. Risch, Mike Crapo, and Congressman Russ Fulcher.
[10] Senators Roger Marshall M.D. and Jerry Moran.

Dated: April 23, 2024.

Debbie-Anne A. Reese,

Acting Secretary.

[FR Doc. 2024–09195 Filed 4–29–24; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP23–87–001]

WBI Energy Transmission, Inc.; Notice of Request for Extension of Time

Take notice that on April 11, 2024, WBI Energy Transmission, Inc. (WBI Energy) requested that the Federal Energy Regulatory Commission (Commission) grant an extension of time, until October 1, 2024, to construct and place into service its Line Section 15 Expansion Project (Project) located in Butte, Lawrence, Meade, and Pennington Counties, South Dakota. On March 14, 2023, the Commission issued a Notice of Request Under Blanket Authorization, which established a 60-day comment period, ending on May 15, 2023, to file protests. No protests were filed during the comment period, and accordingly the project was authorized on May 15, 2023 and by Rule should have been completed within one year.

In its 2023 Extension of Time Request, WBI Energy states that it will not be able to complete all the work associated with the Project by the May 15, 2024, deadline. As of November 12, 2023, the commissioning of all Project facilities was complete except for remaining work on the 500-foot Yellow Mainline Extension from the existing Krebs Station to the new Krebs Station.[1] At that time, Montana-Dakota Utilities Co. (Montana-Dakota), a Project shipper, had yet to complete its required work downstream of the new Krebs Station and WBI Energy utilized a minor temporary pipeline reconfiguration to allow natural gas to continue to flow to the existing Krebs Station as reported in the weekly construction reports. Currently, Montana-Dakota is scheduled to complete its required work downstream of the new Krebs Station by the end of August 2024. After Montana-Dakota completes its work, WBI Energy can finish the remaining work on the Yellow Mainline Extension and complete necessary tie-ins to deliver gas to Montana-Dakota through the new Krebs Station. Accordingly, WBI Energy requests an extension of time until October 1, 2024, to complete construction of project facilities and

[1] WBI Energy is reporting in its weekly construction reports that the extensions of the Red and Yellow Mainlines at the Krebs Station are 98 percent complete with the remaining 2 percent of work associated with the Yellow Mainline Extension.

begin providing service to Montana-Dakota through the new Krebs Station.

This notice establishes a 15-calendar day intervention and comment period deadline. Any person wishing to comment on WBI Energy's request for an extension of time may do so. No reply comments or answers will be considered. If you wish to obtain legal status by becoming a party to the proceedings for this request, you should, on or before the comment date stated below, file a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the Natural Gas Act (NGA) (18 CFR 157.10).

As a matter of practice, the Commission itself generally acts on requests for extensions of time to complete construction for NGA facilities when such requests are contested before order issuance. For those extension requests that are contested,[2] the Commission will aim to issue an order acting on the request within 45 days.[3] The Commission will address all arguments relating to whether the applicant has demonstrated there is good cause to grant the extension.[4] The Commission will not consider arguments that re-litigate the issuance of the certificate order, including whether the Commission properly found the project to be in the public convenience and necessity and whether the Commission's environmental analysis for the certificate complied with the National Environmental Policy Act (NEPA).[5] At the time a pipeline requests an extension of time, orders on certificates of public convenience and necessity are final and the Commission will not re-litigate their issuance.[6] The Director of the Office of Energy Projects, or his or her designee, will act on all of those extension requests that are uncontested.

In addition to publishing the full text of this document in the **Federal Register**, the Commission provides all interested persons an opportunity to view and/or print the contents of this document via the internet through the Commission's Home Page (*http://www.ferc.gov*). From the Commission's Home Page on the internet, this information is available on eLibrary. The full text of this document is available on eLibrary in PDF and Microsoft Word format for viewing, printing, and/or downloading. To access this document in eLibrary, type the docket number excluding the last three digits of this document in the docket number field.

User assistance is available for eLibrary and the Commission's website during normal business hours from FERC Online Support at 202–502–6652 (toll free at 1–866–208–3676) or email at *ferconlinesupport@ferc.gov,* or the Public Reference Room at (202) 502–8371, TTY (202) 502–8659. Email the Public Reference Room at *public.referenceroom@ferc.gov.*

The Commission strongly encourages electronic filings of comments in lieu of paper using the ''eFile'' link at *http://www.ferc.gov.* In lieu of electronic filing, you may submit a paper copy which must reference the Project docket number.

To file via USPS: Debbie-Anne A. Reese, Acting Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426.

To file via any other courier: Debbie-Anne A. Reese, Acting Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852.

The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members and others, access publicly available information and navigate Commission processes. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202) 502–6595 or *OPP@ferc.gov.*

Comment Date: 5 p.m. eastern time on May 8, 2024.

Dated: April 23, 2024.

Debbie-Anne A. Reese,

Acting Secretary.

[FR Doc. 2024–09200 Filed 4–29–24; 8:45 am]

BILLING CODE 6717–01–P

[2] Contested proceedings are those where an intervenor disputes any material issue of the filing. 18 CFR 385.2201(c)(1).

[3] *Algonquin Gas Transmission, LLC,* 170 FERC ¶ 61,144, at P 40 (2020).

[4] *Id.* at P 40.

[5] Similarly, the Commission will not re-litigate the issuance of an NGA section 3 authorization, including whether a proposed project is not inconsistent with the public interest and whether the Commission's environmental analysis for the permit order complied with NEPA.

[6] *Algonquin Gas Transmission, LLC,* 170 FERC ¶ 61,144, at P 40 (2020).

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 1061–103]

Pacific Gas and Electric Company; Notice of Availability of Final Environmental Assessment

In accordance with the National Environmental Policy Act of 1969 and the Federal Energy Regulatory Commission's (Commission) regulations, 18 CFR part 380, the Office of Energy Projects has reviewed the application for a new license to continue to operate and maintain the Phoenix Hydroelectric Project. The project is located on the South Fork Stanislaus River in Tuolumne County, California. Commission staff has prepared a final Environmental Assessment (EA) for the project. The project would occupy 26.99 acres of federal land administered by the U.S. Forest Service and 0.59 acre of federal land administered by the Bureau of Land Management.

The final EA contains staff's analysis of the potential environmental impacts of the project and concludes that licensing the project, with appropriate environmental protective measures, would not constitute a major federal action that would significantly affect the quality of the human environment.

The Commission provides all interested persons with an opportunity to view and/or print the final EA via the internet through the Commission's Home Page (*http://www.ferc.gov/*), using the ''eLibrary'' link. Enter the docket number, excluding the last three digits in the docket number field, to access the document. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov,* or toll-free at (866) 208–3676, or for TTY, (202) 502–8659.

You may also register online at *https://ferconline.ferc.gov/FERCOnline.aspx* to be notified via email of new filings and issuances related to this or other pending projects. For assistance, contact FERC Online Support.

The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members and others, access publicly available information and navigate Commission processes. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to

contact OPP at (202) 502–6595 or *OPP@ferc.gov*.

For further information, contact Ousmane Sidibe at (202) 502–6245 or by email at *ousmane.sidibe@ferc.gov.*

Dated: April 24, 2024.

Debbie-Anne A. Reese,

Acting Secretary.

[FR Doc. 2024–09289 Filed 4–29–24; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC24–71–000.

Applicants: Public Service Company of Oklahoma, Southwestern Electric Power Company.

Description: Joint Application for Authorization Under Section 203 of the Federal Power Act of Public Service Company of Oklahoma, et al.

Filed Date: 4/18/24.

Accession Number: 20240418–5342.

Comment Date: 5 p.m. ET 5/9/24.

Take notice that the Commission received the following Complaints and Compliance filings in EL Dockets:

Docket Numbers: EL24–104–000.

Applicants: PJM Load Parties v. PJM Interconnection, LLC.

Description: Complaint of PJM Load Parties v. PJM Interconnection, LLC.

Filed Date: 4/22/24.

Accession Number: 20240422–5283.

Comment Date: 5 p.m. ET 5/1/24.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER21–2460–007.

Applicants: New York Independent System Operator, Inc.

Description: Second informational report of the New York Independent System Operator, Inc. in compliance with the 04/20/2023 Order.

Filed Date: 4/22/24.

Accession Number: 20240422–5357.

Comment Date: 5 p.m. ET 5/13/24.

Docket Numbers: ER23–1497–002.

Applicants: GSG Wind, LLC.

Description: Notice of Change in Status of GSG Wind, LLC.

Filed Date: 4/22/24.

Accession Number: 20240422–5359.

Comment Date: 5 p.m. ET 5/13/24.

Docket Numbers: ER24–965–002.

Applicants: Versant Power.

Description: Tariff Amendment: Request to Continue Paused Action on Notice of Cancellation (ER24–965–) to be effective 12/31/9998.

Filed Date: 4/23/24.

Accession Number: 20240423–5069.

Comment Date: 5 p.m. ET 5/14/24.

Docket Numbers: ER24–1350–001.

Applicants: Atrisco Solar SF LLC.

Description: Tariff Amendment: Amendment to Shared Facilities Agreement to be effective 5/1/2024.

Filed Date: 4/23/24.

Accession Number: 20240423–5000.

Comment Date: 5 p.m. ET 5/14/24.

Docket Numbers: ER24–1513–000.

Applicants: Pacific Gas and Electric Company.

Description: Amendment to 03/15/2024 Abandoned Transmission Plant Recovery Request of Pacific Gas and Electric Company.

Filed Date: 4/18/24.

Accession Number: 20240418–5344.

Comment Date: 5 p.m. ET 5/9/24.

Docket Numbers: ER24–1814–000.

Applicants: AEP Texas Inc.

Description: § 205(d) Rate Filing: AEPTX—Texas-New Mexico Power Company Facilities Development Agreement to be effective 4/5/2024.

Filed Date: 4/22/24.

Accession Number: 20240422–5276.

Comment Date: 5 p.m. ET 5/13/24.

Docket Numbers: ER24–1815–000.

Applicants: Calpine New Jersey Generation, LLC.

Description: § 205(d) Rate Filing: Proposed Revisions to Reactive Service Rate Schedule and Requests for Waiver to be effective 6/1/2024.

Filed Date: 4/23/24.

Accession Number: 20240423–5061.

Comment Date: 5 p.m. ET 5/14/24.

Docket Numbers: ER24–1816–000.

Applicants: High River Energy Center, LLC.

Description: Baseline eTariff Filing: High River Energy Center, LLC Application for MBR Authorization with Waivers to be effective 5/28/2024.

Filed Date: 4/23/24.

Accession Number: 20240423–5067.

Comment Date: 5 p.m. ET 5/14/24.

Docket Numbers: ER24–1817–000.

Applicants: San Diego Gas & Electric.

Description: § 205(d) Rate Filing: W260 SGIA to be effective 4/24/2024.

Filed Date: 4/23/24.

Accession Number: 20240423–5109.

Comment Date: 5 p.m. ET 5/14/24.

Docket Numbers: ER24–1818–000.

Applicants: El Paso Electric Company.

Description: Tariff Amendment: Cancellation of Rate Schedule No. 321, EPE and TEP, SRSGP Agreement to be effective 5/1/2024.

Filed Date: 4/23/24.

Accession Number: 20240423–5116.

Comment Date: 5 p.m. ET 5/14/24.

Docket Numbers: ER24–1819–000.

Applicants: Tri-State Generation and Transmission Association, Inc.

Description: § 205(d) Rate Filing: Amendment to Rate Schedule FERC No. 10 to be effective 6/24/2024.

Filed Date: 4/23/24.

Accession Number: 20240423–5140.

Comment Date: 5 p.m. ET 5/14/24.

Docket Numbers: ER24–1820–000.

Applicants: PacifiCorp.

Description: § 205(d) Rate Filing: Colstrip Trans System LGIA—Concurrence Haymaker Energy to be effective 4/12/2024.

Filed Date: 4/23/24.

Accession Number: 20240423–5148.

Comment Date: 5 p.m. ET 5/14/24.

Docket Numbers: ER24–1821–000.

Applicants: Duke Energy Carolinas, LLC.

Description: § 205(d) Rate Filing: DEC–PMPA NITSA SA No. 355 to be effective 7/1/2024.

Filed Date: 4/23/24.

Accession Number: 20240423–5159.

Comment Date: 5 p.m. ET 5/14/24.

The filings are accessible in the Commission's eLibrary system (*https://elibrary.ferc.gov/idmws/search/fercgensearch.asp*) by querying the docket number.

Any person desiring to intervene, to protest, or to answer a complaint in any of the above proceedings must file in accordance with Rules 211, 214, or 206 of the Commission's Regulations (18 CFR 385.211, 385.214, or 385.206) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members and others, access publicly available information and navigate Commission processes. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202) 502–6595 or *OPP@ferc.gov.*

Dated: April 23, 2024.

Debbie-Anne A. Reese,

Acting Secretary.

[FR Doc. 2024–09202 Filed 4–29–24; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 13272–007]

Alaska Village Electric Cooperative, Inc., Alutiiq Tribe of Old Harbor; Notice of Application of Transfer of License and Soliciting Comments, Motions To Intervene, and Protests

On February 22, 2024, Alaska Village Electric Cooperative, Inc., (transferor) filed an application for a transfer of license of the 262-kilowatt Old Harbor Hydroelectric Project No. 13272. The project is located on Mountain Creek in Kodiak Island Borough, Alaska. The project occupies federal land within the Kodiak National Wildlife Refuge administered by the U.S. Fish and Wildlife Service.

Pursuant to 16 U.S.C. 801, the applicant seeks Commission approval to transfer the license for the project from Alaska Village Electric Cooperative, Inc. to Alutiiq Tribe of Old Harbor (transferee). The transferee will be required by the Commission to comply with all the requirements of the license as though it were the original licensee.

Applicants Contact: William R. Stamm, Alaska Village Electric Cooperative, Inc, 4831 Eagle Street, Anchorage, AK 99503, *bstamm@avec.org.*

Jeff Peterson, Alutiiq Tribe of Old Harbor, P.O. Box 62, Old Harbor, AK 99643.

FERC Contact: Steven Sachs, Phone: (202) 502–8666, Email: *Steven.Sachs@ferc.gov.*

Deadline for filing comments, motions to intervene, and protests: 30 days from the date that the Commission issues this notice. The Commission strongly encourages electronic filing. Please file comments, motions to intervene, and protests 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 U.S. Postal Service must be addressed to, Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426. Submissions sent via any other carrier must be addressed to, Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852. The first page of any filing should include docket number P–13272–007. Comments emailed to Commission staff are not considered part of the Commission record.

The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members and others, access publicly available information and navigate Commission processes. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202)502–6595 or *OPP@ferc.gov.*

Dated: April 23, 2024.

Debbie-Anne A. Reese,

Acting Secretary.

[FR Doc. 2024–09197 Filed 4–29–24; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RD24–2–000]

Commission Information Collection Activities (FERC–725E); Comment Request; Revision and Extension

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Notice for revision and extension of information collection and request for comments.

SUMMARY: In compliance with the requirements of the Paperwork Reduction Act of 1995, the Federal Energy Regulatory Commission (Commission or FERC) is soliciting public comment on the revision and extension to the information collection, FERC–725E (Mandatory Reliability Standards for the Western Electric Coordinating Council), which will be submitted to the Office of Management and Budget (OMB) for review. No Comments were received on the 60-day notice that was published on February 6, 2024.

DATES: Comments on the collection of information are due May 30, 2024.

ADDRESSES: Send written comments on FERC 725E to OMB through *www.reginfo.gov/public/do/PRAMain.* Attention: Federal Energy Regulatory Commission Desk Officer. Please identify the OMB Control Number (1902–0246) in the subject line of your comments. Comments should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.*

Please submit copies of your comments to the Commission. You may submit copies of your comments (identified by Docket No. RD24–2–000) by one of the following methods: Electronic filing through *https://www.ferc.gov,* is preferred.

- *Electronic Filing:* Documents must be filed in acceptable native applications and print-to-PDF, but not in scanned or picture format.
- For those unable to file electronically, comments may be filed by USPS mail or by hand (including courier) delivery.

○ *Mail via U.S. Postal Service Only:* Addressed to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street NE, Washington, DC 20426.

○ *Hand (including courier) delivery:* Deliver to: Federal Energy Regulatory Commission, Secretary of the Commission, 12225 Wilkins Avenue, Rockville, MD 20852.

Instructions: OMB submissions must be formatted and filed in accordance with submission guidelines at *www.reginfo.gov/public/do/PRAMain.* Using the search function under the ''Currently Under Review'' field, select Federal Energy Regulatory Commission; click ''submit,'' and select ''comment'' to the right of the subject collection.

FERC submissions must be formatted and filed in accordance with submission guidelines at *https://www.ferc.gov/ferc-online/overview.* For user assistance, contact FERC Online Support by email at *ferconlinesupport@ferc.gov,* or by phone at: (866) 208–3676 (toll-free).

Docket: Users interested in receiving automatic notification of activity in this docket or in viewing/downloading comments and issuances in this docket may do so at *https://www.ferc.gov/ferc-online/overview.*

FOR FURTHER INFORMATION CONTACT: Jean Sonneman may be reached by email at *DataClearance@FERC.gov,* telephone at (202) 502–6362.

SUPPLEMENTARY INFORMATION:

Title: FERC–725E, Mandatory Reliability Standards for the Western Electric Coordinating Council (WECC).

OMB Control No.: 1902–0246.

Type of Request: Revision and extension to the FERC–725E information collection requirements.

Abstract: FERC–725E is the information collection that is required to implement the statutory provisions of section 215 of the Federal Power Act (FPA) (16 U.S.C. 824o). Section 215 of the FPA buttresses the Commission's efforts to strengthen the reliability of the interstate grid through the grant of new authority by providing for a system of mandatory Reliability Standards developed by the Electric Reliability Organization (ERO). Reliability Standards that the ERO proposes to the Commission may include Reliability Standards that are proposed to the ERO by a Regional Entity.[1] A Regional Entity is an entity that has been approved by the Commission to enforce Reliability Standards under delegated authority from the ERO.[2] On June 8, 2008, the Commission approved eight regional Reliability Standards submitted by the ERO that were proposed by WECC.[3]

WECC promotes bulk electric system reliability in the Western Interconnection. WECC is the Regional Entity responsible for compliance monitoring and enforcement. In addition, WECC provides an environment for the development of Reliability Standards and the coordination of the operating and planning activities of its members as set forth in the WECC Bylaws.

There are several regional Reliability Standards in the WECC region. These regional Reliability Standards generally require entities to document compliance with substantive requirements, retain documentation, and submit reports to WECC. In RD24–2–000, standard VAR–501–WECC–3.1 is being updated for syntax and the proposed changes have been deemed non-substantive. The currently approved VAR–501–WECC–3.1 is being replaced by VAR–501–WECC–4. The changes include updates to document numbering, the removal and replacement of obsolete language, and removal of redundant language.

For the purposes of the extension, the following standards will remain unchanged:

- BAL–002–WECC–3 (Contingency Reserve)[4] requires balancing authorities and reserve sharing groups to document compliance with the contingency reserve requirements described in the standard.
- BAL–004–WECC–3 (Automatic Time Error Correction)[5] requires balancing authorities to document that time error corrections and primary inadvertent interchange payback were conducted according to the requirements in the standard.
- FAC–501–WECC–2 (Transmission Maintenance)[6] requires transmission owners with certain transmission paths to have a transmission maintenance and inspection plan and to document maintenance and inspection activities according to the plan.
- IRO–006–WECC–3 (Qualified Transfer Path Unscheduled Flow (USF) Relief)[7] requires balancing authorities and reliability coordinators to document actions taken to mitigate unscheduled flow.
- VAR–501–WECC–4 (Power System Stabilizers (PSS)) requires the Western Interconnection is operated in a coordinated manner under normal and abnormal conditions by establishing the performance criteria for WECC power system stabilizers.

Type of Respondents: Balancing authorities, reserve sharing groups, transmission owners, reliability coordinators, transmission operators, generator operators and generator owners.

Estimate of Annual Burden:[8] We provide the tables below with burden estimates which show the current burden estimates which include the ongoing burden associated with reporting and recordkeeping requirements, which are not changing in RD24–2–000. Further, the change in RD24–2–000 is considered non-substantive, therefore, the Commission is estimating that there is no change in the burden estimates from the currently approved estimates.

In Table 1, the Commission highlights the burden estimates for the VAR–501–WECC–4 (updated in Docket No. RD24–2–000). In Table 2, the Commission estimates the total estimated burden for the entirety of the FERC 725E collection.

TABLE 1—BURDEN ESTIMATES FOR VAR–501–WECC–4, AS UPDATED IN DOCKET NO. RD24–2–000, FERC–725E, MANDATORY RELIABILITY STANDARDS FOR THE WESTERN ELECTRIC COORDINATING COUNCIL, CHANGES IN DOCKET NO. RD24–2–000

Entity	Number of respondents[9]	Annual number of responses per respondent	Annual number of responses	Average burden hrs. & cost[10] per response ($)	Total annual burden hours & total annual cost ($)	Cost per respondent ($)
	(1)	(2)	(1) * (2) = (3)	(4)	(3) * (4) = (5)	(5) ÷ (1) = (6)
Standard VAR–501–WECC–4						
Reporting Requirements						
Generator Owners and/or Operators annual ...	311	2	622	1 hr.; $91.81	622 hrs.; $57,105.82	$183.62

[1] 16 U.S.C. 824o(e)(4).

[2] 16 U.S.C. 824o(a)(7) and (e)(4).

[3] *N. Am. Electric Reliability Corp.,* 119 FERC ¶ 61,260 (2007).

[4] BAL–002–WECC–2 is included in the OMB-approved inventory for FERC–725E. On November 9, 2016, NERC and WECC submitted a joint petition for approval of an interpretation of BAL–002–WECC–2, to be designated BAL–002–WECC–2a. BAL–002–WECC–2a was approved by order in Docket No. RD17–3–000 on January 24, 2017. The Order determined: ''The proposed interpretation provides clarification regarding the types of resources that may be used to satisfy Contingency Reserve requirements in regional Reliability Standard BAL–002–WECC–2.'' BAL–002–WECC–2a did not trigger the Paperwork Reduction Act and did not affect the burden estimate. BAL–002–WECC–2a is being included in this Notice and the Commission's submittal to OMB as part of the FERC–725E. BAL–002–WECC–3 became effective June 28, 2021, under docket RM19–20–000 in Order No. 876, replacing BAL–002–WECC–2a.

[5] BAL–004–WECC–3 was approved under docket RD18–2–000 on May 30, 2018.

[6] FAC–501–WECC–2 was approved under docket RD18–5–000 on May 30, 2018.

[7] On December 20, 2013, NERC and WECC submitted a joint petition for approval of IRO–006–WECC–2 and retirement of IRO–006–WECC–1. IRO–006–WECC–2 was approved by order in Docket No. RD14–9–000 on May 13, 2014. IRO–006–WECC–3 was approved by order in Docket No. RD19–4–000 on May 10, 2019. Because the reporting burden for IRO–006–WECC–3 did not increase for entities that operate within the Western Interconnection, FERC submitted the order to OMB for information only. The burden related to IRO–006–WECC–3 does not differ from the burden of IRO–006–WECC–2, which is included in the OMB-approved inventory. IRO–006–WECC–3 is being included in this Notice and the Commission's submittal to OMB as part of FERC–725E.

[8] Burden is defined as the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. For further explanation of what is included in the information collection burden, refer to 5 Code of Federal Regulations 1320.3.

TABLE 1—BURDEN ESTIMATES FOR VAR–501–WECC–4, AS UPDATED IN DOCKET NO. RD24–2–000, FERC–725E, MANDATORY RELIABILITY STANDARDS FOR THE WESTERN ELECTRIC COORDINATING COUNCIL, CHANGES IN DOCKET NO. RD24–2–000—Continued

Entity	Number of respondents [9]	Annual number of responses per respondent	Annual number of responses	Average burden hrs. & cost [10] per response ($)	Total annual burden hours & total annual cost ($)	Cost per respondent ($)
	(1)	(2)	(1) * (2) = (3)	(4)	(3) * (4) = (5)	(5) ÷ (1) = (6)
Recordkeeping Requirements						
Generator Owners and/or Operators annual ...	311	2	622	0.5 hrs.; $28.07	311 hrs.; $17,459.54	56.14
Burden Annual for VAR–501–WECC–4	.....	.....	.....	.....	933 hrs.; $74,565.36	.....

Net Burden for FERC–725E, for Submittal to OMB. The table below describes the new and continuing information collection requirements and the associated burden for FERC–725E. (The burden in Table 2 refers to burden associated with VAR–501–WECC–4, BAL–002–WECC–3, BAL–004–WECC–3, FAC–501–WECC–2, and IRO–006–WECC–3).

TABLE 2—NET BURDEN FOR FERC–725E, FERC–725E, MANDATORY RELIABILITY STANDARDS FOR THE WESTERN ELECTRIC COORDINATING COUNCIL

[Continuing Information Collection Requirements]

Entity	Number of respondents [11]	Annual number of responses per respondent	Annual number of responses	Average burden hrs. & cost per response ($)	Total annual burden hours & total annual cost ($)	Cost per respondent ($)
	(1)	(2)	(1) * (2) = (3)	(4)	(3) * (4) = (5)	(5) ÷ (1) = (6)
Reporting Requirements						
Balancing Authorities	34	1	34	21 hrs., $1,928.01	714 hrs., $65,552.34	$1,928.01
Transmission Owners that operate qualified transfer paths	5	3	15	40 hrs., $3,672.40	600 hrs., $55,086.00	11,017.20
Reliability Coordinators	2	1	2	1 hr., $91.81	2 hr., $183.62	91.81
Reserve Sharing Group	2	1	2	1 hr., $91.81	2 hrs., $183.62	91.81
Generator Owners and/or Operators annual for VAR–501–WECC–4	311	2	622	1 hr.; $91.81	622 hrs.; $57,105.82	183.62
Total Annual Reporting Requirements for FERC–725E	.....	.....	1,940 hrs.; $178,111.40	.....		
Recordkeeping Requirements						
Balancing Authorities	34	1	34	2.1 hrs., $117.89	71.4 hrs., $4,008.40	117.89
Balancing Authorities (IRO–006)	34	1	34	1 hr., $56.14	34 hrs., $1,908.76	56.14
Reliability Coordinator	2	1	2	1 hr.; $56.14	2 hr.; $112.28	56.14
Generator Owners and/or Operators annual for VAR–501–WECC–4	311	2	622	0.5 hrs.; $28.07	311 hrs.; $17,459.54	56.14
Total Annual Recordkeeping for FERC–725E	.....	.....	.....	.....	418.4 hrs.; $23,488.98	.....
Total Annual Burden for FERC–725E	.....	.....	.....	.....	2,358.4 hrs.; $201,600.38	.....

Comments: Comments are invited on: (1) whether the collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden and cost of the collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information collection; and (4) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Dated: April 24, 2024.

Debbie-Anne A. Reese,

Acting Secretary.

[FR Doc. 2024–09283 Filed 4–29–24; 8:45 am]

BILLING CODE 6717–01–P

[9] The number of respondents is derived from the NERC Compliance Registry as of December 15, 2023.

[10] For VAR–501–WECC–4, the 2023 hourly cost (for salary plus benefits) uses the figures from the Bureau of Labor Statistics for three positions involved in the reporting and recordkeeping requirements. These figures include salary (*http://bls.gov/oes/current/naics2_22.htm*) and benefits (*http://www.bls.gov/news.release/ecec.nr0.htm*) and are:

1. Manager: $106.33/hour;
2. Engineer: $77.29/hour;
3. Information and Record Clerk: $56.14/hour.

The hourly cost for the reporting requirements ($91.81) is an average of the cost of a manager and engineer. The hourly cost for recordkeeping requirements uses the cost of an Information and Record Clerk ($56.14/hour).

[11] The number of respondents is derived from the NERC Compliance Registry as of December 15, 2023, and represent unique U.S. register entities in the WECC regional area.

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Filings Instituting Proceedings

Docket Numbers: CP24–201–000.
Applicants: CenterPoint Energy Resources Corp., Delta Utilities S. LA, LLC, Delta Utilities NO. LA, LLC.
Description: CenterPoint Energy Resources Corp. et al. submits Application for Abandonment of the service area determination.
Filed Date: 4/19/24.
Accession Number: 20240419–5287.
Comment Date: 5 p.m. ET 5/10/24.

Docket Numbers: RP24–683–000.
Applicants: Stanchion Energy, LLC, Stanchion Gas Marketing, LLC.
Description: Joint Petition for Limited Waiver of Capacity Release Regulations, et al. of Stanchion Energy, LLC, et al.
Filed Date: 4/23/24.
Accession Number: 20240423–5209.
Comment Date: 5 p.m. ET 5/6/24.

Docket Numbers: RP24–684–000.
Applicants: Northern Border Pipeline Company.
Description: Compliance filing: 2024 Company Use Gas Adjustment Annual Report to be effective N/A.
Filed Date: 4/24/24.
Accession Number: 20240424–5033.
Comment Date: 5 p.m. ET 5/6/24.

Docket Numbers: RP24–685–000.
Applicants: Northern Border Pipeline Company.
Description: Compliance filing: 2024 Operational Purchases and Sales Report to be effective N/A.
Filed Date: 4/24/24.
Accession Number: 20240424–5035.
Comment Date: 5 p.m. ET 5/6/24.

Docket Numbers: RP24–686–000.
Applicants: Midcontinent Express Pipeline LLC.
Description: 4(d) Rate Filing: Fuel Tracker Filing 4/24/24 to be effective 6/1/2024.
Filed Date: 4/24/24.
Accession Number: 20240424–5041.
Comment Date: 5 p.m. ET 5/6/24.

Docket Numbers: RP24–687–000.
Applicants: ANR Storage Company.
Description: Compliance filing: 2024 Operational Purchases and Sales Report to be effective N/A.
Filed Date: 4/24/24.
Accession Number: 20240424–5051.
Comment Date: 5 p.m. ET 5/6/24.

Docket Numbers: RP24–688–000.
Applicants: Bison Pipeline LLC.
Description: Compliance filing: 2024 Operational Purchases and Sales Report to be effective N/A.
Filed Date: 4/24/24.
Accession Number: 20240424–5052.
Comment Date: 5 p.m. ET 5/6/24.

Docket Numbers: RP24–689–000.
Applicants: Blue Lake Gas Storage Company.
Description: Compliance filing: 2024 Operational Purchases and Sales Report to be effective N/A.
Filed Date: 4/24/24.
Accession Number: 20240424–5053.
Comment Date: 5 p.m. ET 5/6/24.

Docket Numbers: RP24–690–000.
Applicants: Great Lakes Gas Transmission Limited Partnership.
Description: Compliance filing: 2024 Operational Purchases and Sales Report to be effective N/A.
Filed Date: 4/24/24.
Accession Number: 20240424–5054.
Comment Date: 5 p.m. ET 5/6/24.

Any person desiring to intervene, to protest, or to answer a complaint in any of the above proceedings must file in accordance with Rules 211, 214, or 206 of the Commission's Regulations (18 CFR 385.211, 385.214, or 385.206) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

Filings in Existing Proceedings

Docket Numbers: RP24–514–002.
Applicants: Great Basin Gas Transmission Company.
Description: Compliance filing: Compliance Filing 2024 General Rate Case to be effective 4/6/2024.
Filed Date: 4/23/24.
Accession Number: 20240423–5157.
Comment Date: 5 p.m. ET 5/6/24.

Any person desiring to protest in any the above proceedings must file in accordance with Rule 211 of the Commission's Regulations (18 CFR 385.211) on or before 5:00 p.m. Eastern time on the specified comment date.

The filings are accessible in the Commission's eLibrary system (*https://elibrary.ferc.gov/idmws/search/fercgensearch.asp*) by querying the docket number.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members and others, access publicly available information and navigate Commission processes. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202) 502–6595 or *OPP@ferc.gov.*

Dated: April 24, 2024.

Debbie-Anne A. Reese,

Acting Secretary.

[FR Doc. 2024–09284 Filed 4–29–24; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings

Take notice that the Commission has received the following Natural Gas Pipeline Rate and Refund Report filings:

Filings Instituting Proceedings

Docket Numbers: PR24–65–000.
Applicants: EasTrans, LLC.
Description: § 284.123 Rate Filing: EasTrans Rate Certification—Correction to be effective 3/31/2024.
Filed Date: 4/23/24.
Accession Number: 20240423–5113.
Comment Date: 5 p.m. ET 5/7/24.

Docket Numbers: RP24–676–000.
Applicants: DK Trading and Supply LLC, Macquarie Energy LLC.
Description: Joint Petition for Limited Waiver of Capacity Release Regulations, et al. of DK Trading and Supply LLC et al.
Filed Date: 4/17/24.
Accession Number: 20240417–5215.
Comment Date: 5 p.m. ET 4/29/24.

Docket Numbers: RP24–680–000.
Applicants: Mountain Valley Pipeline, LLC.
Description: § 4(d) Rate Filing: Mountain Valley Pipeline, LLC FERC Gas Tariff Volume No. 1 to be effective 5/23/2024.
Filed Date: 4/22/24.
Accession Number: 20240422–5271.
Comment Date: 5 p.m. ET 5/6/24.

Docket Numbers: RP24–682–000.
Applicants: Mountain Valley Pipeline, LLC.
Description: § 4(d) Rate Filing: Day 1 Update Filing to be effective 5/23/2024.
Filed Date: 4/22/24.
Accession Number: 20240422–5289.
Comment Date: 5 p.m. ET 5/6/24.

Any person desiring to intervene, to protest, or to answer a complaint in any of the above proceedings must file in accordance with Rules 211, 214, or 206 of the Commission's Regulations (18 CFR 385.211, 385.214, or 385.206) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

The filings are accessible in the Commission's eLibrary system (*https://elibrary.ferc.gov/idmws/search/fercgensearch.asp*) by querying the docket number.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members and others, access publicly available information and navigate Commission processes. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202) 502–6595 or *OPP@ferc.gov.*

Dated: April 23, 2024.

Debbie-Anne A. Reese,

Acting Secretary.

[FR Doc. 2024–09201 Filed 4–29–24; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RD23–5–000]

Commission Information Collection Activities (FERC–725G); Comment Request; Revision

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Notice of information collection and request for comments.

SUMMARY: In compliance with the requirements of the Paperwork Reduction Act of 1995, the Federal Energy Regulatory Commission (Commission or FERC) is soliciting public comment on proposed revisions of the currently approved information collection, FERC–725G, (Mandatory Reliability Standards for the Bulk-Power System), approval of PRC–023–6.

DATES: Comments on the collection of information are due July 1, 2024.

ADDRESSES: You may submit copies of your comments (identified by Docket No. RD23–5–000) by one of the following methods:

Electronic filing through *http://www.ferc.gov,* is preferred.

- *Electronic Filing:* Documents must be filed in acceptable native applications and print-to-PDF, but not in scanned or picture format.
- For those unable to file electronically, comments may be filed by USPS mail or by hand (including courier) delivery:
  - *Mail via U.S. Postal Service Only:* Addressed to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street NE, Washington, DC 20426.
  - *Hand (including courier) delivery:* Deliver to: Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, MD 20852.

Instructions: All submissions must be formatted and filed in accordance with submission guidelines at: *http://www.ferc.gov.* For user assistance, contact FERC Online Support by email at *ferconlinesupport@ferc.gov,* or by phone at (866) 208–3676 (toll-free).

Docket: Users interested in receiving automatic notification of activity in this docket or in viewing/downloading comments and issuances in this docket may do so at *http://www.ferc.gov.*

FOR FURTHER INFORMATION CONTACT: Jean Sonneman may be reached by email at *DataClearance@FERC.gov,* telephone at (202) 502–6362.

SUPPLEMENTARY INFORMATION:

Title: FERC–725G (Mandatory Reliability Standards for the Bulk-Power System: Approval of PRC Reliability Standard PRC–023–6.

OMB Control No.: 1902–0252.

Type of Request: Approval of FERC–725G information collection requirements associated with proposed PRC Reliability Standard PRC–023–6.

Abstract: This Notice pertains to the FERC–725G information collection requirements associated Reliability Standard PRC–023–6 (Transmission Relay Load ability), the associated proposed implementation plan, and violation risk factors and violation severity levels. On March 2, 2023, the North American Electric Reliability Corporation (NERC) filed a petition seeking approval of proposed Reliability Standard PRC–023–6 (Transmission Relay Load ability), the associated proposed implementation plan, and violation risk factors and violation severity levels.[1] NERC also requested the Commission's approval of the retirement of the version of Reliability Standard PRC–023 that would be in effect (*i.e.,* currently effective Reliability Standard PRC–023–4 or the approved but not yet effective Reliability Standard PRC–023–5).[2]

NERC explains that the proposed Reliability Standard would advance Bulk-Power System reliability by removing certain redundant and unnecessary language from the Standard related to the setting of out-of-step blocking relays. To achieve this, NERC proposes to retire the Reliability Standard's Requirement R2 related to setting out-of-step blocking schemes to allow tripping of phase protective relays and remove the Attachment A, Item 2.3 exclusion for protection systems intended for protection during stable power swings.[3] NERC states that Requirement R2 is redundant because the fault condition addressed by Requirement R2 is addressed by Requirement R1 and requires the same compliance activity by the entity.[4] NERC explains, thus, that Requirement R2 is not needed for reliability. Further, NERC explains that the exclusion in Attachment A, Item 2.3 is no longer necessary due to system changes.[5]

On October 10, 2023, the Office of Electric Reliability issued a letter requesting that NERC provide additional information to explain how Requirement R2 of Reliability Standard PRC–023 is redundant to Requirement R1 and confirm whether the existing obligations in Requirement R2 would be enforced and audited under Requirement R1.[6] NERC filed its amended petition on November 3, 2023. In its amended petition, NERC confirms that because Requirement R2 is redundant to Requirement R1, any entity noncompliance with existing obligations of Requirement R2 would be assessed under Requirement R1.[7]

The petition was noticed on March 22, 2023, with interventions, comments, and protests due on or before April 21, 2023. No interventions, comments, or protests were filed.

Due to NERC's confirmation that any entity noncompliance with existing obligations under Requirement R2 (*i.e.,* the proper setting out out-of-step blocking relays) can be assessed under

[1] NERC Petition at 1.
[2] NERC Petition at 1–2.
[3] NERC Petition at 4.
[4] NERC Petition at 21.
[5] NERC Petition at 25–26.
[6] RFI at 2.
[7] NERC Amended Petition at 25.

Requirement R1 if R2 is retired, NERC's uncontested filing is hereby approved pursuant to the relevant authority delegated to the Director, Office of Electric Reliability under 18 CFR 375.303, effective as of the date of this order.

This action shall not be construed as approving any other application, including proposed revisions of Electric Reliability Organization or Regional Entity rules or procedures pursuant to 18 CFR 375.303(a)(2)(i). Such action shall not be deemed as recognition of any claimed right or obligation associated therewith and such action is without prejudice to any findings or orders that have been or may hereafter be made by the Commission in any proceeding now pending or hereafter instituted by or against the Electric Reliability Organization or any Regional Entity.

This order constitutes final agency action. Requests for rehearing by the Commission may be filed within 30 days of the date of issuance of this order, pursuant to 18 CFR 385.713. The revisions to PRC–023–6 will result in a change in how relay settings will be assessed under Requirement R1 of out-of-step blocking elements but will not result in reporting or recordkeeping requirements or burden. As of February 2024, there are 324 transmission owner, 1,173 generator owners, 371 distribution providers and 62 planning coordinators registered with NERC. These registered entities will have to comply requirements in the proposed Reliability Standard PRC–023–6.

PROPOSED CHANGES DUE TO ORDER IN DOCKET NO. RD23–5–000

Reliability standard & requirement	Type[8] and number of entity	Number of annual responses per entity	Total number of responses	Average number of burden hours per response[9]	Total burden hours
	(1)	(2)	(1) * (2) = (3)	(4)	(3) * (4) = (5)
FERC–725G					
PRC–023–6					
TO	324	1	324	16 hrs. $1,067.52	5,184 hrs. $345,876.48.
GO	1,173	1	1,173	16 hrs. $1,067.52	18,768 hrs. $1,252,200.96.
DP	371	1	371	8 hrs. $533.76	2,968 hrs. $198,024.96.
PC	62	1	62	8 hrs. $533.76	496 $33,093.12.
Total for PRC–023–6.			1,930	48 hrs. $3,202.56	27,416 hrs. $1,829,195.52.
One Time Estimate—Years 1 and 2.					

The one-time burden of 27,416 hours that only applies for Year 1 and 2 will be averaged over three years (27,416 hours ÷ 3 = 9,138.67 (9,138.67–rounded) hours/year over three years). The number of responses is also averaged over three years (1,930 responses ÷ 3 = 643.33 (643.33–rounded) responses/year).

The responses and burden hours for Years 1–3 will total respectively as follows for Year 1 one-time burden:

Year 1: 643.33 responses; 9,138.67 hours
Year 2: 643.33 responses; 9,138.67 hours
Year 3: 643.33 responses; 9,138.67 hours

Comments: Comments are invited on: (1) whether the collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden and cost of the collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information collection; and (4) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Dated: April 23, 2024.

Debbie-Anne A. Reese,

Acting Secretary.

[FR Doc. 2024–09196 Filed 4–29–24; 8:45 am]

BILLING CODE 6717–01–P

[8] TO = Transmission Owner, GO = Generator Owner, DP = Distribution Provider and PC = Planning Coordinator.

[9] The estimated hourly cost (salary plus benefits) derived using the following formula: Burden Hours per Response * $/hour = Cost per Response. Based on the Bureau of Labor Statistics (BLS), as of August 1, 2023, of an Electrical Engineer (17–2071)—$77.29, and for Information and Record Clerks (43–4199) $56.14, The average hourly burden cost for this collection is [($77.29 + $56.14)/2 = $66.715)] rounded to $66.72 an hour.

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 2407–179]

Alabama Power Company; Notice of Application Accepted for Filing and Soliciting Comments, Motions To Intervene, and Protests

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Application Type:* Temporary Variance from Reservoir Elevation.

b. *Project No.:* 2407–179.

c. *Date Filed:* February 15, 2024.

d. *Applicant:* Alabama Power Company.

e. *Name of Project:* Yates and Thurlow Project.

f. *Location:* The Yates and Thurlow Project is located on the Tallapoosa River in Elmore County, Alabama, and Tallapoosa County, Alabama.

g. *Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791 (a)–825(r).

h. *Applicant Contact:* David K. Anderson, Hydro Licensing Specialist, 600 North 18th Street, Hydro Services 16N–8180, Birmingham, AL 35203, (205) 257–1398, *dkanders@southernco.com.*

i. *FERC Contact:* Greg Morris, (202) 502–8116, *gregory.morris@ferc.gov.*

j. *Cooperating agencies:* With this notice, the Commission is inviting federal, state, local, and Tribal agencies with jurisdiction and/or special expertise with respect to environmental issues affected by the proposal, that wish to cooperate in the preparation of any environmental document, if

applicable, to follow the instructions for filing such requests described in item m below. Cooperating agencies should note the Commission's policy that agencies that cooperate in the preparation of any environmental document cannot also intervene. See 94 FERC ¶ 61,076 (2001).

k. *Deadline for filing comments, motions to intervene, and protests:* 30 days from the issuance date of this notice by the Commission.

The Commission strongly encourages electronic filing. Please file comments, motions to intervene, and protests 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/doc-sfiling/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 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 Reese, Acting Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852. The first page of any filing should include the docket number P–2407–179. Comments emailed to Commission staff are not considered part of the Commission record.

The Commission's Rules of Practice and Procedure require all intervenors filing documents with the Commission to serve a copy of that document on each person whose name appears on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

l. *Description of Request:* The applicant requests Commission approval for a temporary variance from the reservoir elevation requirements at Thurlow Reservoir. The applicant is proposing to lower the Thurlow Reservoir by approximately six feet for four weeks in 2024. Specifically, the applicant will operate the Thurlow development so that its maximum drawdown does not exceed one foot below a pool elevation of 282.7 feet from September 8, 2024, through October 5, 2024. The purpose of the proposed drawdown is twofold. First, a group of homeowners on Thurlow Reservoir requested to conduct a drawdown so they can perform maintenance on their shoreline structures. Because the Thurlow Reservoir is typically operated with a one-foot fluctuation, a drawdown of six feet will allow maintenance of structures that are normally below the water line. Second, the drawdown will allow the applicant to perform a needed inspection and potential repairs within the draft tube at the upstream Yates development. The drawdown will not affect the Thurlow minimum flow required by Article 401 of the Project license.

m. *Locations of the Application:* This filing may be viewed on the Commission's website at *http://www.ferc.gov* using the ''eLibrary'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. 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. Agencies may obtain copies of the application directly from the applicant.

n. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

o. *Comments, Motions to Intervene, or Protests:* 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, .214, respectively. 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.

p. *Filing and Service of Responsive Documents:* Any filing must (1) bear in all capital letters the title ''COMMENTS'', ''PROTEST'', or ''MOTION TO INTERVENE'' as applicable; (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person commenting, protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, motions to intervene, or protests must set forth their evidentiary basis. Any filing made by an intervenor must be accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 385.2010.

q. The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members and others, access publicly available information and navigate Commission processes. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to contact OPP at (202)502–6595 or *OPP@ferc.gov.*

Dated: April 24, 2024.

Debbie-Anne A. Reese,

Acting Secretary.

[FR Doc. 2024–09288 Filed 4–29–24; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. IC24–15–000]

Commission Information Collection Activities (FERC–587); Comment Request; Extension

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Notice of information collection and request for comments.

SUMMARY: In compliance with the requirements of the Paperwork Reduction Act of 1995, the Federal Energy Regulatory Commission (Commission or FERC) is soliciting public comment on the currently approved information collection FERC–587, Land Description: Public Land States/Non-Public Land States, OMB Control Number 1902–0145.

DATES: Comments on the collections of information are due July 1, 2024.

ADDRESSES: You may submit copies of your comments (identified by Docket No. IC24–15–000 and the specific FERC collection number (FERC–587) by one of the following methods:

Electronic filing through *http://www.ferc.gov,* is preferred.

• *Electronic Filing:* Documents must be filed in acceptable native applications and print-to-PDF, but not in scanned or picture format.

• For those unable to file electronically, comments may be filed by USPS mail or by other delivery services:

○ *Mail via U.S. Postal Service Only:* Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street NE, Washington, DC 20426.

○ *All other delivery services:* Federal Energy Regulatory Commission, Secretary of the Commission, 12225 Wilkins Avenue, Rockville, MD 20852.

Instructions: All submissions must be formatted and filed in accordance with submission guidelines at *https://www.ferc.gov/ferc-online/overview.* For user assistance, contact FERC Online Support by email at *ferconlinesupport@ferc.gov,* or by phone at (866) 208–3676 (toll-free).

Docket: Users interested in receiving automatic notification of activity in this docket or in viewing/downloading comments and issuances in this docket may do so at *https://www.ferc.gov/ferc-online/overview.*

FOR FURTHER INFORMATION CONTACT: Jean Sonneman may be reached by email at *DataClearance@FERC.gov,* or telephone at (202) 502–6362.

SUPPLEMENTARY INFORMATION:

Title: FERC–587, Land Description: Public Land States/Non-Public Land States.

OMB Control No.: 1902–0145.

Type of Request: Three-year extension of the FERC–587 information collection requirements with no changes to the current reporting requirements.

Abstract: Section 24 of the Federal Power Act (FPA) [1] requires the Commission to conduct this collection of information, which pertains to applications proposing hydropower projects, or changes to existing hydropower projects, within ''lands of the United States.'' FERC Form 587 [2] consolidates the required information, including a description of the applicable U.S. lands and identification of hydropower project boundary maps associated with the applicable U.S. lands. An applicant must send FERC Form 587 both to the Commission and to the Bureau of Land Management (BLM) [3] state office where the project is located. The information consolidated in FERC Form 587 facilitates the reservation of U.S. lands as hydropower sites and the withdrawal of such lands from other uses.

Type of Respondents: Applicants proposing hydropower projects, or changes to existing hydropower projects, within lands of the United States.

Estimate of Annual Burden: The Commission estimates the average annual burden [4] and cost [5] for this information collection as follows.

A. Number of respondents	B. Annual number of responses per respondent	C. Total number of responses (Column A × Column B)	D. Average hour burden & cost per response	E. Total annual burden hours & total annual cost (Column C × Column D)	F. Cost per respondent ($) (Column E ÷ Column A)
70	1	70	1 hour; $100.00	70 hours; $7,000	$100.00

Comments: Comments are invited on: (1) whether the collections of information is necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden and cost of the collections of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information collections; and (4) ways to minimize the burden of the collections of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Dated: April 23, 2024.

Debbie-Anne A. Reese,

Acting Secretary.

[FR Doc. 2024–09199 Filed 4–29–24; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Combined Notice of Filings #1

Take notice that the Commission received the following electric corporate filings:

Docket Numbers: EC24–72–000.

Applicants: Morongo Transmission LLC, Axium Coachella Holdings LLC.

Description: Joint Application for Authorization Under Section 203 of the Federal Power Act of Morongo Transmission LLC, et al.

Filed Date: 4/23/24.

Accession Number: 20240423–5211.

Comment Date: 5 p.m. ET 5/14/24.

Docket Numbers: EC24–73–000.

Applicants: Orsted DevCo, LLC, Orsted DevCo II, LLC, Eversource Investment LLC, Sunrise Wind LLC.

Description: Application for Authorization Under Section 203 of the Federal Power Act of Sunrise Wind LLC.

Filed Date: 4/22/24.

Accession Number: 20240422–5369.

Comment Date: 5 p.m. ET 5/13/24.

Take notice that the Commission received the following exempt wholesale generator filings:

Docket Numbers: EG24–167–000.

Applicants: Markum Solar Farm, LLC.

Description: Markum Solar Farm, LLC submits Notice of Self-Certification of Exempt Wholesale Generator Status.

Filed Date: 4/24/24.

Accession Number: 20240424–5066.

Comment Date: 5 p.m. ET 5/15/24.

Take notice that the Commission received the following electric rate filings:

Docket Numbers: ER10–1982–017.

Applicants: Consolidated Edison Company of New York, Inc.

Description: Notice of Non-Material Change in Status of Consolidated Edison Company of New York, Inc., et al.

Filed Date: 4/19/24.

Accession Number: 20240419–5289.

Comment Date: 5 p.m. ET 5/10/24.

Docket Numbers: ER17–923–002.

[1] 16 U.S.C. 818.

[2] Form 587 can be found at *https://cms.ferc.gov/media/ferc-587.*

[3] The Bureau of Land Management is within the U.S. Department of the Interior.

[4] Burden is defined as the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. For further explanation of what is included in the information collections burden, reference 5 CFR 1320.3.

[5] The Commission staff estimates that the average respondent for FERC–587 is similarly situated to the Commission, in terms of salary plus benefits. Based on FERC's current annual average of $207,786 (for salary plus benefits), the average hourly cost is $100/hour.

Applicants: Ashley Energy LLC.
Description: Notice of Change in Status of Ashley Energy LLC.
Filed Date: 4/23/24.
Accession Number: 20240423–5217.
Comment Date: 5 p.m. ET 5/14/24.
Docket Numbers: ER20–55–003; ER21–772–003.
Applicants: Resi Station, LLC, OhmConnect, Inc.
Description: Notice of Change in Status of OhmConnect, Inc., et al.
Filed Date: 4/24/24.
Accession Number: 20240424–5228.
Comment Date: 5 p.m. ET 5/15/24.
Docket Numbers: ER23–618–002.
Applicants: Sandy Ridge Wind 2, LLC.
Description: Notice of Non-Material Change in Status of Sandy Ridge Wind 2, LLC.
Filed Date: 4/24/24.
Accession Number: 20240424–5210.
Comment Date: 5 p.m. ET 5/15/24.
Docket Numbers: ER24–1337–001.
Applicants: Alabama Power Company, Georgia Power Company, Mississippi Power Company.
Description: Tariff Amendment: Alabama Power Company submits tariff filing per 35.17(b): Three Rocks Solar LGIA Amendment Filing to be effective 2/15/2024.
Filed Date: 4/24/24.
Accession Number: 20240424–5079.
Comment Date: 5 p.m. ET 5/15/24.
Docket Numbers: ER24–1338–001.
Applicants: Alabama Power Company, Georgia Power Company, Mississippi Power Company.
Description: Tariff Amendment: Georgia Power Company submits tariff filing per 35.17(b): West Fork Solar LGIA Amendment Filing to be effective 2/15/2024.
Filed Date: 4/24/24.
Accession Number: 20240424–5077.
Comment Date: 5 p.m. ET 5/15/24.
Docket Numbers: ER24–1456–001.
Applicants: Tropicana Manufacturing Company Inc.
Description: Tariff Amendment: Amendment and Supplement to Application for Market-Based Rate Authority to be effective 5/13/2024.
Filed Date: 4/24/24.
Accession Number: 20240424–5224.
Comment Date: 5 p.m. ET 5/15/24.
Docket Numbers: ER24–1822–000.
Applicants: Cavalier Solar A, LLC.
Description: 205(d) Rate Filing: Normal filing 2024 SFA to be effective 6/17/2024.
Filed Date: 4/24/24.
Accession Number: 20240424–5002.
Comment Date: 5 p.m. ET 5/15/24.
Docket Numbers: ER24–1824–000.
Applicants: PJM Interconnection, L.L.C.
Description: 205(d) Rate Filing: Second Amended WMPA, Service Agreement No. 5696; AF1–140 to be effective 6/24/2024.
Filed Date: 4/24/24.
Accession Number: 20240424–5048.
Comment Date: 5 p.m. ET 5/15/24.
Docket Numbers: ER24–1825–000.
Applicants: Mid-Atlantic Interstate Transmission, LLC, PJM Interconnection, L.L.C.
Description: 205(d) Rate Filing: Mid-Atlantic Interstate Transmission, LLC submits tariff filing per 35.13(a)(2)(iii: MAIT submits one Construction Agreement, SA No. 6941 to be effective 6/24/2024.
Filed Date: 4/24/24.
Accession Number: 20240424–5102.
Comment Date: 5 p.m. ET 5/15/24.
Docket Numbers: ER24–1826–000.
Applicants: PJM Interconnection, L.L.C.
Description: 205(d) Rate Filing: Amendment to ISA, Service Agreement No. 5814; AD1–041/AE1–190/AE1–191 to be effective 6/24/2024.
Filed Date: 4/24/24.
Accession Number: 20240424–5134.
Comment Date: 5 p.m. ET 5/15/24.
Docket Numbers: ER24–1827–000.
Applicants: Southwest Power Pool, Inc.
Description: 205(d) Rate Filing: 4250 DG Woodward Energy Storage Surplus Interconnection GIA to be effective 6/23/2024.
Filed Date: 4/24/24.
Accession Number: 20240424–5167.
Comment Date: 5 p.m. ET 5/15/24.
Docket Numbers: ER24–1828–000.
Applicants: OhmConnect, Inc.
Description: 205(d) Rate Filing: Normal filing 2024 APR to be effective 4/25/2024.
Filed Date: 4/24/24.
Accession Number: 20240424–5199.
Comment Date: 5 p.m. ET 5/15/24.
Docket Numbers: ER24–1829–000.
Applicants: Resi Station, LLC.
Description: 205(d) Rate Filing: Normal filing 2024 APR to be effective 4/25/2024.
Filed Date: 4/24/24.
Accession Number: 20240424–5201.
Comment Date: 5 p.m. ET 5/15/24.
Docket Numbers: ER24–1830–000
Applicants: Alabama Power Company, Georgia Power Company, Mississippi Power Company.
Description: 205(d) Rate Filing: Alabama Power Company submits tariff filing per 35.13(a)(2)(iii: SEPA Amended and Restated Network Agreement Amendment Filing (Revision No. 13) to be effective 1/1/2024.
Filed Date: 4/24/24.
Accession Number: 20240424–5204.
Comment Date: 5 p.m. ET 5/15/24.
Docket Numbers: ER24–1831–000.
Applicants: Alabama Power Company, Georgia Power Company, Mississippi Power Company.
Description: 205(d) Rate Filing: Alabama Power Company submits tariff filing per 35.13(a)(2)(i): OATT Attachments M & N Amendments to Address Regulatory Assets and Liabilities to be effective 5/1/2024.
Filed Date: 4/24/24.
Accession Number: 20240424–5221.
Comment Date: 5 p.m. ET 5/15/24.

Take notice that the Commission received the following public utility holding company filings:

Docket Numbers: PH24–9–000.
Applicants: CAES, LLC, Electrodes Holdings, LLC, Watt Battery Holdings, LLC, Battery Storage Holdings, LLC, Sparks Battery Holdings, LLC, Sparks Battery Holdings 2, LLC.
Description: Joint Waiver Notification of CAES, LLC, et al. FERC 65–B Waiver Notification.
Filed Date: 4/22/24.
Accession Number: 20240422–5366.
Comment Date: 5 p.m. ET 5/13/24.

The filings are accessible in the Commission's eLibrary system (*https://elibrary.ferc.gov/idmws/search/fercgensearch.asp*) by querying the docket number.

Any person desiring to intervene, to protest, or to answer a complaint in any of the above proceedings must file in accordance with Rules 211, 214, or 206 of the Commission's Regulations (18 CFR 385.211, 385.214, or 385.206) on or before 5:00 p.m. Eastern time on the specified comment date. Protests may be considered, but intervention is necessary to become a party to the proceeding.

eFiling is encouraged. More detailed information relating to filing requirements, interventions, protests, service, and qualifying facilities filings can be found at: *http://www.ferc.gov/docs-filing/efiling/filing-req.pdf.* For other information, call (866) 208–3676 (toll free). For TTY, call (202) 502–8659.

The Commission's Office of Public Participation (OPP) supports meaningful public engagement and participation in Commission proceedings. OPP can help members of the public, including landowners, environmental justice communities, Tribal members and others, access publicly available information and navigate Commission processes. For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, the public is encouraged to

contact OPP at (202) 502–6595 or *OPP@ferc.gov.*

Dated: April 24, 2024.

Debbie-Anne A. Reese,

Acting Secretary.

[FR Doc. 2024–09290 Filed 4–29–24; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[EPA–HQ–OPP–2017–0750; FRL–11907–01–OCSPP]

Pesticide Registration Review; Proposed Decisions for Several Pesticides; Notice of Availability

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces the availability of EPA's proposed interim decisions (PIDs) and amended PIDs for the following pesticides: Acephate, Captan, Ferbam, Thiram, and Ziram. EPA is opening a 60-day public comment period for these proposed interim registration review decisions.

DATES: Comments must be received on or before July 1, 2024.

ADDRESSES: Submit your comments through *https://www.regulations.gov* using the docket identification (ID) number for the pesticide of interest as identified in Table 1 of Unit I. Follow the online instructions for submitting comments. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Additional instructions on commenting and visiting the docket, along with more information about dockets generally, is available at *https://www.epa.gov/dockets.*

FOR FURTHER INFORMATION CONTACT:

For pesticide specific information: The Chemical Review Manager for the pesticide of interest is identified in Table 1 of Unit I.

For general information: Melanie Biscoe, Pesticide Re-Evaluation Division (7508P), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave. NW, Washington, DC 20460–0001; telephone number: (202) 566–0701; email address: *biscoe.melanie@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. What action is the Agency taking?

Pursuant to 40 CFR 155.58(a), this notice announces the availability of EPA's proposed interim and proposed registration review decisions for the pesticides shown in table 1 and opens a 60-day public comment period on the proposed interim registration review decisions.

TABLE 1—PROPOSED INTERIM REGISTRATION REVIEW DECISIONS

Registration review case name and No.	Docket ID No.	Chemical review manager and contact information
Acephate Case Number 0042	EPA–HQ–OPP–2008–0915.	Kent Fothergill, *fothergill.kent@epa.gov,* (202) 566–1943.
Captan (Amended) Case Number 0120	EPA–HQ–OPP–2013–0296.	Christina Scheltema, *scheltema.christina@epa.gov,* (202) 566–2272.
Ferbam (Amended) Case Number 8000	EPA–HQ–OPP–2015–0567.	DeMariah Koger, *koger.demariah@epa.gov,* (202) 566–2288.
Thiram (Amended) Case Number 0122	EPA–HQ–OPP–2015–0433.	DeMariah Koger, *koger.demariah@epa.gov,* (202) 566–2288.
Ziram (Amended) Case Number 8001	EPA–HQ–OPP–2015–0568.	DeMariah Koger, *koger.demariah@epa.gov,* (202) 566–2288.

II. What is the Agency's authority for taking this action?

EPA is conducting its registration review of the chemicals listed in the table 1 of unit I pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) section 3(g) (7 U.S.C. 136a(g)) and the Procedural Regulations for Registration Review at 40 CFR part 155, subpart C. FIFRA section 3(g) provides, among other things, that pesticide registrations are to be reviewed every 15 years. Consistent with 40 CFR 155.57, in its final registration review decision, EPA will ultimately determine whether a pesticide continues to meet the registration standard in FIFRA section 3(c)(5) (7 U.S.C. 136a(c)(5)). As part of the registration review process, the Agency has completed a proposed interim or proposed decision for each of the pesticides listed in Table 1 of Unit I.

The registration review docket for a pesticide includes documents related to the registration review case. Among other things, these documents describe EPA's rationales for conducting additional risk assessments for the registration review of the pesticides included in Table 1 of Unit I, as well as the Agency's subsequent risk findings and consideration of possible risk mitigation measures. The proposed interim and proposed registration review decisions are supported by the rationales included in those documents.

Consistent with 40 CFR 155.58(a), EPA provides for at least a 60-day public comment period on proposed interim and proposed registration review decisions. This comment period is intended to provide an opportunity for public input and a mechanism for initiating any necessary amendments to the proposed decision.

For additional background on the registration review program, see: *https://www.epa.gov/pesticide-reevaluation.*

III. Does this action apply to me?

This notice is directed to the public in general and may be of interest to a wide range of stakeholders including environmental, human health, farm worker, and agricultural advocates; the chemical industry; pesticide users; and members of the public interested in the sale, distribution, or use of pesticides. Since others also may be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the Chemical Review Manager for the pesticide of interest identified in table 1 of unit I.

IV. What should I consider as I prepare my comments for EPA?

In submitting a comment to EPA, please consider the following:

1. *Submitting CBI.* Do not submit this information to EPA through *regulations.gov* or email. Clearly mark the part or all the information that you claim to be CBI. For CBI information on a disk or CD–ROM that you mail to EPA, mark the outside of the disk or CD–ROM

as CBI and then identify electronically within the disk or CD–ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for preparing your comments.* When preparing and submitting your comments, see the commenting tips at: *https://www.epa.gov/dockets/commenting-epa-dockets.*

3. *Environmental justice.* EPA seeks to achieve environmental justice, the fair treatment and meaningful involvement of any group, including minority and/or low-income populations, in the development, implementation, and enforcement of environmental laws, regulations, and policies. To help address potential environmental justice issues, the Agency seeks information on any groups or segments of the population who, as a result of their location, cultural practices, or other factors, may have atypical or disproportionately high and adverse human health impacts or environmental effects from exposure to the pesticides discussed in this document, compared to the general population.

All comments should be submitted using the methods in **ADDRESSES** and must be received by EPA on or before the closing date. These comments will become part of the docket for the pesticides included in Table 1 in Unit I. The Agency will consider all comments received by the closing date and may respond to comments in a ''Response to Comments Memorandum'' in the docket and/or in any subsequent interim or final registration review decision, as appropriate.

Authority: 7 U.S.C. 136 *et seq.*

Dated: April 23, 2024.

Timothy Kiely,

Acting Director, Pesticide Re-Evaluation Division, Office of Pesticide Programs.

[FR Doc. 2024–09181 Filed 4–29–24; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–0636; FR ID 216233]

Information Collection Being Reviewed by the Federal Communications Commission

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act (PRA) of 1995, the Federal Communications Commission (FCC or the Commission) invites the general public and other Federal agencies to take this opportunity to comment on the following information collection. Comments are requested concerning: whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees.

DATES: Written PRA comments should be submitted on or before July 1, 2024. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Nicole Ongele, FCC, via email *PRA@fcc.gov* and to *nicole.ongele@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection, contact Nicole Ongele, (202) 418–2991.

SUPPLEMENTARY INFORMATION: The FCC may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid Office of Management and Budget (OMB) control number.

OMB Control Number: 3060–0636.

Title: Sections 2.906, 2.909, 2.1071, 2.1074, 2.1077 and 15.37, Equipment Authorizations—Supplier's Declaration of Conformity (SDoC).

Form No.: N/A.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for-profit entities.

Number of Respondents and Responses: 8,500 respondents; 17,000 responses.

Estimated Time per Response: 1–18 hours (average).

Frequency of Response: One-time reporting requirement, recordkeeping requirement and third party disclosure requirements.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this information collection is contained in 47 U.S.C. 154(i), 301, 302a, 303, 309(j), 312, 403, 503, and the Secure Equipment Act of 2021, Public Law 117–55, 135 Stat. 423.

Total Annual Burden: 161,500 hours.

Total Annual Cost: $17,000,000.

Needs and Uses: The Commission will submit this revised information collection to the Office of Management and Budget (OMB) after this 60 day comment period in order to obtain the full three year clearance from them.

In 2022, the Supplier's Declaration of Conformity (SDOC) procedure were revised in a Report and Order, FCC 22–84 (88 FR 7592, February 6, 2023). Revisions to the information collection included amendments to rule sections 2.906 and 2.909 as reported herein, therefore, the eligibility restrictions resulted in fewer applicants but the continued growth in participation in the program resulted in a re-adjustment of applicants which supports program changes and adjustments.

§ 2.906 Supplier's Declaration of Conformity

(a) Supplier's Declaration of Conformity (SDoC) is a procedure where the responsible party, as defined in § 2.909, makes measurements or completes other procedures found acceptable to the Commission to ensure that the equipment complies with the appropriate technical standards and other applicable requirements. Submittal to the Commission of a sample unit or representative data demonstrating compliance is not required unless specifically requested pursuant to § 2.945.

(b) Supplier's Declaration of Conformity is applicable to all items subsequently marketed by the manufacturer, importer, or the responsible party that are identical, as defined in § 2.908, to the sample tested and found acceptable by the manufacturer.

(c) The responsible party may, if it desires, apply for Certification of a device subject to the Supplier's Declaration of Conformity. In such cases, all rules governing certification will apply to that device.

(d) Notwithstanding other parts of this section, equipment otherwise subject to the Supplier's Declaration of Conformity process that is produced by any entity

identified on the Covered List, established pursuant to § 1.50002 of this chapter, as producing covered communications equipment is prohibited from obtaining equipment authorization through that process. The rules governing certification apply to authorization of such equipment.

§ 2.909 Responsible Party

(a) In the case of equipment that requires the issuance of a grant of certification, the party to whom that grant of certification is issued is responsible for the compliance of the equipment with the applicable technical and other requirements. If any party other than the grantee modifies the radio frequency equipment and that party is not working under the authorization of the grantee pursuant to § 2.929(b), the party performing the modification is responsible for compliance of the product with the applicable administrative and technical provisions in this chapter.

(b) For equipment subject to Supplier's Declaration of Conformity the party responsible for the compliance of the equipment with the applicable standards, who must be located in the United States (see § 2.1077), is set forth as follows:

(1) The manufacturer or, if the equipment is assembled from individual component parts and the resulting system is subject to authorization under Supplier's Declaration of Conformity, the assembler.

(2) If the equipment by itself, or, a system is assembled from individual parts and the resulting system is subject to Supplier's Declaration of Conformity and that equipment or system is imported, the importer.

(3) Retailers or original equipment manufacturers may enter into an agreement with the responsible party designated in paragraph (b)(1) or (b)(2) of this section to assume the responsibilities to ensure compliance of equipment and become the new responsible party.

(4) If the radio frequency equipment is modified by any party not working under the authority of the responsible party, the party performing the modifications, if located within the U.S., or the importer, if the equipment is imported subsequent to the modifications, becomes the new responsible party.

(c) If the end product or equipment is subject to both certification and Supplier's Declaration of Conformity (*i.e.,* composite system), all the requirements of paragraphs (a) and (b) apply.

(d) If, because of modifications performed subsequent to authorization, a new party becomes responsible for ensuring that a product complies with the technical standards and the new party does not obtain a new equipment authorization, the equipment shall be labeled, following the specifications in § 2.925(d), with the following: ''This product has been modified by [insert name, address and telephone number or internet contact information of the party performing the modifications].''

(e) In the case of transfer of control of equipment, as in the case of sale or merger of the responsible party, the new entity shall bear the responsibility of continued compliance of the equipment.

Federal Communications Commission.

Marlene Dortch,

Secretary, Office of the Secretary.

[FR Doc. 2024–09214 Filed 4–29–24; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL COMMUNICATIONS COMMISSION

[OMB 3060–0804; FR ID 216172]

Information Collection Being Reviewed by the Federal Communications Commission

AGENCY: Federal Communications Commission.

ACTION: Notice and request for comments.

SUMMARY: As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act (PRA) of 1995, the Federal Communications Commission (FCC or the Commission) invites the general public and other Federal agencies to take this opportunity to comment on the following information collection. Comments are requested concerning: whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; the accuracy of the Commission's burden estimate; ways to enhance the quality, utility, and clarity of the information collected; ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology; and ways to further reduce the information collection burden on small business concerns with fewer than 25 employees.

DATES: Written PRA comments should be submitted on or before July 1, 2024. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, you should advise the contact listed below as soon as possible.

ADDRESSES: Direct all PRA comments to Nicole Ongele, FCC, via email *PRA@fcc.gov* and to *nicole.ongele@fcc.gov.*

FOR FURTHER INFORMATION CONTACT: For additional information about the information collection, contact Nicole Ongele, (202) 418–2991.

SUPPLEMENTARY INFORMATION: The FCC may not conduct or sponsor a collection of information unless it displays a currently valid control number. No person shall be subject to any penalty for failing to comply with a collection of information subject to the PRA that does not display a valid Office of Management and Budget (OMB) control number.

OMB Control Number: 3060–0804.

Title: Universal Service—Rural Health Care Program.

Form Numbers: FCC Forms 460, 461, 462, 463, 465, 466, 467, and 469.

Type of Review: Revision of a currently approved collection.

Respondents: Business or other for-profit; Not-for-profit institutions; Federal Government; and State, Local, or Tribal governments.

Number of Respondents and Responses: 12,854 unique respondents; 117,071 responses.

Estimated Time per Response: 0.30–17 hours.

Frequency of Response: On occasion, one-time, annual, and monthly reporting requirements.

Obligation to Respond: Required to obtain or retain benefits. Statutory authority for this collection of information is contained in sections 1–4, 201–205, 214, 254, 303(r), and 403 of the Communications Act of 1934, as amended, 47 U.S.C. 151–*154, 201–205, 214, 254, 303(r),* and *403,* unless otherwise noted.

Total Annual Burden: 442,389 hours.

Total Annual Cost: No Cost.

Needs and Uses: The Commission seeks OMB approval of a revision of this information collection as a result of the *2023 Promoting Telehealth Third Report and Order,* FCC 23–110, rel. December 14, 2023 (*2023 Third Report and Order*) (89 FR 1834, January 11, 2024). This collection is utilized for the RHC support mechanism of the Commission's universal service fund (USF). The collection of this information is necessary so that the Commission and the Universal Service Administrative Company (USAC) will have sufficient information to determine if entities are eligible for funding

pursuant to the RHC universal service support mechanism, to determine if entities are complying with the Commission's rules, and to promote program integrity. This information is also necessary in order to allow the Commission to evaluate the extent to which the RHC Program is meeting the statutory objectives specified in section 254(h) of the 1996 Act, and the Commission's performance goals for the RHC Program.

This information collection is being revised to: (1) extend some of the existing information collection requirements for the Healthcare Connect Fund and Telecom Programs; (2) revise some of the information collection requirements for the Healthcare Connect Fund and Telecom Programs as a result of the *2023 Third Report and Order;* and (3) add a new information collection requirement for the Healthcare Connect Fund and Telecom Programs as a result of the *2023 Third Report and Order.* As part of this information collection, the Commission is also revising the FCC Form 460 Template, the FCC Form 461 Template, the FCC Form 465 Template, the FCC Form 466 Template, and the Post-Commitment Template. We propose to make changes to the Post-Commitment Template effective funding year 2024. We propose to make changes to the FCC Form 460 Template, the FCC Form 461 Template, the FCC Form 465 Template, and the FCC Form 466 Template effective funding year 2025. The FCC Form 467 and Telecom Invoice Form will not be used after funding year 2023.

As part of this information collection, the Commission is harmonizing the RHC Program eligibility determination process by using the FCC Form 460 for eligibility determinations in both the Telecom Program and the HCF Program, eliminating the eligibility determination portion from FCC Form 465, which was previously used for eligibility determinations in the Telecom Program. The FCC Form 460 will also be amended to seek information applicable to conditional approvals of eligibility, which will enable health care providers to engage in competitive bidding and request funding (but not receive disbursements) before they become eligible. Additionally, the FCC Form 466 will be amended effective to reflect a streamlined process for calculating urban rates. Finally, the information collection will be updated to allow health care providers to update the time period covered by evergreen contract designations.

The Healthcare Connect Fund Program currently includes FCC Forms 460, 461, 462, and 463. Effective funding year 2024, the Telecom Program includes FCC Forms 465, 466, and 469 and will include the FCC Form 460 starting in funding year 2025. The information on the FCC Form templates is a representative description of the information to be collected via an online portal and is not intended to be a visual representation of what each applicant or service provider will see, the order in which they will see information, or the exact wording or directions used to collect the information. Where possible, information already provided by applicants from previous filing years or that was pre-filed in the system portal will be carried forward and auto-generated into the form to simplify the information collection for applicants.

Federal Communications Commission.

Marlene Dortch,

Secretary, Office of the Secretary.

[FR Doc. 2024–09215 Filed 4–29–24; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL DEPOSIT INSURANCE CORPORATION

Sunshine Act Meetings

TIME AND DATE: 10:00 a.m. on April 25, 2024.

PLACE: The meeting was held in the FDIC Board Room, 550 17th Street NW, Washington, DC, and was webcast to the public.

MATTERS TO BE CONSIDERED: Pursuant to the provisions of the ''Government in the Sunshine Act'' (5 U.S.C. 552b), notice is hereby given that the Federal Deposit Insurance Corporation's Board of Directors met in open session at 10:00 a.m. on Thursday, April 25, 2024, to consider the following matters:

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.

Discussion Agenda: Memorandum re: Deposit Insurance Fund Restoration Plan Semiannual Update.

Memorandum and resolution re: Proposals Related to Change in Bank Control Act.

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 at Washington, DC, on April 25, 2024.

Federal Deposit Insurance Corporation.

James P. Sheesley,

Assistant Executive Secretary.

[FR Doc. 2024–09294 Filed 4–26–24; 11:15 am]

BILLING CODE 6714–01–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 15, 2024.

A. Federal Reserve Bank of Chicago (Colette A. Fried, Assistant Vice President) 230 South LaSalle Street, Chicago, Illinois 60690–1414. Comments can also be sent electronically to *Comments.applications@chi.frb.org:*

1. *Kathryn Paige Duncan, John Robert Duncan, D. Todd Duncan, Clara Summers Stokes Sukovaty, Amelia Stokes, Kathryn Duncan, the Summers*

Stokes Irrevocable Trust, Union Bank & Trust, as trustee, and Clara Summers Stokes Sukovaty, as beneficiary, the Amelia Stokes Irrevocable Trust, Union Bank & Trust, as trustee, and Amelia Stokes, as beneficiary, and a Minor Child's Irrevocable Trust, Union Bank & Trust, as trustee; all of Lincoln, Nebraska; Carol Dianne Thomas and Drew Duncan Thomas, both of Miami, Florida; Brian Sean Thomas, London, United Kingdom; Blake Alan Thomas, Omaha, Nebraska; Ian Duncan Thompson, Los Angeles, California; and Dr. Eric Michael Thompson, Chicago, Illinois; a group acting in concert, to form the Duncan Family Control Group, to retain voting shares of Bank Iowa Corporation, and thereby indirectly retain voting shares of Bank Iowa, both of West Des Moines, Iowa.

B. 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. *Michael Harland Giles, Vancouver, Washington;* to acquire voting shares of Pacific West Bancorp, and thereby indirectly acquire voting shares of Pacific West Bank, both of West Linn, Oregon.

Board of Governors of the Federal Reserve System.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2024–09296 Filed 4–29–24; 8:45 am]

BILLING CODE 6210–01–P

FEDERAL RESERVE SYSTEM

Proposed Agency Information Collection Activities; Comment Request

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Notice, request for comment.

SUMMARY: The Board of Governors of the Federal Reserve System (Board) invites comment on a proposal to extend for three years, with revision, the Application for a Foreign Organization to Acquire a U.S. Bank or Bank Holding Company (FR Y–3F; OMB No. 7100–0119).

DATES: Comments must be submitted on or before July 1, 2024.

ADDRESSES: You may submit comments, identified by FR Y–3F, by any of the following methods:

- *Agency Website: https://www.federalreserve.gov/.* Follow the instructions for submitting comments at *https://www.federalreserve.gov/apps/foia/proposedregs.aspx.*
- *Email: regs.comments@federalreserve.gov.* Include the OMB number or FR number in the subject line of the message.
- *Fax:* (202) 452–3819 or (202) 452–3102.
- *Mail:* Federal Reserve Board of Governors, Attn: Ann E. Misback, Secretary of the Board, Mailstop M–4775, 2001 C St. NW, Washington, DC 20551.

All public comments are available from the Board's website at *https://www.federalreserve.gov/apps/foia/proposedregs.aspx* as submitted, unless modified for technical reasons or to remove personally identifiable information at the commenter's request. Accordingly, comments will not be edited to remove any confidential business information, identifying information, or contact information. Public comments may also be viewed electronically or in paper in Room M–4365A, 2001 C St. NW, Washington, DC 20551, between 9:00 a.m. and 5:00 p.m. on weekdays, except for Federal holidays. For security reasons, the Board requires that visitors make an appointment to inspect comments. You may do so by calling (202) 452–3684. Upon arrival, visitors will be required to present valid government-issued photo identification and to submit to security screening in order to inspect and photocopy comments.

Additionally, commenters may send a copy of their comments to the Office of Management and Budget (OMB) Desk Officer for the Federal Reserve Board, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10235, 725 17th Street NW, Washington, DC 20503, or by fax to (202) 395–6974.

FOR FURTHER INFORMATION CONTACT: Federal Reserve Board Clearance Officer—Nuha Elmaghrabi—Office of the Chief Data Officer, Board of Governors of the Federal Reserve System, *nuha.elmaghrabi@frb.gov,* (202) 452–3884.

SUPPLEMENTARY INFORMATION: On June 15, 1984, OMB delegated to the Board authority under the Paperwork Reduction Act (PRA) to approve and assign OMB control numbers to collections of information conducted or sponsored by the Board. In exercising this delegated authority, the Board is directed to take every reasonable step to solicit comment. In determining whether to approve a collection of information, the Board will consider all comments received from the public and other agencies.

During the comment period for this proposal, a copy of the proposed PRA OMB submission, including the draft reporting form and instructions, supporting statement (which contains more detail about the information collection and burden estimates than this notice), and other documentation, will be made available on the Board's public website at *https://www.federalreserve.gov/apps/reportingforms/home/review* or may be requested from the agency clearance officer, whose name appears above. Final versions of these documents will be made available at *https://www.reginfo.gov/public/do/PRAMain,* if approved.

Request for Comment on Information Collection Proposal

The Board invites public comment on the following information collection, which is being reviewed under authority delegated by the OMB under the PRA. Comments are invited on the following:

a. Whether the proposed collection of information is necessary for the proper performance of the Board's functions, including whether the information has practical utility;

b. The accuracy of the Board's estimate of the burden of the proposed information collection, including the validity of the methodology and assumptions used;

c. Ways to enhance the quality, utility, and clarity of the information to be collected;

d. Ways to minimize the burden of information collection on respondents, including through the use of automated collection techniques or other forms of information technology; and

e. Estimates of capital or startup costs and costs of operation, maintenance, and purchase of services to provide information.

At the end of the comment period, the comments and recommendations received will be analyzed to determine the extent to which the Board should modify the proposal.

Proposal Under OMB Delegated Authority To Extend for Three Years, With Revision, the Following Information Collection

Collection title: Application for a Foreign Organization to Acquire a U.S. Bank or Bank Holding Company.

Collection identifier: FR Y–3F.

OMB control number: 7100–0119.

General description of collection: Under the Bank Holding Company Act of 1956 (BHC Act), any company,

including a company organized under the laws of a foreign country, that seeks to acquire a U.S. bank or bank holding company must receive approval from the Board prior to doing so. The Federal Reserve uses the information collected by the FR Y–3F to determine whether to approve an application for prior approval and, subsequently, to carry out its supervisory responsibilities with respect to the foreign banking organization's operations in the United States.

Proposed revisions: The Board proposes to revise the FR Y–3F to add a question regarding the integration of the target into the applicant; update or add certain citations and references; remove the sample publication from the instructions; and add a clarifying footnote regarding the Interagency Biographical and Financial Reports (IBFRs).

Frequency: Event-generated.

Respondents: Any company organized under the laws of a foreign country that seeks to acquire a U.S. bank or bank holding company.

Total estimated number of respondents: 1.

Estimated average hours per response: 92.

Total estimated change in burden: 0.

Total estimated annual burden hours: 92.[1]

Board of Governors of the Federal Reserve System, April 25, 2024.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2024–09268 Filed 4–29–24; 8:45 am]

BILLING CODE 6210–01–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 30, 2024.

A. Federal Reserve Bank of Boston (Prabal Chakrabarti, Senior Vice President) 600 Atlantic Avenue, Boston, Massachusetts 02210–2204. Comments can also be sent electronically to *BOS.SRC.Applications.Comments@bos.frb.org:*

1. *Hometown Financial Group, MHC, and Hometown Financial Group, Inc., both of Easthampton, Massachusetts;* to acquire North Shore Bancorp, and thereby indirectly acquire North Shore Bank, both of Peabody Massachusetts.

Board of Governors of the Federal Reserve System.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2024–09297 Filed 4–29–24; 8:45 am]

BILLING CODE P

FEDERAL RESERVE SYSTEM

Proposed Agency Information Collection Activities; Comment Request

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Notice, request for comment.

SUMMARY: The Board of Governors of the Federal Reserve System (Board) invites comment on a proposal to extend for three years, with revision, the Bank Holding Company Applications and Notifications (FR Y–3, FR Y–3N, and FR Y–4; OMB No. 7100–0121).

DATES: Comments must be submitted on or before July 1, 2024.

ADDRESSES: You may submit comments, identified by FR Y–3, FR Y–3N, and FR Y–4, by any of the following methods:

- *Agency Website: https://www.federalreserve.gov/.* Follow the instructions for submitting comments at *https://www.federalreserve.gov/apps/foia/proposedregs.aspx.*
- *Email: regs.comments@federalreserve.gov.* Include the OMB number or FR number in the subject line of the message.
- *Fax:* (202) 452–3819 or (202) 452–3102.
- *Mail:* Federal Reserve Board of Governors, Attn: Ann E. Misback, Secretary of the Board, Mailstop M–4775, 2001 C St NW, Washington, DC 20551.

All public comments are available from the Board's website at *https://www.federalreserve.gov/apps/foia/proposedregs.aspx* as submitted, unless modified for technical reasons or to remove personally identifiable information at the commenter's request. Accordingly, comments will not be edited to remove any confidential business information, identifying information, or contact information. Public comments may also be viewed electronically or in paper in Room M–4365A, 2001 C St NW, Washington, DC 20551, between 9:00 a.m. and 5:00 p.m. on weekdays, except for Federal holidays. For security reasons, the Board requires that visitors make an appointment to inspect comments. You may do so by calling (202) 452–3684. Upon arrival, visitors will be required to present valid government-issued photo identification and to submit to security screening in order to inspect and photocopy comments.

Additionally, commenters may send a copy of their comments to the Office of Management and Budget (OMB) Desk Officer for the Federal Reserve Board, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10235, 725 17th Street NW, Washington, DC 20503, or by fax to (202) 395–6974.

FOR FURTHER INFORMATION CONTACT: Federal Reserve Board Clearance Officer—Nuha Elmaghrabi—Office of the Chief Data Officer, Board of Governors of the Federal Reserve System, *nuha.elmaghrabi@frb.gov,* (202) 452–3884.

[1] More detailed information regarding this collection, including more detailed burden estimates, can be found in the OMB Supporting Statement posted at *https://www.federalreserve.gov/apps/reportingforms/home/review.* On the page displayed at the link, you can find the OMB Supporting Statement by referencing the collection identifier, FR Y–3F.

SUPPLEMENTARY INFORMATION: On June 15, 1984, OMB delegated to the Board authority under the Paperwork Reduction Act (PRA) to approve and assign OMB control numbers to collections of information conducted or sponsored by the Board. In exercising this delegated authority, the Board is directed to take every reasonable step to solicit comment. In determining whether to approve a collection of information, the Board will consider all comments received from the public and other agencies.

During the comment period for this proposal, a copy of the proposed PRA OMB submission, including the draft reporting form and instructions, supporting statement (which contains more detail about the information collection and burden estimates than this notice), and other documentation, will be made available on the Board's public website at *https://www.federalreserve.gov/apps/reportingforms/home/review* or may be requested from the agency clearance officer, whose name appears above. Final versions of these documents will be made available at *https://www.reginfo.gov/public/do/PRAMain,* if approved.

Request for Comment on Information Collection Proposals

The Board invites public comment on the following information collections, which are being reviewed under authority delegated by the OMB under the PRA. Comments are invited on the following:

a. Whether the proposed collections of information are necessary for the proper performance of the Board's functions, including whether the information has practical utility;

b. The accuracy of the Board's estimate of the burden of the proposed information collections, including the validity of the methodology and assumptions used;

c. Ways to enhance the quality, utility, and clarity of the information to be collected;

d. Ways to minimize the burden of information collection on respondents, including through the use of automated collection techniques or other forms of information technology; and

e. Estimates of capital or startup costs and costs of operation, maintenance, and purchase of services to provide information.

At the end of the comment period, the comments and recommendations received will be analyzed to determine the extent to which the Board should modify the proposal.

Proposal Under OMB Delegated Authority To Extend for Three Years, With Revision, the Following Information Collections

Collection title: Bank Holding Company Applications and Notifications.

Collection identifier: FR Y–3, FR Y–3N, and FR Y–4.

OMB control number: 7100–0121.

General description of collection: These filings collect information on proposals by Bank Holding Companies (BHCs) involving formations, acquisitions, mergers, and nonbanking activities. The Board requires the submission of these filings for regulatory and supervisory purposes and to allow the Board to fulfill its statutory obligations under the Bank Holding Company Act of 1956 (the BHC Act). The Board uses this information to evaluate each individual transaction with respect to financial and managerial factors, permissibility, competitive effects, financial stability, net public benefits, and impact on the convenience and needs of affected communities.

Proposed revisions: The Board proposes to revise the FR Y–3, FR Y–3N, and FR Y–4 forms and instructions to update or add certain citations and references; delete language that requires an explanation of the assumptions used in financial projections only if the projections deviate from historical performance; remove the sample publication from the instruction; add questions regarding groups acting in concert, individuals who would own 10 percent or more of the applicant, and companies that would own five percent or more of the applicant; add a requirement that applicants provide a breakdown of pro forma equity; add a requirement that applicants identify any management official of the applicant who is also a management official at another depository institution; and add a question regarding the integration of the target into the applicant.

Frequency: Event-generated.

Respondents: BHCs and a company seeking to become a BHC.

Total estimated number of respondents: 335.

Total estimated change in burden: 388.

Total estimated annual burden hours: 7,603.[1]

[1] More detailed information regarding this collection, including more detailed burden estimates, can be found in the OMB Supporting Statement posted at *https://www.federalreserve.gov/apps/reportingforms/home/review.* On the page displayed at the link, you can find the OMB Supporting Statement by referencing the collection identifier, FR Y–3, FR Y–3N, and FR Y–4.

Board of Governors of the Federal Reserve System, April 25, 2024.

Michele Taylor Fennell,

Deputy Associate Secretary of the Board.

[FR Doc. 2024–09274 Filed 4–29–24; 8:45 am]

BILLING CODE 6210–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[CMS–3463–PN]

Medicare Program; Application by the Community Health Accreditation Partner (CHAP) for Continued CMS Approval of Its Home Infusion Therapy (HIT) Accreditation Program

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Notice with request for comment.

SUMMARY: This notice acknowledges the receipt of an application from the Community Health Accreditation Partner (CHAP) for continued approval by the Centers for Medicare & Medicaid Services (CMS) of CHAP's national accrediting organization program for suppliers providing home infusion therapy (HIT) services and that wish to participate in the Medicare or Medicaid programs. The statute requires that within 60 days of receipt of an organization's complete application, CMS will publish a notice that identifies the national accrediting body making the request, describes the nature of the request, and provides at least a 30-day public comment period.

DATES: To be assured consideration, comments must be received at one of the addresses provided below, by May 30, 2024.

ADDRESSES: In commenting, refer to file code CMS–3463–PN.

Comments, including mass comment submissions, must be submitted in one of the following three ways (please choose only one of the ways listed):

1. *Electronically.* You may submit electronic comments on this regulation to *http://www.regulations.gov.* Follow the ''Submit a comment'' instructions.

2. *By regular mail.* You may mail written comments to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–3463–PN, P.O. Box 8016, Baltimore, MD 21244–8010.

Please allow sufficient time for mailed comments to be received before the close of the comment period.

3. *By express or overnight mail.* You may send written comments to the following address ONLY: Centers for Medicare & Medicaid Services, Department of Health and Human Services, Attention: CMS–3463–PN, Mail Stop C4–26–05, 7500 Security Boulevard, Baltimore, MD 21244–1850.

For information on viewing public comments, see the beginning of the **SUPPLEMENTARY INFORMATION** section.

FOR FURTHER INFORMATION CONTACT: Shannon Freeland, (410) 786–4348.

SUPPLEMENTARY INFORMATION:

Inspection of Public Comments: All comments received before the close of the comment period are available for viewing by the public, including any personally identifiable or confidential business information that is included in a comment. We post all comments received before the close of the comment period on the following website as soon as possible after they have been received: *https://www.regulations.gov.* Follow the search instructions on that website to view public comments. We will not post on *Regulations.gov* public comments that make threats to individuals or institutions or suggest that the individual will take actions to harm the individual. We continue to encourage individuals not to submit duplicative comments. We will post acceptable comments from multiple unique commenters even if the content is identical or nearly identical to other comments.

I. Background

Home infusion therapy (HIT) is a treatment option for Medicare beneficiaries with a wide range of acute and chronic conditions. Section 5012 of the 21st Century Cures Act (Pub. L. 114–255, enacted December 13, 2016) added section 1861(iii) to the Social Security Act (the Act), establishing a new Medicare benefit for HIT services. Section 1861(iii)(1) of the Act defines ''home infusion therapy'' as professional services, including nursing services; training and education not otherwise covered under the Durable Medical Equipment (DME) benefit; remote monitoring; and other monitoring services. HIT must be furnished by a qualified HIT supplier and furnished in the individual's home. The individual must:

- Be under the care of an applicable provider (that is, physician, nurse practitioner, or physician assistant); and
- Have a plan of care established and periodically reviewed by a physician in coordination with the furnishing of home infusion drugs under Part B, that prescribes the type, amount, and duration of infusion therapy services that are to be furnished.

Section 1861(iii)(3)(D)(i)(III) of the Act requires that a qualified HIT supplier be accredited by an accrediting organization (AO) designated by the Secretary in accordance with section 1834(u)(5) of the Act. Section 1834(u)(5)(A) of the Act identifies factors for designating AOs and in reviewing and modifying the list of designated AOs. These statutory factors are as follows:

- The ability of the organization to conduct timely reviews of accreditation applications.
- The ability of the organization to take into account the capacities of suppliers located in a rural area (as defined in section 1886(d)(2)(D) of the Act).
- Whether the organization has established reasonable fees to be charged to suppliers applying for accreditation.
- Such other factors as the Secretary determines appropriate.

Section 1834(u)(5)(B) of the Act requires the Secretary to designate AOs to accredit HIT suppliers furnishing HIT no later than January 1, 2021. Section 1861(iii)(3)(D)(i)(III) of the Act requires a ''qualified home infusion therapy supplier'' to be accredited by a CMS-approved AO, pursuant to section 1834(u)(5) of the Act.

On March 1, 2019, we published a solicitation notice entitled, ''Medicare Program; Solicitation of Independent Accrediting Organizations to Participate in the Home Infusion Therapy Supplier Accreditation Program'' (84 FR 7057). This notice informed national AOs that accredit HIT suppliers of an opportunity to submit applications to participate in the HIT supplier accreditation program. We stated that complete applications would be considered for the January 1, 2021 designation deadline if received by February 1, 2020. Regulations for the approval and oversight of AOs for HIT organizations are located at 42 CFR part 488, subpart L. The requirements for HIT suppliers are located at 42 CFR part 486, subpart I.

II. Approval of Deeming Organization

Section 1834(u)(5) of the Act and regulations at 42 CFR 488.1010 require that our findings concerning review and approval of a national accrediting organization's requirements consider, among other factors, the applying accrediting organization's requirements for accreditation; survey procedures; resources for conducting required surveys; capacity to furnish information for use in enforcement activities; monitoring procedures for provider entities found not in compliance with the conditions or requirements; and ability to provide CMS with the necessary data.

Our rules at 42 CFR 488.1020(a) require that we publish, after receipt of an organization's complete application, a notice that identifies the national accrediting body making the request, describes the nature of the request, and provides at least a 30-day public comment period. Pursuant to our rules at 42 CFR 488.1010(d), we have 210 days from the receipt of a complete application to publish notice of approval or denial of the application.

The purpose of this proposed notice is to inform the public of the Community Health Accreditation Partner's (CHAP's) request for CMS' continued recognition of its HIT accreditation program. This notice also solicits public comment on whether CHAP's requirements meet or exceed the Medicare requirements of participation for HIT services.

III. Evaluation of Deeming Authority Request

In the April 27, 2020 **Federal Register**, we published CHAP's initial application for recognition as an accreditation organization for HIT (85 FR 23364). On September 25, 2020, we published notification of their approval as such an organization, effective September 25, 2020 through September 25, 2024 (85 FR 60469). CHAP has since submitted all the necessary materials to enable us to make a determination concerning its request for continued recognition of its HIT accreditation program. This application was determined to be complete on February 28, 2024. Under section 1834(u)(5) of the Act and 42 CFR 488.1010 (Application and re-application procedures for national home infusion therapy accrediting organizations), our review and evaluation of CHAP will be conducted in accordance with, but not necessarily limited to, the following factors:

- The equivalency of CHAP's standards for HIT as compared with CMS' HIT requirements for participation in the Medicare program.
- CHAP's survey process to determine the following:

++ The composition of the survey team, surveyor qualifications, and the ability of the organization to provide continuing surveyor training.

++ The comparability of CHAP's to CMS' standards and processes, including survey frequency, and the ability to investigate and respond

appropriately to complaints against accredited facilities.

++ CHAP's processes and procedures for monitoring a HIT supplier found out of compliance with CHAP's program requirements.

++ CHAP's capacity to report deficiencies to the surveyed facilities and respond to the facility's plan of correction in a timely manner.

++ CHAP's capacity to provide CMS with electronic data and reports necessary for effective assessment and interpretation of the organization's survey process.

++ The adequacy of CHAP's staff and other resources, and its financial viability.

++ CHAP's capacity to adequately fund required surveys.

++ CHAP's policies with respect to whether surveys are announced or unannounced, to ensure that surveys are unannounced.

++ CHAP's agreement to provide CMS with a copy of the most current accreditation survey together with any other information related to the survey as CMS may require (including corrective action plans).

++ CHAP's policies and procedures to avoid conflicts of interest, including the appearance of conflicts of interest, involving individuals who conduct surveys, audits or participate in accreditation decisions.

++ CHAP's agreement or policies for voluntary and involuntary termination of HIT suppliers.

++ CHAP's agreement or policies for voluntary and involuntary termination of the HIT AO program.

IV. Collection of Information Requirements

This document does not impose information collection requirements, that is, reporting, recordkeeping, or third-party disclosure requirements. Consequently, there is no need for review by the Office of Management and Budget under the authority of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

V. Response to Comments

Because of the large number of public comments, we normally receive on **Federal Register** documents, we are not able to acknowledge or respond to them individually. We will consider all comments we receive by the date and time specified in the **DATES** section of this preamble, and, when we proceed with a subsequent document, we will respond to the comments in the preamble to that document.

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. 2024–09176 Filed 4–29–24; 8:45 am]

BILLING CODE 4120–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

[Document Identifiers: CMS–10788]

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 30, 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:* Revision of a currently approved collection; *Title of Information Collection:* Prescription Drug and Health Care Spending; *Use:* On December 27, 2020, the Consolidated Appropriations Act, 2021 (CAA) was signed into law. Section 204 of Title II of Division BB of the CAA added parallel provisions at section 9825 of the Internal Revenue Code (the Code), section 725 of the Employee Retirement Income Security Act (ERISA), and section 2799A–10 of the Public Health Service Act (PHS Act) that require group health plans and health insurance issuers offering group or individual health insurance coverage to annually report to the Department of the Treasury, the Department of Labor (DOL), and the Department of Health and Human Services (HHS) (collectively, ''the Departments'') certain information about prescription drug and health care spending, premiums, and enrollment under the plan or coverage. This information will support the

development of public reports that will be published by the Departments on prescription drug reimbursements for plans and coverage, prescription drug pricing trends, and the role of prescription drug costs in contributing to premium increases or decreases under the plans or coverage. The 2021 interim final rules, ''Prescription Drug and Health Care Spending'' (2021 interim final rules), issued by the Departments and the Office of Personnel Management (OPM) implement the provisions of section 9825 of the Code, section 725 of ERISA, and section 2799A–10 of the PHS Act, as enacted by section 204 of Title II of Division BB of the CAA. OPM joined the Departments in issuing the 2021 interim final rules, requiring Federal Employees Health Benefits (FEHB) carriers to report information about prescription drug and health care spending, premiums, and plan enrollment in the same manner as a group health plan or health insurance issuer offering group or individual health insurance coverage.

The 2023 Prescription Drug Data Collection (RxDC) Reporting Instructions reflect changes for the 2023 reference year and beyond. As a result of removing first-year implementation costs and burdens that were incurred prior to 2024, it is estimated that there will be a decrease in total three-year average annual burden from 1,684,080 to 668,952. *Form Number:* CMS–10788 (OMB Control Number: 0938–1407); *Frequency:* Annually; *Affected Public:* Private Sector; *Number of Respondents:* 356; *Number of Responses:* 356; *Total Annual Hours:* 668,952. (For policy questions regarding this collection contact Christina Whitefield at 202–536–8676.)

William N. Parham, III,

Director, Division of Information Collections and Regulatory Impacts, Office of Strategic Operations and Regulatory Affairs.

[FR Doc. 2024–09314 Filed 4–29–24; 8:45 am]

BILLING CODE P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

Submission for Office of Management and Budget (OMB) Review; Generic Clearance for the Comprehensive Child Welfare Information System (CCWIS) Technical Assistance and Review Process (OMB #: 0970–0568)

AGENCY: Children's Bureau, Administration for Children and Families, U.S. Department of Health and Human Services.

ACTION: Request for public comments.

SUMMARY: The Children's Bureau (CB), Administration for Children and Families (ACF), U.S. Department of Health and Human Services (HHS) is requesting a 3-year extension of the Generic Clearance for the Comprehensive Child Welfare Information System (CCWIS) Technical Assistance (TA) and Review Process, (OMB #0970–0568, expiration 4/30/2024) and all approved information collections under this generic. There are no changes requested to the terms of the umbrella generic or to the currently approved information collections.

DATES: *Comments due within 30 days of publication.* OMB must make a decision about the collection of information between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment is best assured of having its full effect if OMB receives it within 30 days of publication.

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. You can also obtain copies of the proposed collection of information by emailing *infocollection@acf.hhs.gov.* Identify all emailed requests by the title of the information collection.

SUPPLEMENTARY INFORMATION:

Description: The CCWIS Technical Assistance and Review information collection includes two components.

- The CCWIS Assessment Review (CAR) Process.
- TA tools for title IV–E agencies to self-assess their conformity to CCWIS project and design requirements at 45 CFR 1355.52–3.

The CCWIS requirements at 45 CFR 1355.55 require the review, assessment, and inspection of the planning, design, development, installation, operation, and maintenance of each CCWIS project on a continuing basis. The Advance Planning Document (APD) regulations at 45 CFR 95.621 require periodic reviews of state and local agency methods and practices to ensure information systems, including CCWIS, are utilized for purposes consistent with proper and efficient administration.

This request is for an extension with no changes to the umbrella generic and all currently approved information collections, which can be found here: *https://www.reginfo.gov/public/do/PRAICList?ref_nbr=202311-0970-010.*

Respondents: Title IV–E agencies under the Social Security Act.

Annual Burden Estimates

ANNUAL BURDEN—CURRENTLY APPROVED INFORMATION COLLECTIONS

Instrument	Total number of respondents	Total number of responses per respondent (3 years)	Average burden hours per response	Total burden hours	Annual burden hours
CCWIS Self-Assessment—Administration	55	1	10	550	183
CCWIS Self-Assessment—Adoption	55	1	10	550	183
CCWIS Self-Assessment—Case Management	55	1	10	550	183
CCWIS Self-Assessment—Foster Care and Service Provider Management	55	1	10	550	183
CCWIS Self-Assessment—Intake	55	1	10	550	183
CCWIS Self-Assessment—Investigation	55	1	10	550	183
CCWIS Self-Assessment: Child Welfare Contributing Agency (CWCA)	55	1	10	550	183
CCWIS Self-Assessment: Data Exchanges	55	1	10	550	183
CCWIS Self-Assessment: Data Quality	55	1	10	550	183

ANNUAL BURDEN—CURRENTLY APPROVED INFORMATION COLLECTIONS—Continued

Instrument	Total number of respondents	Total number of responses per respondent (3 years)	Average burden hours per response	Total burden hours	Annual burden hours
CCWIS Self-Assessment: Design Requirements	55	1	24	1320	440
CCWIS Self-Assessment: Financial	55	1	10	550	183
CCWIS Self-Assessment: Reporting	55	1	10	550	183
CCWIS Self-Assessment: Security	55	1	10	550	183
CCWIS Self-Assessment: Title IV–E Foster Care Maintenance Eligibility	55	1	10	550	183
CCWIS Self-Assessment: User Experience	55	1	10	550	183
Total Annual Burden for Currently Approved Generics				9020	3,002

ANNUAL BURDEN—POTENTIAL ADDITIONAL INFORMATION COLLECTION REQUESTS

Instrument	Total number of respondents	Total number of responses per respondent (3 years)	Average burden hours per response	Total burden hours	Annual burden hours
Future Tools to be developed	55	1	10	550	183

Authority: 5 U.S.C. 301; 42 U.S.C. 470, 620 *et seq.,* 622(b), 629b(a), 652(b), 654A, 670 *et seq.,* 671(a), 1302, and 1396a(a).

Mary C. Jones,

ACF/OPRE Certifying Officer.

[FR Doc. 2024–09226 Filed 4–29–24; 8:45 am]

BILLING CODE 4184–25–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2024–D–1243]

Safety Testing of Human Allogeneic Cells Expanded for Use in Cell-Based Medical Products; 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 draft document entitled ''Safety Testing of Human Allogeneic Cells Expanded for Use in Cell-Based Medical Products; Draft Guidance for Industry.'' Allogeneic cells of human origin may be expanded in culture to manufacture medical products consisting of live cells, inactivated cells, cell lysates, or other cell-based materials such as cell-derived particles. The draft guidance document provides sponsors of allogeneic cell-based medical products recommendations for determining the appropriate cell safety testing to support an investigational new drug application (IND) or a biologics license application (BLA). Cell safety testing should be based on a risk analysis that considers the expansion potential of the cells, the reagents that are used to expand the cells in culture, and the number of individuals the cell-based medical product is capable of treating.

DATES: Submit either electronic or written comments on the draft guidance by July 29, 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–2024–D–1243 for ''Safety Testing of Human Allogeneic Cells Expanded for Use in Cell-Based Medical Products; Draft Guidance for Industry.'' 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 Office of Communication, Outreach and Development, Center for Biologics Evaluation and Research (CBER), 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 the office in processing your requests. The draft guidance may also be obtained by mail by calling CBER at 1–800–835–4709 or 240–402–8010. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance document.

FOR FURTHER INFORMATION CONTACT: Tami Belouin, 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 draft document entitled ''Safety Testing of Human Allogeneic Cells Expanded for Use in Cell-Based Medical Products; Draft Guidance for Industry.'' Allogeneic cells of human origin may be expanded in culture to manufacture medical products consisting of live cells, inactivated cells, cell lysates, or other cell-based materials such as cell-derived particles. The draft guidance document provides sponsors of allogeneic cell-based medical products recommendations for determining the appropriate cell safety testing to support an IND or a BLA. Cell safety testing should be based on a risk analysis that considers the expansion potential of the cells, the reagents that are used to expand the cells in culture, and the number of individuals the cell-based medical product is capable of treating. This guidance does not address the measurement or analysis of cell characteristics that may be relevant to biological activity.

Viral and microbial contamination is a potential risk for all cell-based medical products, especially when the cells are cultured extensively during manufacturing. Contamination may be present in the source cells, or the cells may become contaminated with adventitious agents during manufacturing. In addition, genomic changes that result in tumorigenic cells can occur during extensive culture.

The purpose of this draft guidance is to provide guidance on safety testing to assist manufacturers in addressing the requirements of 21 CFR 610.18(c)(1) and 312.23(a)(7), and other relevant regulations, as applicable, with respect to human allogeneic cells expanded for use in cell-based medical products. FDA's recommendations for cell safety testing reflect a risk-based approach that takes into consideration both the specific characteristics of the cells and their proposed use.

The recommendations in this draft guidance apply to cultured allogeneic cells, including cell banks, that are sources of the intended constituents of the final drug product, as well as combination products that contain an allogeneic cell or cell-based biologic constituent part in combination with a drug and/or device. The recommendations in this draft guidance also apply to genetically modified allogeneic cells that have been transduced with viral and/or plasmid vectors, and cells that have undergone genome editing. This guidance does not apply to cell substrates that are used during manufacturing of non-cell-based products such as viruses, gene therapy vectors, or recombinant proteins.

The draft guidance, when finalized, is intended to supplement the following two final guidances: ''Chemistry, Manufacturing, and Control (CMC) Information for Human Gene Therapy Investigational New Drug Applications (INDs); Guidance for Industry'' dated January 2020, and ''Guidance for FDA Reviewers and Sponsors: Content and Review of Chemistry, Manufacturing, and Control (CMC) Information for Human Somatic Cell Therapy Investigational New Drug Applications (INDs)'' dated April 2008.

Elsewhere in this issue of the **Federal Register**, FDA is announcing the availability of another human gene therapy final guidance document entitled ''Considerations for the Use of Human-and Animal-Derived Materials and Components in the Manufacture of Cell and Gene Therapy and Tissue-Engineered Medical Products; Draft Guidance for Industry.''

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 ''Safety Testing of Human Allogeneic Cells Expanded for Use in Cell-Based Medical Products.'' 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 draft 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 9 CFR 113.47 and 113.53 have been approved under OMB control number 0579–0013; the collections of information in 21 CFR part 312 have been approved under OMB control number 0910–0014; the collections of information in 21 CFR part 601 have been approved under OMB control number 0910–0338; the collections of information in 21 CFR part 610 have been approved under OMB control number 0910–0139; and the collections of information in 21 CFR part 1271 have

been approved under OMB control number 0910–0543.

III. Electronic Access

Persons with access to the internet may obtain the draft guidance at *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 25, 2024.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2024–09287 Filed 4–29–24; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2024–D–1244]

Considerations for the Use of Human- and Animal-Derived Materials and Components in the Manufacture of Cell and Gene Therapy and Tissue-Engineered Medical Products; 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 draft document entitled ''Considerations for the Use of Human- and Animal-Derived Materials and Components in the Manufacture of Cell and Gene Therapy and Tissue-Engineered Medical Products; Draft Guidance for Industry.'' The draft guidance document provides manufacturers of cellular and gene therapy (CGT) and tissue-engineered medical products (TEMPs) with recommendations regarding assuring the safety, quality, and identity of materials of human and animal origin used in the manufacture of these products. In addition, recommendations are provided regarding the chemistry, manufacturing, and control (CMC) information submitted in an investigational new drug application (IND) relating to the use of human- and animal-derived materials.

DATES: Submit either electronic or written comments on the draft guidance by July 29, 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–2024–D–1244 for ''Considerations for the Use of Human- and Animal-Derived Materials and Components in the Manufacture of Cell and Gene Therapy and Tissue-Engineered Medical Products; Draft Guidance for Industry.'' 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 Office of Communication, Outreach and Development, Center for Biologics Evaluation and Research (CBER), 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 the office in processing your requests. The draft guidance may also be obtained by mail by calling CBER at 1–800–835–4709 or 240–402–8010. See the **SUPPLEMENTARY INFORMATION** section for electronic access to the draft guidance document.

FOR FURTHER INFORMATION CONTACT: Tami Belouin, 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 draft document entitled ''Considerations for the Use of Human- and Animal-Derived Materials and Components in the Manufacture of Cell and Gene Therapy and Tissue-Engineered Medical Products; Draft Guidance for Industry.'' The use of human- and animal-derived materials to manufacture CGT products and TEMPs raises several key issues to consider, including transmission of adventitious agents, material lot-to-lot consistency, and material identity, as well as general material qualification considerations. The draft guidance document provides manufacturers of CGT products and TEMPs with recommendations regarding assuring the safety, quality, and identity of materials of human and animal origin used in the manufacture of these products. In addition, recommendations are provided regarding the CMC information submitted in an IND relating to the use of human- and animal-derived materials.

Human- and animal-derived materials may be used directly during manufacturing of a drug substance and a drug product. In addition, human- and animal-derived materials may be used in the manufacture of reagents or substrates used in manufacturing, such as cell banks, viral stocks, antibodies, and other proteins. Some common examples of human- and animal-derived materials include human or animal blood, antibodies produced in sera from animal hybridoma cells, and cytokines produced in insect cell lines.

Use of human- and animal-derived materials during product manufacturing may increase risks of infectious disease transmission, and raises potential safety concerns, such as the possible introduction of adventitious agents or other impurities into CGT products and TEMPs. Human- and animal-derived materials can also contribute to product variability by affecting the reproducibility of the manufacturing process or the quality of the final product.

The draft guidance, when finalized, is intended to supplement the following two final guidances: ''Chemistry, Manufacturing, and Control (CMC) Information for Human Gene Therapy Investigational New Drug Applications (INDs); Guidance for Industry'' dated January 2020, and ''Guidance for FDA Reviewers and Sponsors: Content and Review of Chemistry, Manufacturing, and Control (CMC) Information for Human Somatic Cell Therapy Investigational New Drug Applications (INDs)'' dated April 2008.

Elsewhere in this issue of the **Federal Register**, FDA is announcing the availability of another human gene therapy final guidance document entitled ''Safety Testing of Human Allogeneic Cells Expanded for Use in Cell-Based Medical Products; Draft Guidance for Industry.''

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 ''Considerations for the Use of Human- and Animal-Derived Materials and Components in the Manufacture of Cell and Gene Therapy and Tissue-Engineered Medical Products.'' 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 21 CFR part 312 pertaining to the submission of investigational new drug applications have been approved under OMB control number 0910–0014. The collections of information in 21 CFR part 211 pertaining to current good manufacturing practice for finished pharmaceuticals have been approved under OMB control number 0910–0139. The collections of information in 21 CFR part 601 pertaining to biologics license applications have been approved under OMB control number 0910–0338. The collections of information in 21 CFR parts 610, 630, and 640 pertaining to current good manufacturing practice for blood and blood components have been approved under OMB control number 0910–0116. The collections of information in 21 CFR part 1271 pertaining to human cells, tissues, and cellular and tissue-based products have been approved under OMB control number 0910–0543. The collections of information in FDA's guidance entitled ''Formal Meetings Between the FDA and Sponsors or Applicants'' have been approved under OMB control number 0910–0001. The collections of information in FDA's guidance entitled, ''PHS Guideline on Infectious Disease Issues in Xenotransplantation'' have been approved under OMB control number 0910–0456.

III. Electronic Access

Persons with access to the internet may obtain the draft guidance at *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 25, 2024.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2024–09286 Filed 4–29–24; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2024–N–1809]

Listening Session: Optimizing the Food and Drug Administration's Use of and Processes for Advisory Committees; Public Meeting; Request for Comments

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice of public meeting; request for comments.

SUMMARY: The Food and Drug Administration (FDA, the Agency, or we) is announcing the following virtual public meeting entitled ''Listening Session: Optimizing FDA's Use of and Processes for Advisory Committees.'' The purpose of the listening session is to solicit feedback on the Agency's use of and processes for its advisory committee system.

DATES: The virtual listening session will be held on June 13, 2024, from 9 a.m. to 4 p.m. Eastern Daylight Time (EDT) or until after the last public commenter has spoken, whichever occurs first. Submit requests to make oral presentations at the listening session by 3 p.m. EDT, May 13, 2024. Electronic or written comments on this listening session must be submitted to the docket by August 13, 2024. See the **SUPPLEMENTARY INFORMATION** section for registration date and information.

ADDRESSES: Additional details, such as registration information, are available at: *https://www.fda.gov/news-events/fda-meetings-conferences-and-workshops/public-meeting-optimizing-fdas-use-*

and-processes-advisory-committees-06132024.

FDA is establishing a public docket for this listening session. You may submit comments as follows. Please note that late, untimely filed comments may not be considered. Electronic comments must be submitted on or before August 13, 2024. The *https://www.regulations.gov* electronic filing system will accept comments until 11:59 p.m. EDT on August 13, 2024. Comments received by mail/hand delivery/courier (for written/paper submissions) will be considered timely if they are postmarked or the delivery service acceptance receipt is on or before that date.

Electronic Submissions

Submit electronic comments in the following way:

- *Federal eRulemaking Portal: https://www.regulations.gov.* Follow the instructions for submitting comments. Comments submitted electronically, including attachments, to *https://www.regulations.gov* will be posted to the docket unchanged. Because your comment will be made public, you are solely responsible for ensuring that your comment does not include any confidential information that you or a third party may not wish to be posted, such as medical information, your or anyone else's Social Security number, or confidential business information, such as a manufacturing process. Please note that if you include your name, contact information, or other information that identifies you in the body of your comments, that information will be posted on *https://www.regulations.gov.*
- If you want to submit a comment with confidential information that you do not wish to be made available to the public, submit the comment as a written/paper submission and in the manner detailed (see ''Written/Paper Submissions'' and ''Instructions'').

Written/Paper Submissions

Submit written/paper submissions as follows:

- *Mail/Hand Delivery/Courier (for written/paper submissions):* Dockets Management Staff (HFA–305), Food and Drug Administration, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852.
- For written/paper comments submitted to the Dockets Management Staff, FDA will post your comment, as well as any attachments, except for information submitted, marked and identified, as confidential, if submitted as detailed in ''Instructions.''

Instructions: All submissions received must include the Docket No. FDA–2024–N–1809 for ''Listening Session: Optimizing FDA's Use of and Processes for Advisory Committees.'' Received comments, those filed in a timely manner (see **ADDRESSES**), will be placed in the docket and, except for those submitted as ''Confidential Submissions,'' publicly viewable at *https://www.regulations.gov* or at the Dockets Management Staff between 9 a.m. and 4 p.m., Monday through Friday, 240–402–7500.

- Confidential Submissions—To submit a comment with confidential information that you do not wish to be made publicly available, submit your comments only as a written/paper submission. You should submit two copies total. One copy will include the information you claim to be confidential with a heading or cover note that states ''THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION.'' The Agency will review this copy, including the claimed confidential information, in its consideration of comments. The second copy, which will have the claimed confidential information redacted/blacked out, will be available for public viewing and posted on *https://www.regulations.gov.* Submit both copies to the Dockets Management Staff. If you do not wish your name and contact information to be made publicly available, you can provide this information on the cover sheet and not in the body of your comments and you must identify this information as ''confidential.'' Any information marked as ''confidential'' will not be disclosed except in accordance with 21 CFR 10.20 and other applicable disclosure law. For more information about FDA's posting of comments to public dockets, see 80 FR 56469, September 18, 2015, or access the information at: *https://www.govinfo.gov/content/pkg/FR-2015-09-18/pdf/2015-23389.pdf.*

Docket: For access to the docket to read background documents or the electronic and written/paper comments received, go to *https://www.regulations.gov* and insert the docket number, found in brackets in the heading of this document, into the ''Search'' box and follow the prompts and/or go to the Dockets Management Staff, 5630 Fishers Lane, Rm. 1061, Rockville, MD 20852, 240–402–7500.

FOR FURTHER INFORMATION CONTACT: Jill Wasserman, Stakeholder Engagement Staff, Office of External Affairs, Office of the Commissioner, Food and Drug Administration, 10903 New Hampshire Ave., Bldg. 32, Rm. 5367, Silver Spring, MD 20993, 240–623–6945, (this is not a toll-free number), email: *ACfeedback@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION:

I. Background

Advisory committees comprised of external advisors support FDA's mission of protecting and promoting the public health by providing us with independent advice on scientific, technical, and policy matters. FDA makes the final decisions on any matters considered by an advisory committee.

Committees are either mandated by statute or established at FDA's discretion. Advisory committees must meet the requirements set forth in the Federal Advisory Committee Act (5 U.S.C. 1001 *et seq.*). General procedures for FDA advisory committees are included in FDA's regulations at 21 CFR part 14.

The products that FDA regulates can impact the daily lives of the American public, and advisory committee are an important part of FDA's regulatory processes. While the Agency hears frequently from certain groups about advisory committees, we are interested in more broadly hearing from all parties interested in the advisory committee process and how advisory committees inform FDA's decisions. We are hosting this virtual public meeting to give an open and transparent platform for feedback on advisory committees.

II. Topics for Comment at the Public Meeting

We have listed the specific topics on which FDA is seeking input below. Input may be provided orally, during the virtual public meeting on June 13, 2024, or via written comments to the docket referenced above. In all cases, FDA encourages respondents to provide the specific rationale and basis for their comments, including any available supporting data and information. Respondents need not address all topics listed. Please identify your answers as responses to a specific topic.

A. Topic 1: Composition of Advisory Committees

1. The membership of a committee, which is set by each committee's charter, typically varies depending on the focus of the committee and topics for particular meetings. In some cases, the composition of a particular committee may be set by law.[1] To the extent there is flexibility in determining the composition of a committee or the expertise present at particular meetings:

a. What are the categories of expertise, viewpoints, or voices that are particularly important for representation on advisory committees?

[1] *E.g.,* 21 U.S.C. 387q (detailing requirements for composition of the Tobacco Products Scientific Advisory Committee).

b. What are the categories of expertise, viewpoints, or voices that may not be relevant given the topic or product type that is the focus of the committee?

2. Are there ways that FDA can better ensure that a variety of diverse perspectives and experiences are incorporated into advisory committee meetings, and if so, how?

3. In some cases, there is a legal requirement to include a consumer or patient representative on advisory committees. In other cases, the charter of an advisory committee may allow for there to be a consumer or patient representative who is a voting member of the committee. Consumers and patients may also participate in the open public hearing or submit written comments to the docket for a particular advisory committee meeting. Are there ways that FDA can better incorporate the consumer or patient voice into advisory committee meetings, and if so, how?

B. Topic 2: Service on an Advisory Committee as a Special Government Employee (SGE)

4. Service on an advisory committee as an SGE gives individuals an opportunity to provide advice and recommendations on decisions that are often critical to protecting public health, but we understand that administrative burdens (*e.g.,* amount of onboarding paperwork and processing time) are sometimes a deterrent to SGE service. FDA is exploring ways to streamline the administrative requirements on SGEs for initial hiring and meeting preparation. While FDA must remain in compliance with federal laws around federal service, how might we mitigate administrative barriers to service for SGEs?

5. How can FDA otherwise improve the experience of advisory committee members?

C. Topic 3: Public Perception and Understanding of Advisory Committees

6. What do you perceive to be the public's awareness and understanding of the role of FDA advisory committees?

7. What steps can FDA take to improve public awareness and understanding of advisory committees and their role in providing advice and recommendations for FDA to consider in its decision-making?

8. How can FDA better communicate with the public about advisory committee meetings?

9. FDA's regulatory decisions are often, but not always, aligned with advisory committee recommendations. What steps can FDA take to clarify for the public that its regulatory decisions take the committee's recommendation into account, but that the committee's recommendations are only one of several factors considered?

10. There appears to be a persistent misconception that advisory committee votes are the final decision of the Agency on the matter considered by the committee. Is there a way that FDA could adjust the processes for discussion and/or voting that would improve public understanding of how FDA receives external advice through the exchange of information at advisory committee meetings, and the ultimate import of the advisory committee's discussion?

III. Participating in the Public Meeting

Registration: To register for the free public meeting, please visit the following website: *https://www.fda.gov/news-events/fda-meetings-conferences-and-workshops/public-meeting-optimizing-fdas-use-and-processes-advisory-committees-06132024.* Non-speaking attendees may register any time before or during the listening session. Individuals who wish to make presentations at the public meeting must register by the deadline described below.

Registration is free and based on space availability, with priority given to early registrants. Persons interested in making an oral presentation at this public meeting must register by 3 p.m. EDT on May 13, 2024. Early registration is recommended. FDA may limit the number of participants from each organization due to technology constraints on the total number of participants. Registrants will receive confirmation when they have been accepted.

Information on requests for special accommodations due to a disability will be provided during registration.

Requests for Oral Presentations: During online registration you may indicate if you wish to present during the listening session and which topic(s) you wish to address. We will do our best to accommodate requests to make public comments. Individuals and organizations with common interests are urged to consolidate or coordinate their presentations and request time for a joint presentation. Following the deadline to register to make an oral presentation, we will determine the amount of time allotted to each presenter (which we expect to be approximately 5 minutes), the approximate time each oral presentation is to begin, and will select and notify participants by June 3, 2024. All requests to make oral presentations must be received by May 13, 2024, at 3 p.m. EDT. If selected for presentation, any presentation materials must be emailed to *ACfeedback@fda.hhs.gov* (see **FOR FURTHER INFORMATION CONTACT**) no later than June 7, 2024. No commercial or promotional material will be permitted to be presented or distributed at the public meeting.

Dated: April 23, 2024.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2024–09014 Filed 4–29–24; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. FDA–2023–N–4066]

Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Food and Drug Administration Recall Regulations

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA, Agency, or we) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995.

DATES: Submit written comments (including recommendations) on the collection of information by May 30, 2024.

ADDRESSES: To ensure that comments on the information collection are received, OMB recommends that written comments be submitted to *https://www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under Review—Open for Public Comments'' or by using the search function. The OMB control number for this information collection is 0910–0249. Also include the FDA docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Domini Bean, Office of Operations, Food and Drug Administration, Three White Flint North, 10A–12M, 11601 Landsdown St., North Bethesda, MD 20852, 301–796–5733, *PRAStaff@fda.hhs.gov.*

SUPPLEMENTARY INFORMATION: In compliance with 44 U.S.C. 3507, FDA has submitted the following proposed

collection of information to OMB for review and clearance.

FDA Recall Regulations—21 CFR Part 7

OMB Control Number 0910–0249—Extension

This information collection helps support implementation of section 701 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 371) pertaining to product recalls, and regulations in 21 CFR part 7, subpart C (21 CFR 7.40 through 7.59) promulgated to clarify and explain associated practices and procedures by FDA. Sections 7.49, 7.50, and 7.59 (21 CFR 7.49, 7.50, and 7.59) of the regulations apply specifically to product recalls, which may be undertaken voluntarily and at any time by manufacturers and distributors, or at the request of the Agency.

Recalls are terminated when all reasonable efforts have been made to remove or correct the product in accordance with the recall strategy. The regulations also provide for corrective actions to be taken regarding violative products and establish specific guidelines that enable us to monitor and assess the effectiveness of a firm's efforts in this regard. The provisions include reporting to FDA on the initiation and termination of a recall, as well as submitting recall status reports and making required communication disclosures. The regulations also permit FDA to evaluate whether a recall has been completed in a manner which assures that unreasonable risk of substantial harm to the public health has been eliminated and that violative products have been corrected or removed from the market. Specific guidance regarding recalls is set forth in § 7.59, although product-specific guidance documents may also be developed to assist respondents to the information collection. Agency guidance documents are issued in accordance with our good guidance regulations in 21 CFR 10.115, which provide for public comment at any time.

Consistent with § 7.50, all recalls monitored by FDA are included in an ''Enforcement Report'' once they are classified and may be listed prior to classification when FDA determines the firm's removal or correction of a marketed product(s) meets the definition of a recall. Recall data in the Enforcement Report can be accessed through the weekly report publication, the quick and advanced search functionalities, and an Application Programming Interface (API). Instructions for navigating the report, accessing and using the API, and definitions of the report contents are found at *https://www.fda.gov/safety/enforcement-reports/enforcement-report-information-and-definitions.*

In the **Federal Register** of October 13, 2023, (88 FR 70995), we published a 60-day notice requesting public comment on the proposed collection of information. One comment was received offering general support for the information collection. The comment also suggested that reporting might be enhanced through the use of automated technology and that FDA monitor and utilize such technology to track improvement. Finally, the comment questioned the rationale for our estimate of the time necessary for preparing and submitting recall reports. Based on experience with compiling and submitting a report along with its attachments, the commenter communicated that less time was likely needed.

We appreciate this feedback and will continue to monitor burden associated with product recall activity. We also continue to look for ways to enhance our IT systems as our limited resources allow and public health priorities require. With regard to our current estimates, we note that our figures reflect what we believe to be the average burden incurred among more than 2,000 respondents, and in conjunction with more than 30,000 reports, annually, and therefore we have made no adjustment in our assumptions at this time.

We estimate the burden of the information collection as follows:

TABLE 1—ESTIMATED ANNUAL REPORTING BURDEN [1]

Activity; 21 CFR section	Number of respondents	Number of responses per respondent	Total annual responses	Average burden per response	Total hours
Firm initiated recall; § 7.46	2,309	1	2,309	25	57,725
Termination of recall; § 7.55	2,128	1	2,128	10	21,280
Recall status reports; § 7.53	2,309	13	30,017	10	300,170
Total			34,454		379,175

[1] There are no capital or operating and maintenance costs associated with this collection.

A review of Agency data shows that 6,928 recall events were conducted during fiscal years 2020 through 2022, for an average of 2,309 recalls annually. We assume an average of 25 hours is needed to submit the requisite notification to FDA, for a total annual burden of 57,725 hours. Similarly, during the same period, 6,385 recalls were terminated, for an average of 2,128 recall terminations annually, and we assume an average of 10 hours is needed for the corresponding information collection activity. To determine burden associated with recall status reports, we multiplied the average number of annual respondents (2,309) by the average number of status reports per recall (13), producing the number annual submissions (30,017), which, assuming 10 hours per response, results in a burden of 300,170 hours annually.

TABLE 2—ESTIMATED THIRD-PARTY DISCLOSURE BURDEN [1]

Activity; 21 CFR section	Number of respondents	Number of disclosures per respondent	Total annual disclosures	Average burden per disclosure	Total hours
Recall communications; § 7.49	2,309	1,108	2,559,200	0.05 (3 minutes)	127,960

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

To determine burden associated with recall communication disclosures described in § 7.49, we calculated an average of 1,108 disclosures per recall and attribute 3 minutes for each disclosure, resulting in 127,960 burden hours annually. We provide no estimate for recordkeeping in § 7.59 as these activities are provided as guidance only, and we regard them to be usual and customary to these respondents.

Cumulatively, these adjustments reflect an overall decrease in our estimate, which we attribute to a corresponding decrease in FDA-regulated product recalls since our last evaluation of the information collection.

Dated: April 24, 2024.

Lauren K. Roth,

Associate Commissioner for Policy.

[FR Doc. 2024–09177 Filed 4–29–24; 8:45 am]

BILLING CODE 4164–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Deafness and Other Communication Disorders; Notice of Closed Meetings

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Deafness and Other Communication Disorders Special Emphasis Panel; Research Opportunities for New Investigators to Promote Workforce Diversity.

Date: May 23, 2024.

Time: 1:00 p.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Virtual Meeting).

Contact Person: Andrea B. Kelly, Ph.D., Scientific Review Officer, National Institute on Deafness and Other Communication Disorders, National Institutes of Health, 6001 Executive Boulevard, Room 8351, Bethesda, MD 20892, (301) 451–6339, *kellya2@nih.gov.*

Name of Committee: National Institute on Deafness and Other Communication Disorders Special Emphasis Panel; U01 Cooperative Agreement for Clinical Trials in Hearing Disorders.

Date: May 28, 2024.

Time: 11:30 a.m. to 1:30 p.m.

Agenda: To review and evaluate cooperative agreement applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Virtual Meeting).

Contact Person: Sonia Elena Nanescu, Ph.D., Scientific Review Officer, Division of Extramural Activities, NIDCD, NIH, 6001 Executive Blvd., Suite 8300, Bethesda, MD 20892, (301) 496–8683, *sonia.nanescu@nih.gov.*

Name of Committee: National Institute on Deafness and Other Communication Disorders Special Emphasis Panel; R25 Education Grant Review.

Date: May 29, 2024.

Time: 1:00 p.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Virtual Meeting).

Contact Person: Andrea B. Kelly, Ph.D., Scientific Review Officer, National Institute on Deafness and Other Communication Disorders, National Institutes of Health, 6001 Executive Boulevard, Room 8351, Bethesda, MD 20892, (301) 451–6339, *kellya2@nih.gov.*

Name of Committee: National Institute on Deafness and Other Communication Disorders Special Emphasis Panel; NIDCD Cooperative Agreement for Clinical Trials in Communication Disorders.

Date: May 31, 2024.

Time: 11:30 a.m. to 1:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Virtual Meeting).

Contact Person: Sonia Elena Nanescu, Ph.D., Scientific Review Officer, Division of Extramural Activities, NIDCD, NIH, 6001 Executive Blvd., Suite 8300, Bethesda, MD 20892, (301) 496–8683, *sonia.nanescu@nih.gov.*

Name of Committee: National Institute on Deafness and Other Communication Disorders Special Emphasis Panel; Inner Ear Imaging RFA.

Date: June 6, 2024.

Time: 1:30 p.m. to 3:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Virtual Meeting).

Contact Person: Kausik Ray, Ph.D., Scientific Review Officer, National Institute on Deafness and Other Communication Disorders, National Institutes of Health, 6001 Executive Blvd., Rockville, MD 20852, 301–402–3587, *rayk@nidcd.nih.gov.*

Name of Committee: National Institute on Deafness and Other Communication Disorders Special Emphasis Panel; Hearing and Balance Fellowships Review.

Date: June 12, 2024.

Time: 10:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Virtual Meeting).

Contact Person: Kausik Ray, Ph.D., Scientific Review Officer, National Institute on Deafness and Other Communication Disorders, National Institutes of Health, 6001 Executive Blvd., Rockville, MD 20852, 301–402–3587, *rayk@nidcd.nih.gov.*

Name of Committee: Communication Disorders Review Committee.

Date: June 13–14, 2024.

Time: 8:00 a.m. to 5:00 p.m.

Agenda: To review and evaluate grant applications.

Place: Hyatt Regency, Bethesda, One Bethesda Metro Center, Bethesda, MD 20814 (In-Person and Virtual).

Contact Person: Katherine Shim, Ph.D., Scientific Review Officer, Division of Extramural Activities, NIDCD, NIH, 6001 Executive Blvd., Bethesda, MD 20892, 301–496–8683, *shimk@nidcd.nih.gov.*

Name of Committee: National Institute on Deafness and Other Communication Disorders Special Emphasis Panel; Chemosensory Fellowship Review.

Date: June 17, 2024.

Time: 1:00 p.m. to 3:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Virtual Meeting).

Contact Person: Andrea B. Kelly, Ph.D., Scientific Review Officer, National Institute on Deafness and Other Communication Disorders, National Institutes of Health, 6001 Executive Boulevard, Room 8351, Bethesda, MD 20892, (301) 451–6339, *kellya2@nih.gov.*

Name of Committee: National Institute on Deafness and Other Communication Disorders Special Emphasis Panel; Voice, Speech, and Language Fellowship Review.

Date: June 18, 2024.

Time: 12:00 p.m. to 4:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Virtual Meeting).

Contact Person: Sonia Elena Nanescu, Ph.D., Scientific Review Officer, Division of Extramural Activities, NIDCD, NIH, 6001 Executive Blvd., Suite 8300, Bethesda, MD 20892, (301) 496–8683, *sonia.nanescu@nih.gov.*

Name of Committee: National Institute on Deafness and Other Communication Disorders Special Emphasis Panel; NIDCD Clinical Research Center Grant (P50) Review.

Date: June 26, 2024.

Time: 12:00 p.m. to 3:30 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 (Virtual Meeting).

Contact Person: Andrea B. Kelly, Ph.D., Scientific Review Officer, National Institute on Deafness and Other Communication Disorders, National Institutes of Health, 6001 Executive Boulevard, Room 8351, Bethesda, MD 20892, (301) 451–6339, *kellya2@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.173, Biological Research Related to Deafness and Communicative Disorders, National Institutes of Health, HHS)

Dated: April 24, 2024.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024–09180 Filed 4–29–24; 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; NIA IMPACT Collaboratory.

Date: June 7, 2024.

Time: 12:00 p.m. to 3:00 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: Sandhya Sanghi, Ph.D., Scientific Review Officer, National Institutes of Health,National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue (2N230), NIA/SRB, Bethesda, MD 20892, (301) 496–2879, *sandhya.sanghi@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: April 25, 2024.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024–09261 Filed 4–29–24; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Allergy and Infectious Diseases; Notice of Closed Meeting

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Allergy, Immunology, and Transplantation Research Committee.

Date: June 20–21, 2024.

Time: 10:00 a.m. to 6:00 p.m.

Agenda: To review and evaluate grant applications.

Place: National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3G51, Rockville, MD 20892 (Virtual).

Contact Person: Thomas F. Conway, Ph.D., Scientific Review Officer, Scientific Review Program, Division of Extramural Activities, National Institute of Allergy and Infectious Diseases, National Institutes of Health, 5601 Fishers Lane, Room 3G51, Rockville, MD 20892, 240–507–9685, *thomas.conway@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.855, Allergy, Immunology, and Transplantation Research; 93.856, Microbiology and Infectious Diseases Research, National Institutes of Health, HHS)

Dated: April 25, 2024.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024–09302 Filed 4–29–24; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Drug Abuse; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the National Advisory Council on Drug Abuse, May 07, 2024, 10:30 a.m. to May 07, 2024, 05:00 p.m., National Institutes of Health, Neuroscience Center, 6001 Executive Boulevard, Rockville, MD 20852 which was published in the **Federal Register** on March 28, 2024, FR Doc. 2024–06612, 89 FR 21526.

This notice is being amended to change the open session start and end time from 12:45 p.m.–05:00 p.m. to 01:00 p.m.–4:45 p.m. The meeting date, closed session time, and location will stay the same. The meeting is partially closed to the public.

Dated: April 25, 2024.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024–09260 Filed 4–29–24; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Office of the Secretary, Muscular Dystrophy Coordinating Committee Call for Committee Membership Nominations

AGENCY: National Institutes of Health, HHS.

ACTION: Notice.

SUMMARY: The Office of the Secretary of the Department of Health and Human Services (HHS) is seeking nominations for one individual to serve as a non-Federal public member on the Muscular Dystrophy Coordinating Committee.

DATES: Nominations are due by 5:00 p.m. ET on May 31, 2024.

ADDRESSES: Nominations must be sent to Glen Nuckolls, Ph.D., by email to *nuckollg@ninds.nih.gov.*

FOR FURTHER INFORMATION CONTACT: Glen Nuckolls, Ph.D., by email to *nuckollg@ninds.nih.gov* or (301) 496–5745.

SUPPLEMENTARY INFORMATION: The Muscular Dystrophy Coordinating Committee (MDCC) is a Federal advisory committee established in accordance with the Muscular Dystrophy Community Assistance, Research, and Education Amendments of 2001 (MD–CARE Act; Pub. L. 107–84). The MD–CARE Act was reauthorized in 2008 by Public Law 110–361, and again in 2014 by Public Law 113–166. The MD–CARE Act specifies that the committee membership be composed of ⅔ governmental agency representatives and ⅓ public members. We are seeking nominations for one non-Federal public member at this time, due to turnover of committee membership. Nominations will be accepted until 5:00 p.m. ET on May 31, 2024.

Who is Eligible: Nominations are encouraged for new or reappointment of non-Federal public members who can provide the public and/or patient perspectives to discussions of issues considered by the Committee. Self-nominations and nominations of other individuals are both permitted. Only one nomination per individual is required. Multiple nominations for the same individual will not increase likelihood of selection. Non-Federal public members may be selected from the pool of submitted nominations or other sources as needed to meet statutory requirements and to form a balanced committee that represents the diversity within the muscular dystrophy communities. Nominations are especially encouraged from leaders or representatives of muscular dystrophy research, advocacy, or service organizations, as well as individuals with muscular dystrophy or their parents or guardians. In accordance with White House Office of Management and Budget guidelines (FR Doc. 2014–19140), federally-registered lobbyists are not eligible.

Committee Composition: The Department strives to ensure that the membership of HHS Federal advisory committees is fairly balanced in terms of points of view represented and the committee's function. Every effort is made to ensure that the views of all genders, all ethnic and racial groups, and people with disabilities are represented on HHS Federal advisory committees and, therefore, the Department encourages nominations of qualified candidates from these groups. The Department also encourages geographic diversity in the composition of the Committee. Appointment to this Committee shall be made without discrimination on the basis of age, race, ethnicity, gender, sexual orientation, disability, and cultural, religious, or socioeconomic status. Requests for reasonable accommodation to enable participation on the Committee should be indicated in the nomination submission.

Member Terms: Non-Federal public members of the Committee serve for a term of three years and may serve for an unlimited number of terms if reappointed. Members may serve after the expiration of their terms, until their successors have taken office.

Meetings and Travel: As specified by Public Law 113–166, the MDCC ''shall meet no fewer than two times per calendar year.'' Travel expenses are provided for non-Federal public Committee members to facilitate attendance at in-person meetings. Members are expected to make every effort to attend all full committee meetings, twice per year, either in person or via remote access. Participation in relevant subcommittee, working and planning group meetings, and workshops, is also encouraged.

Submission Instructions and Deadline: Nominations are due by 5:00 p.m. ET on May 31, 2024, and should be sent to Glen Nuckolls, Ph.D., by email to *nuckollg@ninds.nih.gov.* Nominations must include contact information for the nominee, a current curriculum vitae or resume of the nominee, and a paragraph describing the qualifications of the person to represent some portion(s) of the muscular dystrophy research, advocacy, and/or patient care communities.

More information about the MDCC is available at *https://mdcc.nih.gov/.*

Dated: April 24, 2024.

Walter J. Koroshetz,

Director, National Institute of Neurological Disorders and Stroke, National Institutes of Health.

[FR Doc. 2024–09303 Filed 4–29–24; 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 Meetings

Pursuant to section 1009 of the Federal Advisory Committee Act, as amended, notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Aging Special Emphasis Panel; Dementia Caregiver Support Intervention.

Date: May 24, 2024.

Time: 10:00 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: Sandhya Sanghi, Ph.D., Scientific Review Officer, National Institutes of Health, National Institute on Aging, Gateway Building, 7201 Wisconsin Avenue (2N230), NIA/SRB, Bethesda, MD 20892, (301) 496–2879, *sandhya.sanghi@nih.gov.*

Name of Committee: National Institute on Aging Special Emphasis Panel; NIA multisite clinical trials.

Date: May 31, 2024.

Time: 9:30 a.m. to 11:00 a.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, National Institutes of Health, National Institute on Aging, Gateway Building, 7201 Wisconsin ROOM 2C218, Bethesda, MD 20892, 301–496–9374, *grimaldim2@mail.nih.gov.*

Name of Committee: National Institute on Aging Special Emphasis Panel; Validation of Analytical and Clinical Biomarkers for ADRD.

Date: June 20, 2024.

Time: 12:00 p.m. to 4:00 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: Gianina Ramona Dumitrescu, MPH, Ph.D., Scientific Review Officer, National Institutes of Health, National Institute on Aging, Gateway Building, 7201 Wisconsin ROOM 2C218, Bethesda, MD 20892, 301–827–4342, *ramona.dumitrescu@nih.gov.*

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: April 24, 2024.

Miguelina Perez,

Program Analyst, Office of Federal Advisory Committee Policy.

[FR Doc. 2024–09179 Filed 4–29–24; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

[OMB Control Number 1651–0123]

Agency Information Collection Activities; Revision; Regulations Relating to Copyrights and Trademarks

AGENCY: U.S. Customs and Border Protection (CBP), Department of Homeland Security.

ACTION: 30-Day notice and request for comments.

SUMMARY: The Department of Homeland Security, U.S. Customs and Border Protection (CBP) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). The information collection is published in

the **Federal Register** to obtain comments from the public and affected agencies.

DATES: Comments are encouraged and must be submitted (no later than May 30, 2024) to be assured of consideration.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Please submit written comments and/or suggestions in English. Find this particular information collection by selecting ''Currently under Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Requests for additional PRA information should be directed to Seth Renkema, Chief, Economic Impact Analysis Branch, U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, 90 K Street NE, 10th Floor, Washington, DC 20229–1177, Telephone number 202–325–0056 or via email *CBP_PRA@cbp.dhs.gov.* Please note that the contact information provided here is solely for questions regarding this notice. Individuals seeking information about other CBP programs should contact the CBP National Customer Service Center at 877–227–5511, (TTY) 1–800–877–8339, or CBP website at *https://www.cbp.gov/.*

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on the proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This proposed information collection was previously published in the **Federal Register** (89 FR 14672) on February 28, 2024, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. This process is conducted in accordance with 5 CFR 1320.8. Written comments and suggestions from the public and affected agencies should address one or more of the following four points: (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 the validity of the methodology and assumptions used; (3) suggestions to enhance the quality, utility, and clarity of the information to be collected; and (4) suggestions 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, *e.g.,* permitting electronic submission of responses. The comments that are submitted will be summarized and included in the request for approval. All comments will become a matter of public record.

Overview of This Information Collection

Title: Regulations Relating to Copyrights and Trademarks.

OMB Number: 1651–0123.

Form Number: N/A.

Current Actions: Revision.

Type of Review: Revision.

Affected Public: Businesses.

Abstract: Title 19 of the United States Code section 1526(e) prohibits the importation of articles that bear a mark that is a counterfeit of a trademark that has been registered with the United States Patent and Trademark Office (USPTO) and subsequently recorded with U.S. Customs and Border Protection (CBP) through the e-Recordation Program. *https://iprr.cbp.gov/s/.* Pursuant to 15 U.S.C. 1124, the importation of articles that bear a mark that infringes a trademark or trade name that has been recorded with CBP is restricted pursuant to 19 U.S.C. 1595a(c)(2)(C). Likewise, under 17 U.S.C. 602 and 17 U.S.C. 603, the importation of articles that constitute a piratical copy of a registered copyrighted work that has subsequently been recorded with CBP is also prohibited. Both 15 U.S.C. 1124 and 17 U.S.C. 602 authorize the Secretary of the Treasury to prescribe by regulation the recordation of trademarks, trade names and copyrights with CBP. Additional rulemaking authority in this regard is conferred by CBP's general rulemaking authority as found in 19 U.S.C. 1624.

CBP officers enforce recorded trademarks, trade names and copyrights at all U.S. Ports of Entry. The information that respondents must submit in order to seek the assistance of CBP to protect against infringing imports is specified for trademarks under 19 CFR 133.2 and 133.3, and the information to be submitted for copyrights is specified under 19 CFR 133.32 and 133.33. Trademark, trade name, and copyright owners seeking border enforcement of their intellectual property rights provide information to CBP beyond that which they submitted to either the U.S. Patent and Trademark Office or the U.S. Copyright Office to obtain their registration. This revision adds the new e-Recordation online application, located at *https://iprr.cbp.gov/.*

E-Recordation applicants may provide as much additional information as they would like that would aid CBP in authenticating their genuine merchandise and distinguishing it from non-genuine merchandise, such as a Product Identification or Authentication Guides, lists of licensees and authorized manufacturers, and Applicants can supplement their application with additional information at any time by emailing the e-Recordation team at *IPRRQuestions@cbp.dhs.gov.* All information provided to CBP is housed in a secure database that can be viewed by CBP and Homeland Security Investigations personnel with a need to know. Limited information regarding the recorded trademark, trade name or copyright is published online to inform the public of which registrations are receiving border enforcement. *https://iprs.cbp.gov/s/.*

On December 15, 2017, CBP published a final rule in the **Federal Register** (82 FR 59511) regarding Donations of Technology and Related Support Services to Enforce Intellectual Property Rights. The final rule added 19 CFR 133.61 in a Subpart H to the CBP regulations which authorizes CBP to accept donations of hardware, software, equipment, and similar technologies, as well as related support services and training, from private sector entities, for the purpose of assisting CBP in enforcing intellectual property rights (IPR). A donation offer must be submitted to CBP either via email, to *dap@cbp.dhs.gov,* or mailed to the attention of the Executive Assistant Commissioner, Office of Field Operations, or his/her designee.

The donation offer must describe the proposed donation in sufficient detail to enable CBP to determine its compatibility with existing CBP technologies, networks, and facilities (*e.g.* operating system or similar requirements, power supply requirements, item size and weight, *etc.*). The donation offer must also include information pertaining to the donation's scope, purpose, expected benefits, intended use, costs, and attached conditions, as applicable, that is sufficient to enable CBP to evaluate the donation and make a determination as to whether to accept it. CBP will notify the donor, in writing, if additional information is requested or if CBP has determined that it will not accept the donation. If CBP accepts a donation, CBP will enter into a signed, written agreement with an authorized representative of the donor. The agreement must contain all applicable terms and conditions of the donation.

The respondents to this information collection are members of the trade community who are familiar with CBP regulations.

Type of Information Collection: IPR Recordation Application.

Estimated Number of Respondents: 2,000.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 2,000.

Estimated Time per Response: 1 hours.

Estimated Total Annual Burden Hours: 2,000.

Type of Information Collection: IPR Donations of Authentication Technology.

Estimated Number of Respondents: 10.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 10.

Estimated Time per Response: 20 hours.

Estimated Total Annual Burden Hours: 200.

Type of Information Collection: Training Requests.

Estimated Number of Respondents: 20.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 20.

Estimated Time per Response: 2 hours.

Estimated Total Annual Burden Hours: 40.

Type of Information Collection:

Estimated Number of Respondents:

Estimated Number of Annual Responses per Respondent:

Estimated Number of Total Annual Responses:

Estimated Time per Response:

Estimated Total Annual Burden Hours:

Dated: April 25, 2024.

Seth D. Renkema,

Branch Chief, Economic Impact Analysis Branch, U.S. Customs and Border Protection.

[FR Doc. 2024–09263 Filed 4–29–24; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

[OMB Control Number 1651–0111]

Agency Information Collection Activities; Revision; Arrival and Departure Record and Electronic System for Travel Authorization (ESTA)

AGENCY: U.S. Customs and Border Protection (CBP), Department of Homeland Security.

ACTION: 30-Day notice and request for comments.

SUMMARY: The Department of Homeland Security, U.S. Customs and Border Protection (CBP) will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). The information collection is published in the **Federal Register** to obtain comments from the public and affected agencies.

DATES: Comments are encouraged and must be submitted (no later than May 30, 2024) to be assured of consideration.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Please submit written comments and/or suggestions in English. Find this particular information collection by selecting ''Currently under Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Requests for additional PRA information should be directed to Seth Renkema, Chief, Economic Impact Analysis Branch, U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, 90 K Street NE, 10th Floor, Washington, DC 20229–1177, Telephone number 202–325–0056 or via email *CBP_PRA@cbp.dhs.gov.* Please note that the contact information provided here is solely for questions regarding this notice. Individuals seeking information about other CBP programs should contact the CBP National Customer Service Center at 877–227–5511, (TTY) 1–800–877–8339, or CBP website at *https://www.cbp.gov/.*

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on the proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This proposed information collection was previously published in the **Federal Register** (89 FR 14083) on February 26, 2024, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. This process is conducted in accordance with 5 CFR 1320.8. Written comments and suggestions from the public and affected agencies should address one or more of the following four points: (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 the validity of the methodology and assumptions used; (3) suggestions to enhance the quality, utility, and clarity of the information to be collected; and (4) suggestions 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, *e.g.,* permitting electronic submission of responses. The comments that are submitted will be summarized and included in the request for approval. All comments will become a matter of public record.

Overview of This Information Collection

Title: Arrival and Departure Record (I–94/I–94W) and Electronic System for Travel Authorization (ESTA).

OMB Number: 1651–0111.

Form Number: I–94, I–94W.

Current Actions: Revision.

Type of Review: Revision.

Affected Public: Individuals.

Abstract: CBP is implementing a new capability within CBP One™ to allow nonimmigrants who are subject to Form I–94 (''I–94'') requirements, and who are departing the United States, to voluntarily provide biographic data, facial images, and geolocation to provide evidence of that departure. This collection is a part of CBP's critical efforts in fulfilling DHS's mandate to collect biometric information from departing nonimmigrants and CBP's plans to fully automate I–94 information collection. This capability will close the information gap on nonimmigrant entries and exits by making it easier for nonimmigrants subject to I–94 requirements to report their exit to CBP after their departure from the United States. It will also create a biometrically confirmed, and thereby more accurate, exit record for such nonimmigrants leaving the United States.

Certain nonimmigrants subject to I–94 requirements may voluntarily submit their facial images using the CBP One™ mobile application (the app) in order to report their exit from the United States.

Nonimmigrants may use the app to voluntarily submit their biographic information from their passports, or other traveler documents after they have exited the United States.

Nonimmigrants will then use the app to take a ''selfie'' picture. CBP will utilize geolocation services to confirm that the nonimmigrant is outside the United States as well as run ''liveness detection'' software to determine that the selfie photo is a live photo, as opposed to a previously uploaded photo. The app will then compare the live photo to facial images for that person already retained by CBP to confirm the exit biometrically.

CBP will utilize this information to help reconcile a nonimmigrant's exit with that person's last arrival. The report of exit will be recorded as a biometrically confirmed departure in the Arrival and Departure Information System (ADIS) maintained by CBP. Nonimmigrants may utilize this information as proof of departure, which is most relevant in the land border environment, but may be utilized for departures via air and sea if desired.

As it pertains to the land environment, there is no requirement for nonimmigrants leaving the United States to report their departure to CBP. However, as described further below, CBP encourages nonimmigrants to report their departure to CBP when they exit, so that CBP can record their exit from the United States.

Although CBP routinely collects biometric data from nonimmigrants entering the United States, there currently is no comprehensive system in place to collect biometrics from nonimmigrants departing the country. Collecting biometrics at both arrival and departure will thus enable CBP and DHS to know with better accuracy whether nonimmigrants are departing the country when they are required to depart. Further, collecting biometric data will help to reduce visa or travel document fraud and improve CBP's ability to identify criminals and known or suspected terrorists. CBP has been testing various options to collect biometrics at departure in the land and air environments since 2004.

At the same time, CBP is also now working to fully automate all I–94 processes. Currently CBP issues electronic I–94s to most nonimmigrants entering the United States at land border ports of entry.

Currently CBP does not routinely staff exit lanes at land border ports of entry, nor does CBP possess a single process for nonimmigrants subject to I–94 requirements to voluntarily report their departure. Nonimmigrants can currently report their departure by any one of the following means: (1) stopping at a land border port of entry and presenting a printed copy of their electronic I–94 to a CBP officer; (2) stopping at a land border port of entry and placing a printed copy of their electronic I–94 in a drop box provided by the port where available; (3) if exiting by land on the northern U.S. border, by turning in a paper copy of their electronic I–94 to the Canadian Border Services Agency (CBSA) when entering Canada (CBSA will then return the form to CBP); or (4) mailing a copy of their electronic I–94 and other proof of departure to CBP.

The current options are burdensome and, in many cases, impractical or inconvenient due to the location and design of the ports. They also lead to haphazard record keeping and inaccurate data collection with respect to the nonimmigrants leaving the country. Most land border ports of entry provide limited access to the port for vehicles exiting the United States and have minimal parking available to the public. For this reason, most nonimmigrants do not report their departure when exiting at land border ports of entry. In those cases, CBP has no way to confirm that a nonimmigrant has exited the United States at the time of departure. CBP often discovers that a nonimmigrant has previously left the United States at a later date, when that same nonimmigrants attempts to re-enter the United States. Having proof of an exit via the CBP One™ app would provide nonimmigrants some information for CBP officers to consider in the event the officer is unsure whether a nonimmigrant complied with the I–94 requirements provided upon their previous entry.

In additonal, CBP intends to update the ESTA application website to require applicants to provide a photograph of their face, or ''selfie'', in addition to the photo of the passport biographical page. These photos would be used to better ensure that the applicant is the rightful possessor of the document being used to obtain an ESTA authorization.

Currently, applicants are allowed to have a third party apply for ESTA on their behalf. While this update would not remove that option, third parties, such as travel agents or family members, would be required to provide a photograph of the ESTA applicant.

The ESTA Mobile application currently requires applicants to take a live photograph of their face, which is compared to the passport photo collected during the ESTA Mobile application process. This change will better align the application processes and requirements of ESTA website and ESTA Mobile applicants.

Type of Information Collection: Paper I–94.

Estimated Number of Respondents: 1,782,564.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 1,782,564.

Estimated Time per Response: 8 minutes.

Estimated Total Annual Burden Hours: 237,675.

Type of Information Collection: I–94 Website.

Estimated Number of Respondents: 91,411.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 91,411.

Estimated Time per Response: 4 minutes.

Estimated Total Annual Burden Hours: 6,094.

Type of Information Collection: ESTA Mobile Application.

Estimated Number of Respondents: 500,000.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 500,000.

Estimated Time per Response: 22 minutes.

Estimated Total Annual Burden Hours: 183,333.

Type of Information Collection: ESTA Website.

Estimated Number of Respondents: 15,000,000.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 15,000,000.

Estimated Time per Response: 13 minutes.

Estimated Total Annual Burden Hours: 3,250,000.

Type of Information Collection: CBP One Mobile Application.

Estimated Number of Respondents: 600,000.

Estimated Number of Annual Responses per Respondent: 1.

Estimated Number of Total Annual Responses: 600,000.

Estimated Time per Response: 2 minutes.

Estimated Total Annual Burden Hours: 20,000.

Dated: April 25, 2024.

Seth D Renkema,

Branch Chief, Economic Impact Analysis Branch, U.S. Customs and Border Protection.

[FR Doc. 2024–09264 Filed 4–29–24; 8:45 am]

BILLING CODE 9111–14–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[BLM_ES_FRN_MO4500178579]

Notice of Intent To Prepare an Environmental Impact Statement and To Initiate Scoping for Federal Coal Lease Applications for Two Leases To Expand Operations at the Warrior Met Coal Mines, Tuscaloosa County, Alabama

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of intent.

SUMMARY: In compliance with the National Environmental Policy Act of 1969, as amended (NEPA), the Bureau of Land Management (BLM) Southeastern States District Office, Flowood, Mississippi, intends to prepare an Environmental Impact Statement (EIS) to consider the effects of offering two Federal coal leases by holding a competitive lease sale for each respective Lease By Application (LBA) received from Warrior Met Coal, Inc. This notice is announcing the beginning of the scoping process to solicit public comments and identify issues.

DATES: This notice initiates the public-scoping process for the EIS. The BLM requests that the public submit comments concerning the scope of the analysis, potential alternatives, and identification of relevant information, and studies by May 30, 2024. To give the BLM enough time to consider comments in the Draft EIS, please ensure your comments are received by BLM before the close of the 30-day scoping period or 15 days after the last public meeting, whichever is later.

ADDRESSES: You may submit comments related to the Warrior Met Coal Mines EIS by any of the following methods:

- *Website: https://eplanning.blm.gov/eplanning-ui/project/2031600/510.*
- *Mail:* Bureau of Land Management, Attn: Warrior Met Coal Mines EIS, 273 Market Street, Flowood, MS 39232.

Documents pertinent to this proposal may be examined online at *https://eplanning.blm.gov/eplanning-ui/home* and by mail at the BLM Southeastern States District Office: 273 Market Street, Flowood, MS 39232.

FOR FURTHER INFORMATION CONTACT: Bob Swithers, BLM Southeastern States District Manager, telephone: 601–919–4696; address: 273 Market Street, Flowood, MS 39232; email: *rswithers@blm.gov.* Contact Mr. Swithers to have your name added to our mailing list. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or TeleBraille) to access telecommunications relay services for contacting Mr. Swithers. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION: The BLM Southeastern States District Office received two Federal LBAs to expand current mining operations located in Tuscaloosa County, Alabama. Warrior Met Coal Mining, LLC, proposes to expand Mine No. 4 (ALES–055797), and Warrior Met Coal BC, LLC, proposes to expand Blue Creek Mine No. 1 (ALES–056519). Warrior Met Coal Mining, LLC, and Warrior Met Coal BC, LLC, are subsidiaries of Warrior Met Coal, Inc., and will henceforth be referred to collectively as ''Warrior Met Coal.''

The LBA for the Mine No. 4 expansion (ALES–055797) consists of approximately 5,720 acres of private surface lands (*i.e.,* split-estate lands) with an estimated 24 million short tons of recoverable Federal coal. The LBA for the Blue Creek Mine No. 1 expansion (ALES–056519) consists of approximately 8,320 acres of split-estate lands with an estimated 33.5 million short tons of recoverable Federal coal. The combined proposed lease area for both applications includes approximately 14,040 acres of split-estate lands. Warrior Met Coal is seeking to obtain leases for the extraction of metallurgical coal resources by means of underground longwall mining techniques.

The BLM initially began preparing an environmental assessment to evaluate the LBA for Mine No. 4. Upon further review of the potential effects of the proposed action for Mine No. 4 expansion and, given the proximity to the Blue Creek Mine No. 1 expansion LBA, the BLM determined that an EIS is warranted, and that both LBAs would be evaluated under a single EIS. This notice of intent initiates the EIS process to evaluate both LBAs and terminates the environmental assessment process evaluating the LBA for Mine No. 4.

Purpose and Need for the Proposed Action

The purpose of the project is to provide for responsible development of coal resources in the Warrior Basin by responding to two Federal coal LBAs submitted by Warrior Met Coal to access a total of approximately 14,040 acres of Federal minerals underlying split-estate lands in Tuscaloosa County, Alabama. The applications propose to extract approximately 57.5 million tons of recoverable Federal metallurgical coal reserves.

The need is established by the BLM's responsibility under the Mineral Leasing Act of 1920, as amended; the Mineral Leasing Act for Acquired Lands of 1947, as amended; and the Federal Coal Leasing Amendments Act of 1976, as amended, to respond to two Federal coal LBAs submitted by Warrior Met Coal (ALES–055797 and ALES–056519) which seek to expand two existing underground mines.

Preliminary Proposed Action, and Alternatives

The proposed action is to offer for lease approximately 5,720 acres of Federal minerals for Mine No. 4 (ALES–055797) and 8,320 acres of Federal minerals for Blue Creek Mine No. 1 (ALES–056519) with the intent of allowing for the proposed extraction of a combined estimated 57.5 million tons of metallurgical coal reserves by means of underground longwall mining techniques. The surface of the lands identified in both LBAs are privately owned. Implementation of the proposed action would result in the BLM holding two competitive lease sales, one for each LBA.

The BLM will also evaluate the no action alternative under which the BLM would deny the two LBAs and the land would not be offered for lease. The BLM welcomes comments on all preliminary alternatives as well as suggestions for additional alternatives.

Summary of Expected Impacts

The proposed action would authorize approximately 57.5 million tons of Federal metallurgical coal to be leased. A decision to lease the proposed lands would not provide the successful bidder with an authorization to engage in mining activities. However, mining is a logical extension of leasing the Federal coal reserves. Potential impacts of the proposed action include, but are not limited to, impacts to air quality, including greenhouse gas emissions; impacts on populations with environmental justice concerns; impacts from potential subsidence from underground mining; and impacts to groundwater and surface water quality.

Anticipated Permits and Authorizations

If the proposed action is approved, the BLM would hold two competitive lease sales, one for each LBA, as outlined in 43 CFR part 3420—Competitive Leasing. Upon completion of each competitive lease sale, the BLM would award the leases to the successful bidder(s). Once a lease is issued, the Alabama Surface Mining Commission (ASMC) would be responsible for permitting the mining operations. The ASMC would determine whether to issue a permit and, if so, what terms and conditions to apply, in accordance with relevant policies and authorities. The Office of Surface Mining Reclamation and Enforcement (OSMRE) would prepare a mine plan decision document and make a recommendation to the Assistant Secretary for Land and Minerals Management regarding whether to approve, approve with conditions, or disapprove the mine plan.

Schedule for the Decision-Making Process

The BLM will provide additional opportunities for public participation consistent with the NEPA process, including a 45-day comment period on the Draft EIS. The Draft EIS is anticipated to be available for public review in autumn 2024, and the Final EIS is anticipated to be released in summer 2025 with a Record of Decision in early 2026.

Public Scoping Process

This notice of intent initiates the scoping period. The BLM requests that the public submit comments concerning the scope of the analysis, potential alternatives, and identification of relevant information, and studies by May 30, 2024. The BLM does not intend to hold any public meetings, in-person or virtual, during the public scoping period. If the BLM later determines that it will hold public meetings, the specific date(s) and location(s) of any meeting will be announced in advance through the ePlanning project page (see **ADDRESSES**) and local media.

Cooperating Agencies

OSMRE and the ASMC are cooperating agencies.

Responsible Official

The BLM Eastern States Director is the deciding official on the LBAs submitted by Warrior Met Coal.

Nature of Decision To Be Made

The responsible official will determine whether to offer lands identified in the LBAs ALES–055797 and ALES–056519 for Federal coal leasing and, if approved, what special stipulations to apply to the coal lease(s).

Additional Information

The BLM will identify, analyze, and consider mitigation to address the reasonably foreseeable impacts to resources from the proposed action and all analyzed reasonable alternatives and, in accordance with 40 CFR 1502.14(e), include appropriate mitigation measures not already included in the proposed action or alternatives. Mitigation may include avoidance, minimization, rectification, reduction or elimination over time, and compensation; and it may be considered at multiple scales, including the landscape scale.

The BLM will use and coordinate the NEPA process to help support compliance with applicable procedural requirements under the Endangered Species Act (16 U.S.C. 1536) and Section 106 of the National Historic Preservation Act (54 U.S.C. 306108), as provided in 36 CFR 800.2(d)(3), including public involvement requirements of Section 106. The information about historic and cultural resources and threatened and endangered species within the area potentially affected by the proposed project will assist the BLM in identifying and evaluating impacts to such resources.

The BLM will consult with Indian Tribal Nations on a government-to-government basis in accordance with Executive Order 13175, BLM Manual Section 1780, and other Departmental policies. Tribal concerns, including impacts on Indian trust assets and potential impacts to cultural resources, will be given due consideration. Federal, State, and local agencies, along with Indian Tribal Nations and stakeholders that may be interested in or affected by the two proposed LBAs for Federal coal that the BLM is evaluating, are invited to participate in the scoping process and, if eligible, may request or be requested by the BLM to participate in the development of the environmental analysis as a cooperating agency.

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

(Authority: 40 CFR 1501.9)

Mitchell Leverette,

Eastern States Director.

[FR Doc. 2024–09222 Filed 4–29–24; 8:45 am]

BILLING CODE 4331–18–P

DEPARTMENT OF THE INTERIOR

National Park Service

[NPS–WASO–NRNHL–DTS#–37865; PPWOCRADI0, PCU00RP14.R50000]

National Register of Historic Places; Notification of Pending Nominations and Related Actions

AGENCY: National Park Service, Interior.

ACTION: Notice.

SUMMARY: The National Park Service is soliciting electronic comments on the significance of properties nominated before April 20, 2024, for listing or related actions in the National Register of Historic Places.

DATES: Comments should be submitted electronically by May 15, 2024.

ADDRESSES: Comments are encouraged to be submitted electronically to *National_Register_Submissions@nps.gov* with the subject line ''Public Comment on <property or proposed district name, (County) State>.'' If you have no access to email, you may send them via U.S. Postal Service and all other carriers to the National Register of Historic Places, National Park Service, 1849 C Street NW, MS 7228, Washington, DC 20240.

FOR FURTHER INFORMATION CONTACT: Sherry A. Frear, Chief, National Register of Historic Places/National Historic Landmarks Program, 1849 C Street NW, MS 7228, Washington, DC 20240, *sherry_frear@nps.gov,* 202–913–3763.

SUPPLEMENTARY INFORMATION: The properties listed in this notice are being considered for listing or related actions in the National Register of Historic Places. Nominations for their consideration were received by the National Park Service before April 20, 2024. Pursuant to Section 60.13 of 36 CFR part 60, comments are being accepted concerning the significance of the nominated properties under the National Register criteria for evaluation.

Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we

cannot guarantee that we will be able to do so.

Nominations submitted by State or Tribal Historic Preservation Officers

KEY: State, County, Property Name, Multiple Name (if applicable), Address/Boundary, City, Vicinity, Reference Number.

INDIANA

Carroll County

Wagoner-Ayres House, 4565 East State Road 18, Flora, SG100010377

Putnam County

Baker's Camp Covered Bridge, County Road 650 North over Big Walnut Creek, Bainbridge, SG100010368
Cornstalk Covered Bridge, County Road 1350 North over Cornstalk Creek, Roachdale vicinity, SG100010369
Dick Huffman Covered Bridge, County Road 1050 South/Huffman Road over Big Walnut Creek, Cloverdale vicinity, SG100010370
Dunbar Covered Bridge, County Road 25 North over Big Walnut Creek, Greencastle, SG100010371
Edna Collings Covered Bridge, County Road 450 North over Little Walnut Creek, Clinton Falls vicinity, SG100010372
Houck Covered Bridge, County Road 550 South over Big Walnut Creek, Greencastle vicinity, SG100010373
Oakalla Covered Bridge, County Road 375 West over Big Walnut Creek, Greencastle vicinity, SG100010374
Pine Bluff Covered Bridge, County Road 900 North over Big Walnut Creek, Bainbridge vicinity, SG100010375
Rolling Stone Covered Bridge, County Road 800 North over Big Walnut Creek, Bainbridge vicinity, SG100010376

OREGON

Multnomah County

Normandale Field, NE 57th Avenue and NE Hassalo Street, Portland, SG100010362

PENNSYLVANIA

Delaware County

Painter's Folly, 1421 Baltimore Pike, Chadds Ford, SG100010360

Franklin County

Mary B. Sharpe School, (Educational Resources of Pennsylvania MPS), 850 Broad Street, Chambersburg, MP100010358

SOUTH CAROLINA

Aiken County

Ocean Grove School, Southeast of 12 Ocean Grove Road, near intersection with Shaw's Fork Rd., Aiken vicinity, SG100010365

Georgetown County

Holy Cross Faith Memorial School, 88 Baskerville Drive, Pawleys Island vicinity, SG100010366

An additional documentation has been received for the following resource(s):

TENNESSEE

Davidson County

Parthenon, The (Additional Documentation), Centennial Park, Nashville, AD72001236

Hamblen County

Bethesda Presbyterian Church (Additional Documentation), 4990 Bethesda Road, Morristown vicinity, AD73001771

Knox County

Park, James, House (Additional Documentation), 422 W Cumberland Ave., Knoxville, AD72001242

Sevier County

Buckingham House (Additional Documentation), 3172 Boyds Creek Highway, Sevierville vicinity, AD71000831

Williamson County

Lotz House (Additional Documentation), 1111 Columbia Ave., Franklin, AD76001809

VIRGINIA

Chesterfield County

Vawter Hall and Old President's House (Additional Documentation), Virginia State University campus, Ettrick, AD80004180

Henrico County

Malvern Hill (Additional Documentation)

(Civil War in Virginia MPS), SE of jct. of VA 5 and VA 156, Richmond vicinity, AD69000248

Authority: Section 60.13 of 36 CFR part 60.

Paul Lusignan,

Acting Chief, National Register of Historic Places/National Historic Landmarks Program.

[FR Doc. 2024–09234 Filed 4–29–24; 8:45 am]

BILLING CODE 4312–52–P

DEPARTMENT OF THE INTERIOR

Office of Natural Resources Revenue

[Docket No. ONRR–2011–0025; DS63644000 DR2000000.CH7000 234D1113RT, OMB Control Number 1012–0003]

Agency Information Collection Activities: 30 CFR Parts 1227, 1228, and 1229, Delegated and Cooperative Activities With States and Indian Tribes

AGENCY: Office of Natural Resources Revenue (''ONRR''), Interior.

ACTION: Notice of information collection; request for comment.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (''PRA''), ONRR is proposing to renew an information collection. ONRR uses the information collected in this Information Collection Request (''ICR'') to: (1) review and approve delegation proposals from States seeking to perform royalty management functions, and (2) prepare a cooperative agreement with a State or Indian Tribe seeking to perform royalty audits.

DATES: Interested persons are invited to submit comments on or before July 1, 2024.

ADDRESSES: All comment submissions must (1) reference ''OMB Control Number 1012–0003'' in the subject line; (2) be sent to ONRR before the close of the comment period listed under **DATES**; and (3) be sent through the following method:

Electronically via the Federal eRulemaking Portal: Please visit https://www.regulations.gov. In the Search Box, enter the Docket ID Number for this ICR renewal (''ONRR–2011–0025'') and click ''search'' to view the publications associated with the docket folder. Locate the document with an open comment period and click the ''Comment Now!'' button. Follow the prompts to submit your comment prior to the close of the comment period.

Docket: To access the docket folder to view the ICR **Federal Register** publications, go to *https://www.regulations.gov* and search ''ONRR–2011–0025'' to view renewal notices recently published in the **Federal Register**, publications associated with prior renewals, and applicable public comments received for this ICR. ONRR will make the comments submitted in response to this notice available for public viewing at *https://www.regulations.gov.*

OMB ICR Data: You may also view information collection review data for this ICR, including past OMB approvals, at *https://www.reginfo.gov/public/do/PRASearch.* Under the ''OMB Control Number'' heading enter ''1012–0003'' and click the ''Search'' button located at the bottom of the page. To view the ICR renewal or OMB approval status, click on the latest entry (based on the most recent date). On the ''View ICR—OIRA Conclusion'' page, check the box next to ''All'' to display all available ICR information provided by OMB.

FOR FURTHER INFORMATION CONTACT: To request additional information about this ICR, please contact Mr. Peter Hanley, State and Tribal Royalty Audit Committee, ONRR, by email to *Peter.Hanley@onrr.gov* or by telephone at (303) 231–3721.

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: Pursuant to the PRA, 44 U.S.C. 3501, *et seq.,* and 5 CFR 1320.5, all information collections, as defined in 5 CFR 1320.3, require approval by OMB. ONRR may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB control number.

As part of ONRR's continuing effort to reduce paperwork and respondent burdens, ONRR is inviting the public and other Federal agencies to comment on new, proposed, revised, and continuing collections of information in accordance with the PRA and 5 CFR 1320.8(d)(1). This helps ONRR to assess the impact of its information collection requirements and minimize the public's reporting burden. It also helps the public understand ONRR's information collection requirements and provide the requested data in the desired format.

ONRR is especially interested in public comments addressing the following:

(1) Whether or not the collection of information is necessary for the proper performance of the functions of the agency, including whether or not the information will have practical utility;

(2) The accuracy of ONRR's estimate of the burden for this collection of information, including the validity of the methodology and assumptions used;

(3) Ways to enhance the quality, utility, and clarity of the information to be collected; and

(4) How might the agency minimize the burden of the collection of information on those who are to respond, including 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 response.

Comments that you submit in response to this notice are a matter of public record. ONRR will include or summarize each comment in its request to OMB to approve this ICR. Before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, ONRR cannot guarantee that it will be able to do so.

Abstract: (a) General Information: The Secretary of the United States Department of the Interior (''Secretary'') is responsible for mineral resource development on Federal and Indian lands and the Outer Continental Shelf. Laws pertaining to Federal and Indian mineral leases are posted at *https://onrr.gov/references/statutes.* Pursuant to the Federal Oil and Gas Royalty Management Act of 1982 (''FOGRMA'') and other laws, the Secretary's responsibilities include maintaining a comprehensive inspection, collection, and fiscal and production accounting and auditing system that: (1) accurately determines mineral royalties, interest, and other payments owed, (2) collects and accounts for such amounts in a timely manner, and (3) disburses the funds collected. *See* 30 U.S.C. 1701 and 1711. ONRR performs these royalty and revenue management responsibilities for the Secretary. *See* Secretarial Order No. 3306.

Congress enacted FOGRMA, in part, ''to effectively utilize the capabilities of the States and Indian Tribes in developing and maintaining an efficient and effective Federal royalty management system.'' 30 U.S.C. 1701(b)(5). Relevant to this ICR, FOGRMA provides the Secretary with authority to: (1) review and approve delegation proposals from states seeking to perform royalty management functions, and (2) prepare a cooperative agreement with a State or Indian Tribe seeking to perform royalty audits. 30 U.S.C. 1732 and 1735. Under 30 U.S.C. 1735, the Secretary can delegate all or part of the authority and responsibility to: ''(1) conduct inspections, audits, and investigations; (2) receive and process production and financial reports; (3) correct erroneous reporting data; (4) perform automated verification; and (5) issue demands, subpoenas, and orders to perform restructured accounting, for royalty management enforcement purposes . . . to any State with respect to all Federal land within the State.'' 30 U.S.C. 1735(a)(1)–(5).

Through cooperative agreements, pursuant to 30 U.S.C. 1732, oil or gas royalty management information is shared, allowing a State or Indian Tribe to carry out certain inspection, auditing, investigation, and limited enforcement activities in cooperation with the Secretary. Several States and Indian Tribes are working partners with ONRR and are an integral part of the overall onshore and offshore compliance effort. Through the Appropriations Act of 1992 (Pub. L. 102–154), codified at 30 U.S.C. 196, the Secretary's authority for oil and gas leases was extended to other energy and mineral leases, including coal, geothermal steam, and leases subject to 43 U.S.C. 1337(g) of the Outer Continental Shelf Lands Act (''OCSLA'') as discussed further below.

(b) Information Collections: This ICR covers the paperwork requirements under 30 CFR parts 1227, 1228, and 1229. This collection of information is necessary for States and Indian Tribes to conduct audits and related investigations of Federal and Indian oil, gas, coal, other solid minerals, and geothermal royalty revenues from Federal and Tribal leased lands. ONRR uses the information collected to: (1) review and approve delegation proposals from States seeking to perform royalty management functions, and (2) prepare a cooperative agreement with a State or Indian Tribe seeking to perform royalty audits. The requirements of 30 CFR parts 1227, 1228, and 1229 are:

(1) 30 CFR part 1227—Delegation to States. Part 1227 governs the delegation of certain Federal royalty management functions to a State under 30 U.S.C. 1735, for Federal oil and gas leases covering Federal lands within the State. This part also governs the delegation of audit and investigative functions to a State for Federal geothermal leases or solid mineral leases covering Federal lands within the State (30 U.S.C. 196), or leases covering lands offshore of the State subject to section 8(g) of the OCSLA (43 U.S.C. 1337(g)). To be considered for such delegation, a State must submit a written proposal to ONRR, which ONRR must approve. Following the delegation process, 30 CFR part 1227 outlines State responsibilities, compensation, performance reviews, and the process for terminating a delegation.

(2) 30 CFR part 1228—Cooperative Activities with States and Indian Tribes. FOGRMA (30 U.S.C. 1732) authorizes the Secretary to enter into a cooperative agreement with a State or Indian Tribe to share oil and gas royalty management information, and to carry out inspection, audit, investigation, and enforcement activities on Federal and Indian lands. 30 CFR part 1228 implements this provision and set forth the requirements and procedures for entering into a cooperative agreement, the terms of such agreements, and subsequent responsibilities that must be carried out under the cooperative agreement. Through the Secretary's delegation of the authority contained in 30 CFR 1228.5(a), a State or Indian Tribe may enter into a cooperative agreement with ONRR's Director to carry out audits and related investigations of their respective leased lands. To enter into a cooperative agreement, a State or Indian Tribe must submit a written proposal to ONRR. The proposal must outline the activities that

the State or Indian Tribe will undertake and must present evidence that the State or Indian Tribe can meet the standards of the Secretary to conduct these activities. The State or Indian Tribe also must submit an annual work plan and budget, as well as quarterly reimbursement vouchers.

(3) 30 CFR part 1229—Delegation to States. Part 1229 governs delegations to a State to conduct audits and related investigations for Federal lands within the State, and for Indian lands for which the State has received permission from the respective Indian Tribes or allottees to carry out audit activities delegated to the State under 30 U.S.C. 1735. 30 CFR 1229.4. Under 30 CFR part 1229 the State must receive the Secretary's delegation of authority and submit annual audit work plans detailing its audits and related investigations, annual budgets, and quarterly reimbursement vouchers. The State also must maintain records.

Title of Collection: 30 CFR parts 1227, 1228, and 1229, Delegated and Cooperative Activities with States and Indian Tribes.

OMB Control Number: 1012–0003.

Bureau Form Number: None.

Type of Review: Extension of a currently approved collection.

Respondents/Affected Public: States and Indian Tribes.

Total Estimated Number of Annual Respondents: 9 States and 6 Indian respondents.

Total Estimated Number of Annual Responses: 210.

Estimated Completion Time per Response: 79.51 hours.

Total Estimated Number of Annual Burden Hours: 16,697 hours.

The average completion time is 79.51 hours per response. The average completion time is calculated by dividing the estimated annual burden hours (16,697) by the annual responses (210) to obtain the total annual burden hours (79.51).

Respondent's Obligation: Required to obtain or retain a benefit.

Frequency of Collection: Annual.

Total Estimated Annual Non-Hour Burden Cost: ONRR identified no ''non-hour cost'' burden associated with this collection of information.

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 authority for this action is the PRA (44 U.S.C. 3501, *et seq.*).

Howard M. Cantor,

Director, Office of Natural Resources Revenue.

[FR Doc. 2024–09178 Filed 4–29–24; 8:45 am]

BILLING CODE 4335–30–P

DEPARTMENT OF THE INTERIOR

Bureau of Ocean Energy Management

Notice on Outer Continental Shelf Oil and Gas Lease Sales

AGENCY: Bureau of Ocean Energy Management, Interior.

ACTION: List of restricted joint bidders.

SUMMARY: Pursuant to the Energy Policy and Conservation Act of 1975 and the Bureau of Ocean Energy Management's (BOEM) regulatory restrictions on joint bidding, BOEM is publishing this list of restricted joint bidders. Each entity within one of the following groups is restricted from bidding with any entity in any of the other groups listed below at Outer Continental Shelf oil and gas lease sales held during the bidding period of May 1, 2024, through October 31, 2024.

DATES: This list of restricted joint bidders covers the bidding period of May 1, 2024, through October 31, 2024, and succeeds all prior published lists.

SUPPLEMENTARY INFORMATION:

Group I

BP America Production Company
BP Exploration & Production Inc.

Group II

Chevron Corporation
Chevron U.S.A. Inc.
Chevron Midcontinent, L.P.
Unocal Corporation
Union Oil Company of California
Pure Partners, L.P.

Group III

Eni Petroleum Co. Inc.
Eni Petroleum US LLC
Eni Oil US LLC
Eni Marketing Inc.
Eni BB Petroleum Inc.
Eni US Operating Co. Inc.
Eni BB Pipeline LLC

Group IV

Equinor ASA
Equinor Gulf of Mexico LLC
Equinor USA E&P Inc.

Group V

Exxon Mobil Corporation
ExxonMobil Exploration Company

Group VI

Petroliam Nasional Berhad (PETRONAS)
Progress Resources USA Ltd.
Progress Resources Gulf of Mexico LLC

Group VII

Shell Oil Company
Shell Offshore Inc.
SWEPI LP
Shell Frontier Oil & Gas Inc.
SOI Finance Inc.
Shell Gulf of Mexico Inc.

Group VIII

Total E&P USA, Inc.

Even if an entity does not appear on the above list, BOEM may disqualify and reject certain joint or single bids submitted by an entity if that entity is chargeable for the prior production period with an average daily production in excess of 1.6 million barrels of crude oil, natural gas, and natural gas liquids. *See* 30 CFR 556.512.

Authority: 42 U.S.C. 6213; and 30 CFR 556.511–556.515.

Elizabeth Klein,

Director, Bureau of Ocean Energy Management.

[FR Doc. 2024–09208 Filed 4–29–24; 8:45 am]

BILLING CODE 4310–98–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 701–TA–722–725 and 731–TA–1690–1693 (Preliminary)]

Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From Cambodia, Malaysia, Thailand and Vietnam; 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–722–725 and 731–TA–1690–1693 (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 crystalline silicon photovoltaic cells, whether or not assembled into modules, from

Cambodia, Malaysia, Thailand and Vietnam, provided for in statistical reporting numbers 8541.42.0010, and 8541.43.0010 of the Harmonized Tariff Schedule of the United States, that are alleged to be sold in the United States at less than fair value and alleged to be subsidized by the Governments of Cambodia, Malaysia, Thailand and Vietnam. Crystalline silicon photovoltaic cells, whether or not assembled into modules, may also be imported under HTS subheadings 8501.71, 8501.72, and 8501.80 and statistical reporting number 8507.20.8010. 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 10, 2024. The Commission's views must be transmitted to Commerce within five business days thereafter, or by June 17, 2024.

DATES: April 24, 2024.

FOR FURTHER INFORMATION CONTACT: Julie Duffy (202–708–2579), 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 24, 2024, by the American Alliance for Solar Manufacturing Trade Committee.

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 petitioner) wishing to participate in the investigations as parties must file an entry of appearance with the Secretary to the Commission, as provided in §§ 201.11 and 207.10 of the Commission's rules, not later than seven days after publication of this notice in the **Federal Register**. Industrial users and (if the merchandise under investigation is sold at the retail level) representative consumer organizations have the right to appear as parties in Commission antidumping duty and countervailing duty investigations. The Secretary will prepare a public service list containing the names and addresses of all persons, or their representatives, who are parties to these investigations upon the expiration of the period for filing entries of appearance.

Limited disclosure of business proprietary information (BPI) under an administrative protective order (APO) and BPI service list.—Pursuant to § 207.7(a) of the Commission's rules, the Secretary will make BPI gathered in these investigations available to authorized applicants representing interested parties (as defined in 19 U.S.C. 1677(9)) who are parties to the investigations under the APO issued in the investigations, provided that the application is made not later than seven days after the publication of this notice in the **Federal Register**. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

Conference.—The Office of Investigations will hold a staff conference in connection with the preliminary phase of these investigations beginning at 9:30 a.m. on Wednesday, May 15, 2024. Requests to appear at the conference should be emailed to *preliminaryconferences@usitc.gov* (DO NOT FILE ON EDIS) on or before 5:15 p.m. on Monday, May 13, 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 20, 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 Tuesday, May 14. All written submissions must conform with the provisions of § 201.8 of the Commission's rules; any submissions that contain BPI must also conform with the requirements of §§ 201.6, 207.3, and 207.7 of the Commission's rules. The Commission's *Handbook on Filing Procedures,* available on the Commission's website at *https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf,* elaborates upon the Commission's procedures with respect to filings.

In accordance with §§ 201.16(c) and 207.3 of the rules, each document filed by a party to the investigations must be served on all other parties to the investigations (as identified by either the public or BPI service list), and a certificate of service must be timely filed. The Secretary will not accept a document for filing without a certificate of service.

Certification.—Pursuant to § 207.3 of the Commission's rules, any person submitting information to the Commission in connection with these investigations must certify that the information is accurate and complete to the best of the submitter's knowledge. In making the certification, the submitter will acknowledge that any information that it submits to the Commission during these investigations may be disclosed to and used: (i) by the Commission, its employees and Offices, and contract personnel (a) for developing or maintaining the records of these or related investigations or reviews, or (b) in internal investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the Commission including under 5 U.S.C. Appendix 3; or (ii) by U.S. government employees and contract personnel, solely for cybersecurity purposes. All contract personnel will sign appropriate nondisclosure agreements.

Authority: These investigations are being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to § 207.12 of the Commission's rules.

By order of the Commission.

Issued: April 25, 2024.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2024–09307 Filed 4–29–24; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 701–TA–721 and 731–TA–1689 (Preliminary)]

Alkyl Phosphate Esters From China; Institution of Antidumping and Countervailing Duty Investigations and Scheduling of Preliminary Phase Investigations

AGENCY: United States International Trade Commission.

ACTION: Notice.

SUMMARY: The Commission hereby gives notice of the institution of investigations and commencement of preliminary phase antidumping and countervailing duty investigation Nos. 701–TA–721 and 731–TA–1689 (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 alkyl phosphate esters from China, provided for in subheading 2919.90.50 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 China. Unless the Department of Commerce (''Commerce'') extends the time for initiation, the Commission must reach preliminary determinations in antidumping and countervailing duty investigations in 45 days, or in this case by June 7, 2024. The Commission's views must be transmitted to Commerce within five business days thereafter, or by June 14, 2024.

DATES: April 23, 2024.

FOR FURTHER INFORMATION CONTACT: Celia Feldpausch (202) 205–2387, Office of Investigations, U.S. International Trade Commission, 500 E Street SW, Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its internet server (*https://www.usitc.gov*). The public record for these investigations may be viewed on the Commission's electronic docket (EDIS) at *https://edis.usitc.gov.*

SUPPLEMENTARY INFORMATION:

Background.—These investigations are being instituted, pursuant to sections 703(a) and 733(a) of the Tariff Act of 1930 (19 U.S.C. 1671b(a) and 1673b(a)), in response to petitions filed on April 23, 2024, by ICL–IP America, Inc., St. Louis, Missouri.

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 Tuesday, May 14, 2024. Requests to appear at the conference should be emailed to *preliminaryconferences@usitc.gov* (DO NOT FILE ON EDIS) on or before Friday, May 10, 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 17, 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 13, 2024. All written submissions must conform with the provisions of § 201.8 of the Commission's rules; any submissions that contain BPI must also conform with the requirements of §§ 201.6, 207.3, and 207.7 of the Commission's rules. The Commission's *Handbook on Filing Procedures,* available on the Commission's website at *https://www.usitc.gov/documents/handbook_on_filing_procedures.pdf,* elaborates upon the Commission's procedures with respect to filings.

In accordance with §§ 201.16(c) and 207.3 of the rules, each document filed by a party to the investigations must be served on all other parties to the investigations (as identified by either the public or BPI service list), and a certificate of service must be timely filed. The Secretary will not accept a document for filing without a certificate of service.

Certification.—Pursuant to § 207.3 of the Commission's rules, any person submitting information to the Commission in connection with these investigations must certify that the information is accurate and complete to the best of the submitter's knowledge. In making the certification, the submitter will acknowledge that any information

that it submits to the Commission during these investigations may be disclosed to and used: (i) by the Commission, its employees and Offices, and contract personnel (a) for developing or maintaining the records of these or related investigations or reviews, or (b) in internal investigations, audits, reviews, and evaluations relating to the programs, personnel, and operations of the Commission including under 5 U.S.C. Appendix 3; or (ii) by U.S. government employees and contract personnel, solely for cybersecurity purposes. All contract personnel will sign appropriate nondisclosure agreements.

Authority: These investigations are being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to § 207.12 of the Commission's rules.

By order of the Commission.

Issued: April 24, 2024.

Lisa Barton,

Secretary to the Commission.

[FR Doc. 2024–09183 Filed 4–29–24; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF LABOR

Agency Information Collection Activities; Submission for OMB Review; Comment Request; Mechanical Power Presses Standard

ACTION: Notice of availability; request for comments.

SUMMARY: The Department of Labor (DOL) is submitting this Occupational Safety & Health Administration (OSHA)-sponsored information collection request (ICR) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). Public comments on the ICR are invited.

DATES: The OMB will consider all written comments that the agency receives on or before May 30, 2024.

ADDRESSES: Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* Find this particular information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

FOR FURTHER INFORMATION CONTACT: Nicole Bouchet by telephone at 202–693–0213, or by email at *DOL_PRA_PUBLIC@dol.gov.*

SUPPLEMENTARY INFORMATION: The inspection and certification records required by the Standard on Mechanical Power Presses are intended to ensure that mechanical power presses are in safe operating condition, and that all safety devices are working properly. The failure of these safety devices could cause serious injury or death to a worker. For additional substantive information about this ICR, see the related notice published in the **Federal Register** on February 15, 2024 (89 FR 11872).

Comments are invited on: (1) whether the collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; (2) the accuracy of the agency's estimates of the burden and cost of the collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information collection; and (4) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

This information collection is subject to the PRA. A Federal agency generally cannot conduct or sponsor a collection of information, and the public is generally not required to respond to an information collection, unless the OMB approves it and displays a currently valid OMB Control Number. In addition, notwithstanding any other provisions of law, no person shall generally be subject to penalty for failing to comply with a collection of information that does not display a valid OMB Control Number. *See* 5 CFR 1320.5(a) and 1320.6.

DOL seeks PRA authorization for this information collection for three (3) years. OMB authorization for an ICR cannot be for more than three (3) years without renewal. The DOL notes that information collection requirements submitted to the OMB for existing ICRs receive a month-to-month extension while they undergo review.

Agency: DOL–OSHA.

Title of Collection: Mechanical Power Presses Standard.

OMB Control Number: 1218–0229.

Affected Public: Private Sector—Businesses or other for-profits.

Total Estimated Number of Respondents: 104,035.

Total Estimated Number of Responses: 62,421.

Total Estimated Annual Time Burden: 20,807 hours.

Total Estimated Annual Other Costs Burden: $0.

(Authority: 44 U.S.C. 3507(a)(1)(D))

Nicole Bouchet,

Certifying Official.

[FR Doc. 2024–09193 Filed 4–29–24; 8:45 am]

BILLING CODE 4510–26–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2006–0042]

CSA Group Testing & Certification Inc.: Applications for Expansion of Recognition

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Notice.

SUMMARY: In this notice, OSHA announces the applications of CSA Group & Testing Certification Inc., for expansion of the recognition as a Nationally Recognized Testing Laboratory (NRTL) and presents the agency's preliminary finding to grant the applications.

DATES: Submit comments, information, and documents in response to this notice, or requests for an extension of time to make a submission, on or before May 15, 2024.

ADDRESSES: Comments may be submitted as follows:

Electronically: You may submit comments, including attachments, electronically at *http://www.regulations.gov,* the Federal eRulemaking Portal. Follow the online instructions for submitting comments.

Instructions: All submissions must include the agency's name and the docket number for this rulemaking (Docket No. OSHA–2006–0042). All comments, including any personal information you provide, are placed in the public docket without change and may be made available online at *https://www.regulations.gov.* Therefore, OSHA cautions commenters about submitting information they do not want made available to the public, or submitting materials that contain personal information (either about themselves or others), such as Social Security numbers and birthdates.

Docket: To read or download comments or other material in the docket, go to *http://www.regulations.gov.* Documents in the docket (including this **Federal Register** notice) are listed in the *http://www.regulations.gov* index; however, some information (*e.g.,* copyrighted material) is not publicly available to read or download through the website.

All submissions, including copyrighted material, are available for inspection through the OSHA Docket Office. Contact the OSHA Docket Office at (202) 693–2350 (TTY (877) 889–5627) for assistance in locating docket submissions.

Extension of comment period: Submit requests for an extension of the comment period on or before May 15, 2024 to the Office of Technical Programs and Coordination Activities, Directorate of Technical Support and Emergency Management, Occupational Safety and Health Administration, U.S. Department of Labor, 200 Constitution Avenue NW, Room N–3653, Washington, DC 20210, or by fax to (202) 693–1644.

FOR FURTHER INFORMATION CONTACT: Information regarding this notice is available from the following sources:

Press inquiries: Contact Mr. Frank Meilinger, Director, OSHA Office of Communications, phone: (202) 693–1999 or email: *meilinger.francis2@dol.gov.*

General and technical information: Contact Mr. Kevin Robinson, Director, Office of Technical Programs and Coordination Activities, Directorate of Technical Support and Emergency Management, Occupational Safety and Health Administration, phone: (202) 693–1911 or email: *robinson.kevin@dol.gov.*

SUPPLEMENTARY INFORMATION:

I. Notice of the Applications for Expansion

OSHA is providing notice that CSA Group Testing & Certification Inc. (CSA), is applying for expansion of the current recognition as a NRTL. CSA requests the addition of ten test standards, and one new testing site, to the NRTL scope of recognition.

OSHA recognition of a NRTL signifies that the organization meets the requirements specified in 29 CFR 1910.7. Recognition is an acknowledgment that the organization can perform independent safety testing and certification of the specific products covered within the scope of recognition. Each NRTL's scope of recognition includes: (1) the type of products the NRTL may test, with each type specified by the applicable test standard; and (2) the recognized site(s) that has/have the technical capability to perform the product-testing and product-certification activities for test standards within the NRTL's scope. Recognition is not a delegation or grant of government authority; however, recognition enables employers to use products approved by the NRTL to meet OSHA standards that require product testing and certification.

The agency processes applications by a NRTL for initial recognition and for an expansion or renewal of this recognition, following requirements in Appendix A to 29 CFR 1910.7. This appendix requires that the agency publish two notices in the **Federal Register** in processing an application. In the first notice, OSHA announces the application and provides a preliminary finding. In the second notice, the agency provides a final decision on the application. These notices set forth the NRTL's scope of recognition or modifications of that scope. OSHA maintains an informational web page for each NRTL, including CSA, which details the NRTL's scope of recognition. These pages are available from the OSHA website at *http://www.osha.gov/dts/otpca/nrtl/index.html.*

CSA currently has twenty-one facilities (sites) recognized by OSHA for product testing and certification, with the headquarters located at: CSA Group Testing & Certification Inc., 178 Rexdale Boulevard, Etobicoke, Ontario, M9W 1R3, Canada. A complete list of CSA's scope of recognition is available at *https://www.osha.gov/nationally-recognized-testing-laboratory-program/csa.*

II. General Background on the Application

CSA submitted two applications to OSHA for expansion of the NRTL scope of recognition. The first application, received on January 18, 2022 (OSHA–2006–0042–0037), requested the addition of four standards to the NRTL scope of recognition. The second application, received on July 28, 2022 (OSHA–2006–0042–0038), requested the addition of six standards to the NRTL scope of recognition, as well as the recognition of an additional testing site on the CSA Cleveland Ohio campus. The additional test facility is located at 8801 East Pleasant Valley Road, Cleveland, Ohio 44131. This expansion notice covers the ten standards included in both applications as well as the additional recognized site. OSHA staff performed a detailed analysis of the application packets and reviewed other pertinent information. OSHA performed an on-site review of the additional Cleveland, Ohio site from May 16–17, 2023, in which assessors found some nonconformances with the requirements of 29 CFR 1910.7. CSA addressed these issues sufficiently, and OSHA staff has preliminarily determined that OSHA should grant the applications for test standard expansion and recognition of the additional testing site.

Table 1, below, lists the appropriate test standards found in CSA's applications for expansion for testing and certification of products under the NRTL Program.

TABLE 1—PROPOSED APPROPRIATE TESTS STANDARDS FOR INCLUSION IN CSA'S NRTL SCOPE OF RECOGNITION

Test standard	Test standard title
UL 6A	Electrical Rigid Metal Conduit-Aluminum, Red Brass, and Stainless Steel.
UL 60079–25	Explosive Atmospheres—Part 25: Intrinsically Safe Electrical Systems.
UL 60079–30–1	Explosive Atmospheres—Part 30–1: Electrical Resistance Trace Heating—General and Testing Requirements.
UL 60947–4–1	Low-Voltage Switchgear and Controlgear—Part 4–1: Contactors and Motor-Starters—Electromechanical Contactors and Motor-Starters.
UL 60947–5–1	Low-Voltage Switchgear and Controlgear—Part 5–1: Control Circuit Devices and Switching Elements—Electromechanical Control Circuit Devices.
UL 60947–5–2	Low-Voltage Switchgear and Controlgear—Part 5–2: Control Circuit Devices and Switching Elements—Proximity Switches.
UL 61730–1	Photovoltaic (PV) Module Safety Qualification—Part 1: Requirements for Construction.
UL 61730–2	Photovoltaic (PV) Module Safety Qualification—Part 2: Requirements for Testing.
UL 5085–2	Low Voltage Transformers—Part 2: General Purpose Transformers.
UL 60335–2–8	Household and Similar Electrical Appliances, Part 2: Particular Requirements for Electric Shavers, Hair Clippers and Similar Appliances.

III. Preliminary Findings on the Applications

CSA submitted acceptable applications for expansion of the scope of recognition. OSHA's review of the application files and pertinent documentation indicates that CSA has met the requirements prescribed by 29 CFR 1910.7 for expanding the recognition to include the addition of the ten test standards for NRTL testing and certification listed in Table 1. In addition, CSA has met the requirements for recognition of the additional testing site. This preliminary finding does not constitute an interim or temporary approval of CSA's applications.

OSHA seeks comment on this preliminary determination.

IV. Public Participation

OSHA welcomes public comment as to whether CSA meets the requirements of 29 CFR 1910.7 for expansion of recognition as a NRTL. Comments should consist of pertinent written documents and exhibits.

Commenters needing more time to comment must submit a request in writing, stating the reasons for the request by the due date for comments. OSHA will limit any extension to 10 days unless the requester justifies a longer time period. OSHA may deny a request for an extension if it is not adequately justified.

To review copies of the exhibits identified in this notice, as well as comments submitted to the docket, contact the Docket Office, Occupational Safety and Health Administration, U.S. Department of Labor. These materials also are generally available online at *https://www.regulations.gov* under Docket No. OSHA–2006–0042 (for further information, see the ''*Docket*'' heading in the section of this notice titled **ADDRESSES**).

OSHA staff will review all comments to the docket submitted in a timely manner. After addressing the issues raised by these comments, staff will make a recommendation to the Assistant Secretary of Labor for Occupational Safety and Health on whether to grant CSA's application for expansion of the scope of recognition. The Assistant Secretary will make the final decision on granting the application. In making this decision, the Assistant Secretary may undertake other proceedings prescribed in Appendix A to 29 CFR 1910.7.

OSHA will publish a public notice of the final decision in the **Federal Register**.

V. Authority and Signature

James S. Frederick, Deputy Assistant Secretary of Labor for Occupational Safety and Health, authorized the preparation of this notice. Accordingly, the agency is issuing this notice pursuant to 29 U.S.C. 657(g)(2), Secretary of Labor's Order No. 8–2020 (85 FR 58393, Sept. 18, 2020), and 29 CFR 1910.7.

Signed at Washington, DC.

James S. Frederick,

Deputy Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2024–09190 Filed 4–29–24; 8:45 am]

BILLING CODE 4510–26–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2010–0056]

Notice of Alleged Safety and Health Hazards (OSHA–7 Form); Extension of the Office of Management and Budget's (OMB) Approval of Information Collection (Paperwork) Requirements

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Request for public comments.

SUMMARY: OSHA solicits public comments concerning the proposal to extend the Office of Management and Budget's (OMB) approval of the information collection requirements specified in the Notice of Alleged Safety and Health Hazards (OSHA–7 Form).

DATES: Comments must be submitted (postmarked, sent, or received) by July 1, 2024.

ADDRESSES:

Electronically: You may submit comments and attachments electronically at *https://www.regulations.gov,* which is the Federal eRulemaking Portal. Follow the instructions online for submitting comments.

Docket: To read or download comments or other material in the docket, go to *https://www.regulations.gov.* Documents in the docket are listed in the *https://www.regulations.gov* index; however, some information (*e.g.,* copyrighted material) is not publicly available to read or download through the websites. All submissions, including copyrighted material, are available for inspection through the OSHA Docket Office. Contact the OSHA Docket Office at (202) 693–2350 (TTY (877) 889–5627) for assistance in locating docket submissions.

Instructions: All submissions must include the agency name and OSHA docket number (OSHA–2010–0056) for the Information Collection Request (ICR). OSHA will place all comments, including any personal information, in the public docket, which may be made available online. Therefore, OSHA cautions interested parties about submitting personal information such as social security numbers and birthdates.

For further information on submitting comments, see the ''Public Participation'' heading in the section of this notice titled **SUPPLEMENTARY INFORMATION**.

FOR FURTHER INFORMATION CONTACT: Seleda Perryman, Directorate of Standards and Guidance, OSHA, U.S. Department of Labor; telephone (202) 693–2222.

SUPPLEMENTARY INFORMATION:

I. Background

The Department of Labor, as part of the continuing effort to reduce paperwork and respondent (*i.e.,* employer) burden, conducts a preclearance consultation program to provide the public with an opportunity to comment on proposed and continuing information collection requirements in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)). This program ensures that information is in the desired format, reporting burden (time and costs) is minimal, the collection instruments are clearly understood, and OSHA's estimate of the information collection burden is accurate. The Occupational Safety and Health Act of 1970 (OSH Act) (29 U.S.C. 651 *et seq.*) authorizes information collection by employers as necessary or appropriate for enforcement of the OSH Act or for developing information regarding the causes and prevention of occupational injuries, illnesses, and accidents (29 U.S.C. 657). The OSH Act also requires that OSHA obtain such information with minimum burden upon employers, especially those operating small businesses, and to reduce to the maximum extent feasible unnecessary duplication of effort in obtaining information (29 U.S.C. 657).

The following sections describe who uses the information collected under each requirement, as well as how they use it. The purpose of these requirements is the agency uses the information collected on the OSHA–7 Form to determine whether or not reasonable grounds exist to conduct an inspection of the workplace. The

description of the hazards, including the number of exposed employees, allows the agency to assess the severity and probability of the hazards and the need to expedite the inspection. The completed form also provides an employer with notice of the complaint and may serve as the basis for obtaining a search warrant if an employer denies the agency access to the workplace.

The agency has translated the form into a number of languages other than English and Spanish. The agency intends to submit those translations to OMB for approval via non-material change at a later time.

II. Special Issues for Comment

OSHA has a particular interest in comments on the following issues:

- Whether the proposed information collection requirements are necessary for the proper performance of the agency's functions to protect workers, including whether the information is useful;
- The accuracy of OSHA's estimate of the burden (time and costs) of the information collection requirements, including the validity of the methodology and assumptions used;
- The quality, utility, and clarity of the information collected; and
- Ways to minimize the burden on employers who must comply; for example, by using automated or other technological information, and transmission techniques.

III. Proposed Actions

OSHA is requesting that OMB extend the approval of the information collection requirements contained in Notice of Alleged Safety and Health Hazards (OSHA–7 Form). The agency is requesting an adjustment increase in burden hours 21,171 to 35,783 hours, a difference of 14,612 hours. This increase is due to the increase in the number of the number of estimated OSHA–7 complaint forms submitted from 68,896 to 94,529.

OSHA will summarize the comments submitted in response to this notice and will include this summary in the request to OMB to extend the approval of the information collection requirements.

Type of Review: Extension of a currently approved collection.

Title: Notice of Alleged Safety and Health Hazards (OSHA–7 Form).

OMB Control Number: 1218–0064.

Affected Public: Business or other for-profits.

Number of Respondents: 94,529.

Number of Responses: 120,183.

Frequency of Responses: On occasion.

Average Time per Response: Varies.

Estimated Total Burden Hours: 35,783.

Estimated Cost (Operation and Maintenance): $1,705.

IV. Public Participation—Submission of Comments on This Notice and Internet Access to Comments and Submissions

You may submit comments in response to this document as follows: (1) electronically at *https://www.regulations.gov,* which is the Federal eRulemaking Portal; or (2) by facsimile (fax), if your comments, including attachments, are not longer than 10 pages you may fax them to the OSHA Docket Office at (202) 693–1648. All comments, attachments, and other material must identify the agency name and the OSHA docket number for the ICR (Docket No. OSHA–2010–0056). You may supplement electronic submission by uploading document files electronically.

Comments and submissions are posted without change at *https://www.regulations.gov.* Therefore, OSHA cautions commenters about submitting personal information such as social security numbers and dates of birth. Although all submissions are listed in the *https://www.regulations.gov* index, some information (*e.g.,* copyrighted material) is not publicly available to read or download from this website. All submission, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. Information on using the *https://www.regulations.gov* website to submit comments and access the docket is available at the website's ''User Tips'' link.

Contact the OSHA Docket Office at (202) 693–2350, (TTY (877) 889–5627) for information about materials not available from the website, and for assistance in using the internet to locate docket submissions.

V. Authority and Signature

James S. Frederick, Deputy Assistant Secretary of Labor for Occupational Safety and Health, directed the preparation of this notice. The authority for this notice is the Paperwork Reduction Act of 1995 (44 U.S.C. 3506 *et seq.*) and Secretary of Labor's Order No. 8–2020 (85 FR 58393).

Signed at Washington, DC, on April 23, 2024.

James S. Frederick,

Deputy Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2024–09189 Filed 4–29–24; 8:45 am]

BILLING CODE 4510–26–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

[Docket No. OSHA–2011–0033]

Hazardous Energy Control Standard (Lockout/Tagout); Extension of the Office of Management and Budget's (OMB) Approval of Information Collection (Paperwork) Requirements

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Request for public comments.

SUMMARY: OSHA solicits public comments concerning the proposal to extend the Office of Management and Budget's (OMB) approval of the information collection requirements specified in the Hazardous Energy Control Standard (Lockout/Tagout).

DATES: Comments must be submitted (postmarked, sent, or received) by July 1, 2024.

ADDRESSES:

Electronically: You may submit comments and attachments electronically at *https://www.regulations.gov,* which is the Federal eRulemaking Portal. Follow the instructions online for submitting comments.

Docket: To read or download comments or other material in the docket, go to *https://www.regulations.gov.* Documents in the docket are listed in the *https://www.regulations.gov* index; however, some information (*e.g.,* copyrighted material) is not publicly available to read or download through the websites. All submissions, including copyrighted material, are available for inspection through the OSHA Docket Office. Contact the OSHA Docket Office at (202) 693–2350 (TTY (877) 889–5627) for assistance in locating docket submissions.

Instructions: All submissions must include the agency name and OSHA docket number (OSHA–2011–0033) for the Information Collection Request (ICR). OSHA will place all comments, including any personal information, in the public docket, which may be made available online. Therefore, OSHA cautions interested parties about submitting personal information such as social security numbers and birthdates.

For further information on submitting comments, see the ''Public Participation'' heading in the section of this notice titled ''**SUPPLEMENTARY INFORMATION**.''

FOR FURTHER INFORMATION CONTACT: Seleda Perryman, Directorate of

Standards and Guidance, OSHA, U.S. Department of Labor; telephone (202) 693–2222.

SUPPLEMENTARY INFORMATION:

I. Background

The Department of Labor, as part of the continuing effort to reduce paperwork and respondent (*i.e.,* employer) burden, conducts a preclearance consultation program to provide the public with an opportunity to comment on proposed and continuing information collection requirements in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)). This program ensures that information is in the desired format, reporting burden (time and costs) is minimal, the collection instruments are clearly understood, and OSHA's estimate of the information collection burden is accurate. The Occupational Safety and Health Act of 1970 (OSH Act) (29 U.S.C. 651 *et seq.*) authorizes information collection by employers as necessary or appropriate for enforcement of the OSH Act or for developing information regarding the causes and prevention of occupational injuries, illnesses, and accidents (29 U.S.C. 657). The OSH Act also requires that OSHA obtain such information with minimum burden upon employers, especially those operating small businesses, and to reduce to the maximum extent feasible unnecessary duplication of effort in obtaining information (29 U.S.C. 657).

The following sections describe who uses the information collected under each requirement, as well as how they use it. The purpose of these requirements is to control the release of hazardous energy while workers service, maintain, or repair machines or equipment when activation, start up, or release of energy from an energy source is possible; proper control of hazardous energy prevents death or serious injury among these workers.

Energy Control Procedure (paragraph (c)(4)(i)). With limited exception, employers must document the procedures used to isolate from its energy source and render inoperative, any machine or equipment prior to servicing, maintenance, or repair by workers. These procedures are necessary when activation, start up, or release of stored energy from the energy source is possible, and such release could cause injury to the workers.

Paragraph (c)(4)(ii) states that the required documentation must clearly and specifically outline the scope, purpose, authorization, rules, and techniques workers are to use to control hazardous energy, and the means to enforce compliance. The document must include at least the following elements: a specific statement regarding the use of the procedure; detailed procedural steps for shutting down, isolating, blocking, and securing machines or equipment to control hazardous energy; detailed procedural steps for placing, removing, and transferring lockout or tagout devices, including the responsibility for doing so; and requirements for testing a machine or equipment to determine and verify the effectiveness of lockout or tagout devices, as well as other energy control measures.

Protective Materials and Hardware (paragraphs (c)(5)(ii)(D) and (c)(5)(iii)). Paragraph (c)(5)(ii)(D) requires that lockout and tagout devices indicate the identity of the employee applying it. Paragraph (c)(5)(iii) requires that tags warn against hazardous conditions if the machine or equipment is energized. In addition, the tag must include a legend such as one of the following: Do Not Start; Do Not Open; Do Not Close; Do Not Energize; Do Not Operate.

Periodic Inspection Certification Records (paragraph (c)(6)(ii)). Under paragraph (c)(6)(i), employers are to conduct inspections of energy control procedures at least annually. An authorized worker (other than an authorized worker using the energy control procedure that is the subject of the inspection) is to conduct the inspection and correct any deviations or inadequacies identified. For procedure involving either lockout or tagout, the inspection must include a review, between the inspector and each authorized worker, of that worker's responsibilities under the procedure; for procedures using tagout systems, the review also involves affected workers, and includes an assessment of the workers' knowledge of the training elements required for these systems. Paragraph (c)(6)(ii) requires employers to certify the inspection by documenting the date of the inspection and identifying the machine or equipment inspected, the workers included in the inspection, and the worker who performed the inspection.

Training Certification Records (paragraph (c)(7)(iv)). Under paragraph (c)(7)(iv), employers are to certify that workers completed the required training, and that this training is up-to-date. The certification is to contain each worker's name and the training date. Written certification of the training assures the employer that workers receive the training specified by the standard.

Notification of Employees (paragraph (c)(9)). This provision requires the employer or authorized worker to notify affected workers prior to applying, and after removing, a lockout or tagout device from a machine or equipment.

Off-site Personnel (Contractors, etc.) (paragraph (f)(2)(i)). When the on-site employer uses an off-site employer (*e.g.,* a contractor) to perform the activities covered by the scope and application of the standard, the two employers must inform each other regarding their respective lockout or tagout procedures.

II. Special Issues for Comment

OSHA has a particular interest in comments on the following issues:

- Whether the proposed information collection requirements are necessary for the proper performance of the agency's functions to protect workers, including whether the information is useful;
- The accuracy of OSHA's estimate of the burden (time and costs) of the information collection requirements, including the validity of the methodology and assumptions used;
- The quality, utility, and clarity of the information collected; and
- Ways to minimize the burden on employers who must comply; for example, by using automated or other technological information, and transmission techniques.

III. Proposed Actions

OSHA is requesting that OMB extend the approval of the information collection requirements contained in the Hazardous Energy Control Standard (Lockout/Tagout). The agency is requesting an adjustment increase in burden hours from 2,622,912 hours to 2,732,064 hours, a difference of 109,152 hours. This increase is due to the increase in the number of establishments from 773,209 to 806,890.

OSHA will summarize the comments submitted in response to this notice and will include this summary in the request to OMB to extend the approval of the information collection requirements.

Type of Review: Extension of a currently approved collection.

Title: Hazardous Energy Control Standard (Lockout/Tagout).

OMB Control Number: 1218–0150.

Affected Public: Business or other for-profits.

Number of Respondents: 806,890.

Number of Responses: 73,530,405.

Frequency of Responses: On occasion.

Average Time per Response: Varies.

Estimated Total Burden Hours: 2,732,064.

Estimated Cost (Operation and Maintenance): $1,442,985.

IV. Public Participation—Submission of Comments on This Notice and Internet Access to Comments and Submissions

You may submit comments in response to this document as follows: (1) electronically at *https://www.regulations.gov,* which is the Federal eRulemaking Portal; or (2) by facsimile (fax), if your comments, including attachments, are not longer than 10 pages you may fax them to the OSHA Docket Office at 202–693–1648. All comments, attachments, and other material must identify the agency name and the OSHA docket number for the ICR (Docket No. OSHA–2011–0033). You may supplement electronic submission by uploading document files electronically.

Comments and submissions are posted without change at *https://www.regulations.gov.* Therefore, OSHA cautions commenters about submitting personal information such as social security numbers and dates of birth. Although all submissions are listed in the *https://www.regulations.gov* index, some information (*e.g.,* copyrighted material) is not publicly available to read or download from this website. All submission, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. Information on using the *https://www.regulations.gov* website to submit comments and access the docket is available at the website's ''User Tips'' link. Contact the OSHA Docket Office at (202) 693–2350, (TTY (877) 889–5627) for information about materials not available from the website, and for assistance in using the internet to locate docket submissions.

V. Authority and Signature

James S. Frederick, Deputy Assistant Secretary of Labor for Occupational Safety and Health, directed the preparation of this notice. The authority for this notice is the Paperwork Reduction Act of 1995 (44 U.S.C. 3506 *et seq.*) and Secretary of Labor's Order No. 8–2020 (85 FR 58393).

Signed at Washington, DC, on April 23, 2024.

James S. Frederick,

Deputy Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2024–09191 Filed 4–29–24; 8:45 am]

BILLING CODE 4510–26–P

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

[NARA–24–0010; NARA–2024–031]

Records Schedules; Availability and Request for Comments

AGENCY: National Archives and Records Administration (NARA).

ACTION: Notice of availability of proposed records schedules; request for comments.

SUMMARY: The National Archives and Records Administration (NARA) publishes notice of certain Federal agency requests for records disposition authority (records schedules). We publish notice in the **Federal Register** and on *regulations.gov* for records schedules in which agencies propose to dispose of records they no longer need to conduct agency business. We invite public comments on such records schedules.

DATES: We must receive responses on the schedules listed in this notice by June 17, 2024.

ADDRESSES: To view a records schedule in this notice, or submit a comment on one, use the following address: *https://www.regulations.gov/docket/NARA-24-0010/document.* This is a direct link to the schedules posted in the docket for this notice on *regulations.gov.* You may submit comments by the following method:

- *Federal eRulemaking Portal: https://www.regulations.gov.* On the website, enter either of the numbers cited at the top of this notice into the search field. This will bring you to the docket for this notice, in which we have posted the records schedules open for comment. Each schedule has a 'comment' button so you can comment on that specific schedule. For more information on *regulations.gov* and on submitting comments, see their FAQs at *https://www.regulations.gov/faq.*

If you are unable to comment via *regulations.gov,* you may email us at *request.schedule@nara.gov* for instructions on submitting your comment. You must cite the control number of the schedule you wish to comment on. You can find the control number for each schedule in parentheses at the end of each schedule's entry in the list at the end of this notice.

FOR FURTHER INFORMATION CONTACT: Kimberly Richardson, Strategy and Performance Division, by email at *regulation_comments@nara.gov* or at 301–837–2902. For information about records schedules, contact Records Management Operations by email at *request.schedule@nara.gov* or by phone at 301–837–1799.

SUPPLEMENTARY INFORMATION:

Public Comment Procedures

We are publishing notice of records schedules in which agencies propose to dispose of records they no longer need to conduct agency business. We invite public comments on these records schedules, as required by 44 U.S.C. 3303a(a), and list the schedules at the end of this notice by agency and subdivision requesting disposition authority.

In addition, this notice lists the organizational unit(s) accumulating the records or states that the schedule has agency-wide applicability. It also provides the control number assigned to each schedule, which you will need if you submit comments on that schedule. We have uploaded the records schedules and accompanying appraisal memoranda to the *regulations.gov* docket for this notice as ''other'' documents. Each records schedule contains a full description of the records at the file unit level as well as their proposed disposition. The appraisal memorandum for the schedule includes information about the records.

We will post comments, including any personal information and attachments, to the public docket unchanged. Because comments are public, you are responsible for ensuring that you do not include any confidential or other information that you or a third party may not wish to be publicly posted. If you want to submit a comment with confidential information or cannot otherwise use the *regulations.gov* portal, you may contact *request.schedule@nara.gov* for instructions on submitting your comment.

We will consider all comments submitted by the posted deadline and consult as needed with the Federal agency seeking the disposition authority. After considering comments, we may or may not make changes to the proposed records schedule. The schedule is then sent for final approval by the Archivist of the United States. After the schedule is approved, we will post on *regulations.gov* a ''Consolidated Reply'' summarizing the comments, responding to them, and noting any changes we made to the proposed schedule. You may elect at *regulations.gov* to receive updates on the docket, including an alert when we post the Consolidated Reply, whether or not you submit a comment. If you have a question, you can submit it as a comment, and can also submit any concerns or comments you would have

to a possible response to the question. We will address these items in consolidated replies along with any other comments submitted on that schedule.

We will post schedules on our website in the Records Control Schedule (RCS) Repository, at *https://www.archives.gov/records-mgmt/rcs,* after the Archivist approves them. The RCS contains all schedules approved since 1973.

Background

Each year, Federal agencies create billions of records. To control this accumulation, agency records managers prepare schedules proposing retention periods for records and submit these schedules for NARA's approval. Once approved by NARA, records schedules provide mandatory instructions on what happens to records when no longer needed for current Government business. The records schedules authorize agencies to preserve records of continuing value in the National Archives or to destroy, after a specified period, records lacking continuing administrative, legal, research, or other value. Some schedules are comprehensive and cover all the records of an agency or one of its major subdivisions. Most schedules, however, cover records of only one office or program or a few series of records. Many of these update previously approved schedules, and some include records proposed as permanent.

Agencies may not destroy Federal records without the approval of the Archivist of the United States. The Archivist grants this approval only after thorough consideration of the records' administrative use by the agency of origin, the rights of the Government and of private people directly affected by the Government's activities, and whether or not the records have historical or other value. Public review and comment on these records schedules is part of the Archivist's consideration process.

Schedules Pending

1. Department of Defense, Defense Contract Audit Agency, Learning Management System (DAA–0372–2024–0002).

2. Department of Energy, Agency-wide, Budgeting Records (DAA–0434–2021–0003).

3. Department of Energy, Agency-wide, Grant, Cooperative Agreement and Technology Transfer Records (DAA–0434–2021–0002).

4. Department of Health and Human Services, Administration for Strategic Preparedness and Response, National Veterinary Response Team Records (DAA–0611–2023–0010).

5. Department of Health and Human Services, Office of the Assistant Secretary for Preparedness and Response, Recovery Operations Records (DAA–0468–2022–0002).

6. Department of Health and Human Services, Health Resources and Services Administration, Injury Compensation Programs (DAA–0512–2024–0002).

7. Department of Justice, Executive Office for United States Trustees, Credit Counseling and Debtor Education Records (DAA–0060–2023–0001).

8. Department of Transportation, Federal Aviation Administration, FAA Safety Team website (DAA–0237–2024–0009).

9. Department of Transportation, Federal Aviation Administration, Forensic Toxicology Case Files (DAA–0237–2023–0003).

10. Department of Transportation, Federal Aviation Administration, Quality Assurance Reporting System (DAA–0237–2024–0008).

11. Department of Transportation, Pipeline and Hazardous Materials Safety Administration, Drug and Alcohol Management Information System (DAMIS) Annual Reports (DAA–0571–2024–0003).

12. Department of Transportation, Pipeline and Hazardous Materials Safety Administration, Training and Qualification Records (DAA–0571–2024–0001).

13. Administrative Office of the United States Courts, Circuit Courts of Appeals, Office of the Clerk, Standing Orders (DAA–0276–2023–0001).

14. American Battle Monuments Commission, Office of the General Counsel, Legal Function and Counsel Records (DAA–0117–2023–0008).

15. Federal Energy Regulatory Commission, Agency-wide, Web Content and Social Media Records (DAA–0138–2024–0007).

16. National Aeronautics and Space Administration, Agency-wide, Mishap Investigation Records (DAA–0255–2023–0001).

17. National Archives and Records Administration, Research Services, Internal Disposal for RG 0431 (N2–431–2017–0001).

18. Office of Personnel Management, Agency-wide, White House Fellows (WHF) Records (DAA–0478–2024–0002).

Laurence Brewer,

Chief Records Officer for the U.S. Government.

[FR Doc. 2024–09225 Filed 4–29–24; 8:45 am]

BILLING CODE 7515–01–P

NATIONAL FOUNDATION ON THE ARTS AND THE HUMANITIES

Institute of Museum and Library Services

Notice of Proposed Information Collection Request: National Museum Survey

AGENCY: Institute of Museum and Library Services, National Foundation on the Arts and the Humanities.

ACTION: Notice, request for comments, collection of information.

SUMMARY: The Institute of Museum and Library Services (IMLS), as part of its continuing effort to reduce paperwork and respondent burden, conducts a pre-clearance consultation program to provide the general public and federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act. This pre-clearance consultation program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed. The purpose of this Notice is to request a three-year clearance for the National Museum Survey (NMS). The NMS will be a voluntary collection that seeks to measure and understand the scope and scale of the role that the nation's diverse museums play in American society. IMLS will use the data collected through the NMS to provide museum practitioners, the public, and policymakers with essential baseline statistics regarding the museum sector. A copy of the proposed information collection request can be obtained by contacting the individual listed below in the **ADDRESSES** section of this Notice.

DATES: Written comments on this notice must be submitted to the office listed in the Addresses section below on or before June 28, 2024.

ADDRESSES: Send comments to Julie Balutis, Director of Grants Policy and Management, Institute of Museum and Library Services, 955 L'Enfant Plaza North SW, Suite 4000, Washington, DC 20024–2135. Ms. Balutis can be reached by telephone: 202–653–4645, email: *jbalutis@imls.gov.* Office hours are from 8:30 a.m. to 5 p.m., E.T., Monday through Friday, except federal holidays. Persons who are deaf or hard of hearing (TTY users) can contact IMLS at 202–207–7858 via 711 for TTY-Based Telecommunications Relay Service.

FOR FURTHER INFORMATION CONTACT: Jake Soffronoff, Survey Methodologist, Office of Research and Evaluation, Institute of Museum and Library Services, 955 L'Enfant Plaza North SW, Suite 4000, Washington, DC 20024–2135. Mr. Soffronoff can be reached by telephone: 202–653–4648, email: *jsoffronoff@imls.gov.* Persons who are deaf or hard of hearing (TTY users) can contact IMLS at 202–207–7858 via 711 for TTY-Based Telecommunications Relay Service.

SUPPLEMENTARY INFORMATION: IMLS is particularly interested in public comments that help the agency to:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques, or other forms of information technology, *e.g.,* permitting electronic submissions of responses.

I. Background

The United States is home to tens of thousands of museums. Together, they steward living and non-living collections and, through their programs and services, contribute to the cultural health, economic vitality, and social well-being of the communities they serve. A regular sector-wide data-gathering effort is needed to better understand the museum sector and the services it provides.

IMLS is exercising its authority under 20 U.S. Code § 9108 to conduct a new survey that fills this need: the National Museum Survey (NMS). The NMS will be a voluntary survey of museums that aims to capture the scope and scale of museums' presence and reach within the United States over time. The survey will collect foundational, high-level data directly from museums to inform policymakers, the museum field, and the public about the role that the nation's diverse museums play in American society.

II. Current Actions

Intent to seek approval for a new information collection.

Agency: Institute of Museum and Library Services.

Title: National Museum Survey.

OMB Control Number: 3137–NEW.

Expiration Date: Not applicable.

Agency Number: 3137.

Respondents/Affected Public: IMLS plans to conduct a census of all U.S. museums representing a broad range of museum disciplines, including zoos, aquariums, botanical gardens, and arboretums; nature and science centers; history museums and historic sites; art museums; children's museums; natural history museums; and general and specialized museums. Institutions must meet all the following criteria to be eligible for selection:

- Be a unit of federal, state, local, or tribal government, or a not-for-profit institution.
- Serve the public in a physical location it owns or operates.
- Provide exhibitions and programs.
- Primarily function to house, display, and care for animate or inanimate objects that form the core of its exhibitions, programs, and research.
- Under normal circumstances, be open to the public 90 days or more per year, either through specific hours of operation or by appointment
- Have at least one staff member, or the full-time equivalent, whether paid or unpaid IMLS will request that a senior administrator at each institution be responsible for the completion of the survey at their institution.

Total Estimated Number of Annual Respondents: The survey's expected response rate is 35 percent, leading to approximately 7,500 completed cases.

Frequency of Response: Once per request.

Estimated Average Burden per Response: 1 hour.

Total Estimated Number of Annual Burden Hours: 7,500.

Total Annual Cost Burden: The estimated cost burden for respondents is $431,775 (7,500 hrs × $57.57/hr). $57.57 represents a simple average of hourly mean wage figures for government, academic, and company/enterprise managers (*https://www.bls.gov/oes/current/oes113012.htm*).

Total Annual Federal Costs: $794,580.49.

Public Comments Invited: Comments submitted in response to this Notice will be summarized and/or included in the request for OMB's clearance of this information collection.

Dated: April 25, 2024.

Suzanne Mbollo,

Grants Management Specialist, Institute of Museum and Library Services.

[FR Doc. 2024–09276 Filed 4–29–24; 8:45 am]

BILLING CODE 7036–01–P

NATIONAL SCIENCE FOUNDATION

Sunshine Act Meetings

The National Science Board (NSB), the NSB Committee on Strategy (CS), and the Committee on Awards and Facilities (A&F) hereby give notice of the scheduling of meetings for the transaction of National Science Board business pursuant to the National Science Foundation Act and the Government in the Sunshine Act.

TIME AND DATE: Wednesday, May 1, 2024, from 8:30 a.m.–3:40 p.m. and Thursday, May 2, 2024, from 8:30 a.m.–2:30 p.m. Eastern.

PLACE: These meetings will be held at NSF headquarters, 2415 Eisenhower Avenue, Alexandria, VA 22314, and by videoconference. If the COVID status for Alexandria, Virginia goes to ''high,'' please fill out and bring OMB's certification of vaccination form with you. All open sessions of the meeting will be webcast live on the NSB YouTube channel.

May 1, 2024: https://youtube.com/live/LqwL3CFVG8I?feature=share.

May 2, 2024: https://youtube.com/live/LbXG5bYTzGA?feature=share.

STATUS: Parts of these meetings will be open to the public. The rest of the meetings will be closed to the public. See full description below.

MATTERS TO BE CONSIDERED:

Wednesday, May 1, 2024

Plenary Board Meeting

Open Session: 8:30 a.m.–12:00 p.m.

- NSB Chair's Opening Remarks
  - Welcome
  - Agenda Preview
  - Chair's Activities and Updates
- NSF Director's Opening Remarks
  - Highlights of NSF Thematic Priorities
  - Engagements
  - Senior Staff introductions
- NSB External Panel on Artificial Intelligence, The Future is Now: Harnessing AI for Good
- Approval of February 2024 Open Meeting Minutes
- NSB Committee Reports
  - Committee on External Engagement
    - Highlights of engagement initiatives
    - Reflections and road ahead
  - Committee on Science and Engineering Policy
    - *Indicators 2024*
    - *Indicators 2026* and Vote
    - National Security Team
    - Talent Development Team
    - Reflections and road ahead
  - Committee on Oversight
    - Research misconduct

- NSF FY 2023 Financial Statement
- Chief Financial Officer report highlights
- Reflections and road ahead
- Committee on Strategy
- Reflections and road ahead
- Subcommittee on Technology, Innovation, and Partnerships
- Closing reflections and road ahead

Plenary Board Meeting

Closed Session: 12:00–12:50 p.m.

- NSB Chair's remarks
- Approval of Feb 2024 closed meeting minutes
- Committee Reports
  - Committee on Strategy report
  - Update on FY 24 current plan implications
  - Long-term planning and FY 26 development
  - Subcommittee on Technology, Innovation and Partnerships
  - TIP Roadmap update
- Vote to Enter Executive Closed Session

Executive Closed Session: 1:35–3:40 p.m.

- NSB Chair's Remarks
- Approval of February 2024 Executive Plenary Closed Minutes
- Director's Remarks
  - Organizational updates
- Board Elections
  - Chair, Vice Chair, and EC seat if applicable
- NSB Chair's closing remarks

Thursday, May 2, 2024

Plenary Board Meeting

Open Session: 8:30–11:40 a.m.

- NSB Chair's Opening Remarks
- Farewell to Members
  - Chair's remarks, NSB accomplishments and road ahead
  - Member recognition, Chair and Director
- Q&A with the 2024 NSB Vannevar Bush, Science & Society, and Waterman Awardees
- Committee Report
  - NSB–NSF Commission on Merit Review
  - Preliminary policy recommendations

Plenary Board Meeting

Closed Session: 11:40 a.m.–12:40 p.m.

- Committee Report
  - NSB–NSF Commission on Merit Review
  - Preliminary policy recommendations discussion

Plenary Board

Closed Session: 1:10 p.m.–1:35 p.m.

- Committee Report
- Committee on Awards and Facilities
  - Action Item: National Solar Observatory Operations & Maintenance Award
  - Information Item: Planning for future major facilities

A&F Committee

Open Session: 1:35–2:10 p.m.

- Chair's Remarks
- Reflection and road ahead
- Update on Antarctic Science and Engineering Support Contract
- Information Item: NSF's Decision Process for the USELT Program

A&F Committee

Closed Session: 2:10–2:30 p.m.

- Information Item: NSF's Decision Process for the USELT Program

Meeting Adjourns: 2:30 p.m.

Portions Open to the Public

Wednesday, May 1, 2024

8:30 a.m.–12:00 p.m. Plenary NSB

Thursday, May 2, 2024

8:30 a.m.–11:40 a.m. Plenary NSB
1:35 p.m.–2:10 p.m. Committee on Awards and Facilities (A&F)

Portions Closed to the Public

Wednesday, May 1, 2024

12:00 p.m.–12:50 p.m. Plenary NSB
1:35 p.m.–3:40 p.m. Plenary executive

Thursday, May 2, 2024

11:40 a.m.–12:40 p.m. Plenary NSB
1:10 p.m.–1:35 p.m. Plenary NSB
2:10 p.m.–2:30 p.m. A&F

Members of the public are advised that the NSB provides some flexibility around start and end times. A session may be allowed to run over by as much as 15 minutes if the Chair decides the extra time is warranted. The next session will start no later than 15 minutes after the noticed start time. If a session ends early, the next meeting may start up to 15 minutes earlier than the noticed start time. Sessions will not vary from noticed times by more than 15 minutes.

CONTACT PERSON FOR MORE INFORMATION: The NSB Office contact is Christopher Blair, *cblair@nsf.gov,* 703–292–7000. The NSB Public Affairs contact is Nadine Lymn, *nlymn@nsf.gov,* 703–292–2490. Please refer to the NSB website for additional information: *https://www.nsf.gov/nsb.*

Ann E. Bushmiller,

Senior Legal Counsel to the National Science Board.

[FR Doc. 2024–09367 Filed 4–26–24; 11:15 am]

BILLING CODE 7555–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50–289, 72–77, 50–245, 50–336, 50–423, 72–47, 50–324, 50–325, 72–06, 50–334, 50–412, 72–1043, 50–397, 72–35, 50–382, 72–75, 50–335, 50–389, 72–61, 50–331, 72–32, 50–387, 50–388, 72–28, 50–346, 72–14, 50–440 and 72–69; NRC–2024–0084]

Issuance of Multiple Exemptions Regarding Security Notifications, Reports, and Recording Keeping

AGENCY: Nuclear Regulatory Commission.

ACTION: Exemptions; issuance.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is issuing a single notice to announce the issuance of 11 exemptions in response to requests from ten licensees. These exemptions were requested as a result of a change to NRC's regulations published in the **Federal Register** on March 14, 2023.

DATES: During the period from March 1, 2024, to March 31, 2024, the NRC granted 11 exemptions in response to requests submitted by ten licensees from November 6, 2023, to January 15, 2024.

ADDRESSES: Please refer to Docket ID NRC–2024–0084 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–2024–0084. Address questions about Docket IDs in *Regulations.gov* to Stacy Schumann; telephone: 301–415–0624; email: *Stacy.Schumann@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, at 301–415–4737, or by email to *PDR.Resource@nrc.gov.* For the convenience of the reader, instructions about obtaining materials referenced in this document are provided in the ''Availability of Documents'' section.
- *NRC's PDR:* The PDR, where you may examine and order copies of publicly available documents, is open by appointment. To make an appointment to visit the PDR, please

send an email to *PDR.Resource@nrc.gov* or call 1–800–397–4209 or 301–415–4737, between 8 a.m. and 4 p.m. eastern time (ET), Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Ed Miller, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; telephone: 301–415–2481, email: *Ed.Miller@nc.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

During the period from March 1, 2024, to March 31, 2024, the NRC granted 11 exemptions in response to requests submitted by the following licensees: Constellation Energy Generation, LLC; Dominion Energy Nuclear Connecticut, Inc.; Duke Energy; Energy Harbor Nuclear Corp.; Energy Northwest; Entergy Operations Inc.; Florida Power and Light; Nextera Energy Duane Arnold, LLC.; Susquehanna Nuclear, LLC; and Vistra Operations Company LLC.

These exemptions temporarily allow the licensee to deviate from certain requirements of part 73 of title 10 of the *Code of Federal Regulations* (10 CFR), ''Physical Protection of Plants and Materials,'' subpart T, ''Security Notifications, Reports, and Recordkeeping.'' In support of its exemption requests, the licensees agreed to effect site-specific administrative controls that maintain the approach to complying with 10 CFR part 73 in effect prior to the NRC's issuance of a final rule, ''Enhanced Weapons, Firearms Background Checks, and Security Event Notifications,'' which was published in the **Federal Register** on March 14, 2023, and became effective on April 13, 2023 (88 FR 15864).

II. Availability of Documents

The tables in this notice provide transparency regarding the number and type of exemptions the NRC has issued and provide the facility name, docket number, document description, document date, and ADAMS accession number for each exemption issued. Additional details on each exemption issued, including the exemption request submitted by the respective licensee and the NRC's decision, are provided in each exemption approval listed in the following tables. For additional directions on accessing information in ADAMS, see the **ADDRESSES** section of this document.

Document description	ADAMS accession No.	Document date
Constellation Energy Generation, LLC.; Three Mile Island Nuclear Station, Unit 1; Docket Nos. 50–289 and 72–77		
Three Mile Island Nuclear Station, Unit 1—Request for Exemption from Enhanced Weapons, Firearms Background Checks, and Security Event Notifications Implementation.	ML23326A010	November 22, 2023.
Three Mile Island Nuclear Station, Unit 1—Exemption from Select Requirements of 10 CFR part 73 (EPID L–2023–LLE–0061 [Security Notifications, Reports, and Recordkeeping and Suspicious Activity Reporting]).	ML24052A060	March 20, 2024.
Dominion Energy Nuclear Connecticut, Inc.; Millstone Power Station, Unit Nos. 1, 2, and 3; Docket Nos. 50–245, 50–336, 50–423, and 72–47		
Millstone, Unit [Nos.] 1, 2, and 3—Request for Exemption from Enhanced Weapons Firearms Background Checks, and Security Event Notifications Implementation.	ML23334A224	November 30, 2023.
Millstone Power Station, Unit Nos. 1, 2, and 3—Exemption from Select Requirements of 10 CFR part 73 [Security Notifications, Reports, and Recordkeeping and Suspicious Activity Reporting] (EPID L–2023–LLE–0072).	ML24051A192	March 8, 2024.
Duke Energy; Brunswick Steam Electric Plant, Unit Nos. 1 and 2; Docket Nos. 50–324, 50–325, and 72–06		
[Brunswick Steam Electric Plant, Unit Nos. 1 and 2]—RA–23–0284 Request for Exemption from Enhanced Weapons, Firearms Background Checks, and Security Event Notifications Implementation.	ML23320A283	November 16, 2023.
[Brunswick Steam Electric Plant, Unit Nos. 1 and 2]—Supplement to Request for Exemption from Enhanced Weapons, Firearms Background Checks, and Security Event Notifications Implementation.	ML23338A344	December 4, 2023.
Brunswick Steam Electric Plant, Unit Nos. 1 and 2—Exemption from Select Requirements of 10 CFR part 73 (EPID L–2023–LLE–0057 [Security Notifications, Reports, and Recordkeeping and Suspicious Activity Reporting]).	ML24026A098	March 1, 2024.
Energy Harbor Nuclear Corp.; Beaver Valley Power Station, Unit Nos. 1 and 2; Docket Nos. 50–334, 50–412 and 72–1043		
Beaver Valley Power Station, Unit Nos. 1 and 2 and Independent Spent Fuel Storage Installation—Request for Exemption from Enhanced Weapons, Firearms Background Checks, and Security Event Notifications Implementation.	ML23341A126	December 7, 2023.
Beaver Valley Power Station, Unit Nos. 1 and 2—Exemption from Select Requirements of 10 CFR part 73 (EPID L–2023–LLE–0083 [Security Notifications, Reports, and Recordkeeping and Suspicious Activity Reporting]).	ML24044A066	March 4, 2024.
Energy Northwest; Columbia Generating Station; Docket Nos. 50–397 and 72–35		
Columbia Generating Station—Request for Exemption from Enhanced Weapons, Firearms Background Checks, and Security Event Notifications Implementation.	ML23331A953	November 27, 2023.

Document description	ADAMS accession No.	Document date
Columbia Generating Station, Independent Spent Fuel Storage Installation—Supplement to Request for Exemption from Enhanced Weapons, Firearms Background Checks, and Security Event Notifications Implementation.	ML24015A003	January 15, 2024.
Columbia Generating Station—Exemption From Select Requirements of 10 CFR part 73 (EPID L–2023–LLE–0064 [Security Notifications, Reports, and Recordkeeping and Suspicious Activity Reporting]).	ML24044A049	March 12, 2024.
Entergy Operations Inc; Waterford Steam Electric Station, Unit 3; Docket Nos. 50–382 and 72–75		
[Waterford Steam Electric Station, Unit 3]—Request for Exemption from Enhanced Weapons, Firearms Background Checks, and Security Event Notifications Implementation.	ML23325A144	November 21, 2023.
[Waterford Steam Electric Station Unit 3]—Supplement to Request for Exemption from Enhanced Weapons, Firearms Background Checks, and Security Event Notifications Implementation.	ML23333A136	November 29, 2023.
Waterford Steam Electric Station Unit 3—Exemption from Select Requirements of 10 CFR part 73 (EPID L–2023–LLE–0053 [Security Notifications, Reports, and Recordkeeping and Suspicious Activity Reporting]).	ML24032A003	March 6, 2024.
Florida Power and Light; St. Lucie Plant, Unit Nos. 1 and 2; Docket Nos. 50–335, 50–389, and 72–61		
St. Lucie [Plant, Unit Nos. 1 and 2]—Part 73 Exemption Request Regarding Enhanced Weapons, Firearms Background Checks, and Security Event Notifications Final Rule.	ML23320A266	November 16, 2023.
St. Lucie [Plant, Unit Nos.] 1 and 2—Supplement to Exemption Request Regarding Enhanced Weapons, Firearms Background Checks, and Security Event Notifications Final Rule.	ML23334A075	November 29, 2023.
St. Lucie Plant, Unit Nos. 1 and 2—Exemption from Select Requirements of 10 CFR part 73 (Security Notifications, Reports, and Recordkeeping and Suspicious Activity Reporting) (EPID L–2023–LLE–0062).	ML24058A157	March 19, 2024.
Nextera Energy Duane Arnold, LLC.; Duane Arnold Energy Center; Docket Nos. 50–331 and 72–32		
Duane Arnold Energy Center—Part 73 Exemption Request Regarding Enhanced Weapons, Firearms Background Checks, and Security Event Notifications Final Rule.	ML23320A263	November 16, 2023.
Duane Arnold Energy Center—Supplement to Duane Arnold Exemption Request Regarding Enhanced Weapons, Firearms Background Checks, and Security Event Notifications Final Rule.	ML23340A144	December 6, 2023.
Nextera Energy Duane Arnold, LLC.—Exemption From Select Requirements of 10 CFR part 73 (EPID L–2023–LLE–0065 [Security Notifications, Reports, and Recordkeeping and Suspicious Activity Reporting]).	ML24072A029	March 29, 2024.
Susquehanna Nuclear, LLC; Susquehanna Steam Electric Station, Units 1 and 2; Docket Nos. 50–387, 50–388, and 72–28		
Susquehanna Steam Electric Station, [Units 1 and 2]—Request for Exemption from Enhanced Weapons, Firearms Background Checks and Security Event Notifications Implementation (PLA–8088).	ML23339A170	December 5, 2023.
Susquehanna Steam Electric Station, Units 1 and 2 and Associated Independent Spent Fuel Storage Installation—Exemption from Select Requirements of 10 CFR part 73 (EPID L–2023–LLE–0077 [Security Notifications, Reports, and Recordkeeping and Suspicious Activity Reporting]).	ML24044A253	March 14, 2024.
Vistra Operations Company, LLC; Davis-Besse Nuclear Power Station, Unit No. 1; Docket Nos. 50–346 and 72–14		
Davis-Besse Nuclear Power Station, Unit [No.] 1 and Independent Spent Fuel Storage Installation—Request for Exemption from Enhanced Weapons, Firearms Background Checks, and Security Event Notifications Implementation.	ML23340A108	December 6, 2023.
Davis-Besse Nuclear Power Station, Unit No. 1—Exemption from Select Requirements of 10 CFR part 73 (EPID L–2023–LLE–0076 [Security Notifications, Reports, and Recordkeeping and Suspicious Activity Reporting]).	ML24036A347	March 7, 2024.
Vistra Operations Company, LLC; Perry Nuclear Power Plant, Unit No. 1; Docket Nos. 50–440 and 72–69		
Perry Nuclear Power Plant, Unit No. 1—Request for Exemption from Enhanced Weapons, Firearms Background Checks, and Security Event Notifications Implementation.	ML23340A086	December 6, 2023.
Perry Nuclear Power Plant, Unit No. 1—Exemption from Select Requirements of 10 CFR part 73 (EPID L–2023–LLE–0080 [Security Notifications, Reports, and Recordkeeping and Suspicious Activity Reporting]).	ML24059A392	March 7, 2024.

Dated: April 25, 2024.

For the Nuclear Regulatory Commission.

Jeffrey A. Whited,

Chief, Plant Licensing Branch 3, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation.

[FR Doc. 2024–09250 Filed 4–29–24; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 72–53, 50–254, and 50–265; NRC–2024–0074]

Constellation Energy Generation, LLC; Quad Cities Nuclear Power Station, Units 1 and 2; Independent Spent Fuel Storage Installation; Environmental Assessment and Finding of No Significant Impact

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice; issuance.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is issuing an environmental assessment (EA) and a finding of no significant impact (FONSI) for an exemption request submitted by Constellation Energy Generation, LLC (Constellation) that would permit the Quad Cities Nuclear Power Station (QCNPS) to load four new 68M multi-purpose canisters (MPC) with continuous basket shims (CBS) beginning June 2024 in the HI–STORM 100 Cask System at its QCNPS Units 1 and 2 independent spent fuel storage installation (ISFSI) in a storage condition where the terms, conditions, and specifications in the Certificate of Compliance (CoC) No. 1014, Amendment No. 8, Revision No. 1, are not met.

DATES: The EA and FONSI referenced in this document are available on April 30, 2024.

ADDRESSES: Please refer to Docket ID NRC–2024–0074 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–2024–0074. Address questions about Docket IDs in *Regulations.gov* to Stacy Schumann; telephone: 301–415–0624; email: *Stacy.Schumann@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, at 301–415–4737, or by email to *PDR.Resource@nrc.gov.* For the convenience of the reader, instructions about obtaining materials referenced in this document are provided in the ''Availability of Documents'' section.
- *NRC's PDR:* The PDR, where you may examine and order copies of publicly available documents, is open by appointment. To make an appointment to visit the PDR, please send an email to *PDR.Resource@nrc.gov* or call 1–800–397–4209 or 301–415–4737, between 8 a.m. and 4 p.m. eastern time (ET), Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Yen-Ju Chen, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555; telephone: 301–415–1018; email: *Yen-Ju.Chen@nrc.gov.*

SUPPLEMENTARY INFORMATION:

I. Introduction

The NRC is reviewing an exemption request from Constellation, dated March 15, 2024. Constellation is requesting an exemption, pursuant to section 72.7 of title 10 of the *Code of Federal Regulations* (10 CFR), in paragraphs 72.212(a)(2), 72.212(b)(3), 72.212(b)(5)(i), 72.212(b)(11), and 72.214 that require Constellation to comply with the terms, conditions, and specifications of the CoC No. 1014, Amendment No. 8, Revision No. 1. If approved, the exemption would allow Constellation to load four MPC–68M–CBS beginning June 2024 in the HI–STORM 100 Cask System at the QCNPS ISFSI in a storage condition where the terms, conditions, and specifications in the CoC No. 1014, Amendment No. 8, Revision No. 1, are not met.

II. Environmental Assessment

Background

QCNPS is located 32 kilometers (20 miles) northeast of the Quad Cities Metropolitan Area of Davenport and Bettendorf, Iowa, and Rock Island, Moline and East Moline, Illinois. The site is on the east bank of Pool 14 of the Mississippi River, between Lock and Dams 13 and 14 and approximately 810 kilometers (506 miles) upstream from its confluence with the Ohio River. Both Units 1 and 2 began operating in 1973. Constellation has been storing spent fuel in an ISFSI at QCNPS under a general license as authorized by 10 CFR part 72, subpart K, ''General License for Storage of Spent Fuel at Power Reactor Sites.'' Constellation currently uses the HI–STORM 100 Cask System under CoC No. 1014, Amendment No. 8, Revision No. 1, for dry storage of spent nuclear fuel in a specific MPC (*i.e.,* MPC–68M) at the QCNPS ISFSI.

Description of the Proposed Action

The CoC is the NRC approved design for each dry cask storage system. The proposed action would exempt the applicant from the requirements of 10 CFR 72.212(a)(2), 72.212(b)(3), 72.212(b)(5)(i), 72.212(b)(11), and 72.214 only as these requirements pertain to the use of the MPC–68M–CBS in the HI–STORM 100 Cask System for the near-term planned loading of the systems. The exemption would allow Constellation to load four MPC–68M–CBS in the HI–STORM 100 Cask System at the QCNPS ISFSI beginning June 2024, despite the MPC–68M–CBS in the HI–STORM 100 Cask System not being in compliance with the terms, conditions, and specifications in the CoC No. 1014, Amendment No. 8, Revision No. 1.

The HI–STORM 100 Cask System CoC provides the requirements, conditions, and operating limits necessary for use of the system to store spent fuel. Holtec International (Holtec), the designer and manufacturer of the HI–STORM 100 Cask System, developed a variant of the design with continuous basket shims (CBS) for the MPC–68M, known as MPC–68M–CBS. Holtec originally implemented the CBS variant design under the provisions of 10 CFR 72.48, which allows licensees to make changes to cask designs without a CoC amendment under certain conditions (listed in 10 CFR 72.48(c)). After evaluating the specific changes to the cask designs, the NRC determined that Holtec erred when it implemented the CBS variant design under 10 CFR 72.48, as this was not the type of change allowed without a CoC amendment. For this reason, the NRC issued three Severity Level IV violations to Holtec. Constellation plans to load four MPC–68M–CBS in the HI–STORM 100 Cask System beginning in June 2024. This exemption considers the near-term planned loading of the four canisters with the CBS variant basket design.

Need for the Proposed Action

Constellation requested this exemption in order to allow QCNPS to load four MPC–68M–CBS in the HI–STORM 100 Cask System at the QCNPS

ISFSI for the future loading campaign scheduled to begin in June 2024. Approval of the exemption request would allow Constellation to effectively manage the spent fuel pool margin and capacity to enable refueling and offloading fuel from the reactor. It would also allow Constellation to effectively manage the availability of the specialized workforce and equipment needed to support competing fuel loading and operational activities at QCNPS and other Constellation sites.

Environmental Impacts of the Proposed Action

This EA evaluates the potential environmental impacts of granting an exemption from the terms, conditions, and specifications in CoC No. 1014, Amendment No. 8, Revision No. 1. The exemption would allow four MPC–68M–CBS to be loaded in the HI–STORM 100 Cask System in the near-term loading campaign and maintained in storage at the QCNPS ISFSI.

The potential environmental impacts of storing spent nuclear fuel in NRC-approved storage systems have been documented in previous assessments. On July 18, 1990 (55 FR 29181), the NRC amended 10 CFR part 72 to provide for the storage of spent fuel under a general license in cask designs approved by the NRC. The EA for the 1990 final rule analyzed the potential environmental impacts of using NRC-approved storage casks. The EA for the HI–STORM 100 Cask System, CoC No. 1014, Amendment No. 8, Revision No. 1 (80 FR 49887), published in 2015, tiers off of the EA issued for the July 18, 1990, final rule. ''Tiering'' off earlier EAs is a standard process encouraged by the regulations implementing the National Environmental Policy Act of 1969 (NEPA) that entails the use of impact analyses of previous EAs to bound the impacts of a proposed action where appropriate. The Holtec HI–STORM 100 Cask System is designed to mitigate the effects of design basis accidents that could occur during storage. Considering the specific design requirements for the accident conditions, the design of the cask would prevent loss of containment, shielding, and criticality control. If there is no loss of containment, shielding, or criticality control, the environmental impacts would not be significant.

The exemptions requested by Constellation at the QCNPS site as they relate to CoC No. 1014, Amendment No. 8, Revision No. 1, for the HI–STORM 100 Cask System are limited to the use of the CBS variant basket design only for the near-term planned loading of four canisters utilizing the CBS variant basket design. The staff has determined that this change in the basket will not result in either radiological or non-radiological environmental impacts that significantly differ from the environmental impacts evaluated in the environmental assessment supporting the issuance of CoC No. 1014, Amendment No. 8, Revision No. 1. If the exemption is granted, there will be no significant change in the types or amounts of any effluents released, no significant increase in individual or cumulative public or occupational radiation exposure, and no significant increase in the potential for or consequences from radiological accidents. Accordingly, the Commission concludes that there would be no significant environmental impacts associated with the proposed action.

Alternative to the Proposed Action

The staff considered the no-action alternative. The no-action alternative (denial of the exemption request) would require Constellation to delay the near-term planned future loading of four MPC–68M–CBS in the HI–STORM 100 Cask System. Not allowing the planned future loading campaign could affect Constellation's ability to manage pool capacity, reactor fuel offloading, and refueling. It could also pose challenges to spent fuel heat removal and impact the availability of the specialized workforce and equipment needed to support competing fuel loading and operational activities at QCNPS and other Constellation sites. The NRC has determined that the no-action alternative would result in undue potential human health and safety impacts that could be avoided by proceeding with the proposed exemption, especially given that the staff has concluded in the NRC's Safety Determination Memorandum, issued with respect to the enforcement action against Holtec regarding these violations, that fuel can be stored safely in the MPC–68M–CBS canisters.

Agencies Consulted

The NRC provided the Illinois Emergency Management Agency and Office of Homeland Security (IL–IEMA–OHS) a copy of this draft EA for review by an email dated April 15, 2024. On April 23, 2024, the IL–IEMA–OHS provided its concurrence by email.

III. Finding of No Significant Impact

The environmental impacts of the proposed action have been reviewed in accordance with the requirements in 10 CFR part 51, which implement NEPA. Based upon the foregoing environmental assessment, the NRC finds that the proposed action of granting the exemption from the regulations in 10 CFR 72.212(a)(2), 72.212(b)(3), 72.212(b)(5)(i), 72.212(b)(11) and 72.214, which require the licensee to comply with the terms, conditions, and specifications of the CoC, in this case limited to the specific future loading of four canisters with the CBS variant basket design beginning June 2024, would not significantly impact the quality of the human environment. Accordingly, the NRC has determined that a FONSI is appropriate, and an environmental impact statement is not warranted.

IV. Availability of Documents

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

Document description	ADAMS accession No. or **Federal Register** notice
Constellation's request for exemption, dated March 15, 2024	ML24075A001.
Certificate of Compliance No. 1014, Amendment 8, Revision 1, dated February 10, 2016	ML16041A233 (Package).
Holtec International, Inc.—Notice of Violation; The U.S. Nuclear Regulatory Commission Inspection Report No. 07201014/2022–201, EA–23–044, dated January 30, 2024.	ML24016A190.
10 CFR part 72 amendment to allow spent fuel storage in NRC-approved casks, dated July 18, 1990	55 FR 29181.
EA for part 72 amendment to allow spent fuel storage in NRC-approved casks, dated March 8, 1989	ML051230231.
Final rule for List of Approved Spent Fuel Storage Casks: Holtec International HI–STORM 100 Cask System CoC No. 1014, Amendment 8, Revision 1, dated August 18, 2015.	80 FR 49887.
Safety Determination of a Potential Structural Failure of the Fuel Basket During Accident Conditions for the HI–STORM 100 and HI–STORM Flood/Wind Dry Cask Storage Systems, dated January 31, 2024.	ML24018A085.
NRC email to IL–IEMA–OHS requesting review of EA/FONSI for Quad Cities Exemption, dated April 15, 2024.	ML24114A170.

Document description	ADAMS accession No. or **Federal Register** notice
IL–IEMA–OHS email response, regarding review of EA/FONSI for Quad Cities Exemption,'' dated April 23, 2024.	ML24114A171.

Dated: April 24, 2024.

For the Nuclear Regulatory Commission.

Yoira Diaz-Sanabria,

Chief, Storage and Transportation Licensing Branch, Division of Fuel Management, Office of Nuclear Material Safety and Safeguards.

[FR Doc. 2024–09231 Filed 4–29–24; 8:45 am]

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NUCLEAR REGULATORY COMMISSION

[Docket Nos. 72–0028, 50–387, and 50–388; NRC–2024–0068]

Susquehanna Nuclear, LLC; Susquehanna Steam Electric Station, Units 1 and 2; Independent Spent Fuel Storage Installation; Exemption

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice; issuance.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) issued an exemption to Susquehanna Nuclear, LLC, permitting Susquehanna Steam Electric Station to load six new 89 multi-purpose canisters (MPC) with continuous basket shims in the HI–STORM Flood/Wind MPC Storage System at its Susquehanna Steam Electric Station, Units 1 and 2 independent spent fuel storage installation in a storage condition where the terms, conditions, and specifications in the Certificate of Compliance No. 1032, Amendment No. 5, are not met.

DATES: The exemption was issued on April 22, 2024.

ADDRESSES: Please refer to Docket ID NRC–2024–0068 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–2024–0068. Address questions about Docket IDs in *Regulations.gov* to Stacy Schumann; telephone: 301–415–0624; email: *Stacy.Schumann@nrc.gov.* For technical questions, contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section of this document.
- *NRC's Agencywide Documents Access and Management System (ADAMS):* You may obtain publicly available documents online in the ADAMS Public Documents collection at *https://www.nrc.gov/reading-rm/adams.html.* To begin the search, select ''Begin Web-based ADAMS Search.'' For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1–800–397–4209, at 301–415–4737, or by email to *PDR.Resource@nrc.gov.* The ADAMS accession number for each document referenced (if it is available in ADAMS) is provided the first time that it is mentioned in this document.
- *NRC's PDR:* The PDR, where you may examine and order copies of publicly available documents, is open by appointment. To make an appointment to visit the PDR, please send an email to *PDR.Resource@nrc.gov* or call 1–800–397–4209 or 301–415–4737, between 8 a.m. and 4 p.m. eastern time (ET), Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Christian Jacobs, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555; telephone: 301–415–6825; email: *Christian.Jacobs@nrc.gov.*

SUPPLEMENTARY INFORMATION: The text of the exemption is attached.

Dated: April 25, 2024.

For the Nuclear Regulatory Commission.

Yoira Diaz-Sanabria,

Chief, Storage and Transportation Licensing Branch, Division of Fuel Management, Office of Nuclear Material Safety, and Safeguards.

Attachment—Exemption

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 72–0028, 50–387, and 50–388]

Susquehanna Nuclear, LLC; Susquehanna Steam Electric Station Units 1 and 2; Independent Spent Fuel Storage Installation

I. Background

Susquehanna Nuclear, LLC (Susquehanna) is the holder of Renewed Facility Operating License Nos. NPF–14 and NPF–22, which authorize operation of the Susquehanna Steam Electric Station (SSES), Units 1 and 2 in Salem Township, Luzerne County, PA (70 miles northeast of Harrisburg, PA), pursuant to Part 50 of Title 10 of the *Code of Federal Regulations* (10 CFR), ''Domestic Licensing of Production and Utilization Facilities.'' The licenses provide, among other things, that the facility is subject to all rules, regulations, and orders of the U.S. Nuclear Regulatory Commission (NRC) now or hereafter in effect.

Consistent with 10 CFR part 72, subpart K, ''General License for Storage of Spent Fuel at Power Reactor Sites,'' a general license is issued for the storage of spent fuel in an Independent Spent Fuel Storage Installation (ISFSI) at power reactor sites to persons authorized to possess or operate nuclear power reactors under 10 CFR part 50. Susquehanna is authorized to operate nuclear power reactors under 10 CFR part 50 and holds a 10 CFR part 72 general license for storage of spent fuel at the SSES ISFSI. Under the terms of the general license, Susquehanna stores spent fuel at its SSES ISFSI using the HI–STORM Flood/Wind (FW) Multi-Purpose Canister (MPC) Storage System in accordance with Certificate of Compliance (CoC) No. 1032, Amendment No. 5.

II. Request/Action

By a letter dated March 19, 2024 (Agencywide Documents Access and Management System [ADAMS] Accession No. ML24079A070) and supplemented on March 21, 2024 (ML24081A335), Susquehanna requested an exemption from the requirements of 10 CFR 72.212(a)(2), 72.212(b)(3), 72.212(b)(5)(i), 72.212(b)(11), and 72.214 that requires SSES to comply with the terms, conditions, and specifications of the CoC No. 1032, Amendment No. 5 (ML20163A701). If approved, Susquehanna's exemption request would accordingly allow SSES to load MPCs with continuous basket shims (CBS) (*i.e.,* MPC–89–CBS), an unapproved variant basket design, in the HI–STORM FW MPC Storage System, and thus, to load the systems in a storage condition where the terms, conditions, and specifications in the CoC No. 1032, Amendment No. 5, are not met.

Susquehanna currently uses the HI–STORM FW MPC Storage System under CoC No. 1032, Amendment No. 5, for dry storage of spent nuclear fuel at the SSES ISFSI. Holtec International (Holtec), the designer and manufacturer of the HI–STORM FW MPC Storage

System, developed a variant of the MPC–89 design with CBS, known as MPC–89–CBS. Holtec performed a non-mechanistic tip-over analysis with favorable results and implemented the CBS variant design under the provisions of 10 CFR 72.48, ''Changes, tests, and experiments,'' which allows licensees to make changes to cask designs without a CoC amendment under certain conditions (listed in 10 CFR 72.48(c)). After evaluating the specific changes to the cask designs, the NRC determined that Holtec erred when it implemented the CBS variant design under 10 CFR 72.48, as this is not the type of change allowed without a CoC amendment. For this reason, the NRC issued three Severity Level IV violations to Holtec (ML24016A190).

Susquehanna's near-term loading campaign for the SSES ISFSI includes plans to load six MPC–89–CBS in the HI–STORM FW MPC Storage System beginning in August 2024. While Holtec was required to submit a CoC amendment to the NRC to seek approval of the CBS variant design, such a process will not be completed in time to inform decisions for this near-term loading campaign. Therefore, Susquehanna submitted this exemption request to allow for future loading of six MPC–89–CBS beginning in August 2024 at the SSES ISFSI. This exemption is limited to the use of MPC–89–CBS in the HI–STORM FW MPC Storage System only for the specific near-term planned loading of six new canisters using the MPC–89–CBS variant basket design.

III. Discussion

Pursuant to 10 CFR 72.7, ''Specific exemptions,'' the Commission may, upon application by any interested person or upon its own initiative, grant such exemptions from the requirements of the regulations of 10 CFR part 72 as it determines are authorized by law and will not endanger life or property or the common defense and security and are otherwise in the public interest.

A. The Exemption Is Authorized by Law

This exemption would allow Susquehanna to load six new MPC–89–CBS in the HI–STORM FW MPC Storage System, beginning in August 2024, at its SSES ISFSI in a storage condition where the terms, conditions, and specifications in the CoC No. 1032, Amendment No. 5, are not met. Susquehanna is requesting an exemption from the provisions in 10 CFR part 72 that require the licensee to comply with the terms, conditions, and specifications of the CoC for the approved cask model it uses. Section 72.7 allows the NRC to grant exemptions from the requirements of 10 CFR part 72. This authority to grant exemptions is consistent with the Atomic Energy Act of 1954, as amended, and is not otherwise inconsistent with NRC's regulations or other applicable laws. Additionally, no other law prohibits the activities that would be authorized by the exemption. Therefore, the NRC concludes that there is no statutory prohibition on the issuance of the requested exemption, and the NRC is authorized to grant the exemption by law.

B. The Exemption Will Not Endanger Life or Property or the Common Defense and Security

This exemption would allow Susquehanna to load six new MPC–89–CBS in the HI–STORM FW MPC Storage System, beginning in August 2024, at the SSES ISFSI in a storage condition where the terms, conditions, and specifications in the CoC No. 1032, Amendment No. 5, are not met. In support of its exemption request, Susquehanna asserts that issuance of the exemption would not endanger life or property because a tip-over or handling event is administratively controlled, and that the containment boundary would be maintained in such an event. Susquehanna relies, in part, on the approach in the NRC's Safety Determination Memorandum (ML24018A085). The NRC issued this Safety Determination Memorandum to address whether, with respect to the enforcement action against Holtec regarding this violation, there was any need to take an immediate action for the cask systems that were already loaded with non-compliant basket designs. The Safety Determination Memorandum documents a risk-informed approach concluding that, during the design basis event of a non-mechanistic tip-over, the fuel in the basket in the MPC–89–CBS remains in a subcritical condition.

Susquehanna also provided site-specific technical information, as supplemented, including information explaining why the use of the approach in the NRC's Safety Determination Memorandum is appropriate for determining the safe use of the CBS variant baskets at the SSES ISFSI. Specifically, Susquehanna described that the analysis of the tip-over design basis event that is relied upon in the NRC's Safety Determination Memorandum, which demonstrates that the MPC confinement barrier is maintained, is documented in the updated final safety analysis report (UFSAR) for the HI–STORM FW MPC Storage System CoC No. 1032, Amendment 5, that is used at the SSES site. In addition, the handling procedures utilized by Susquehanna comply with the requirements of Appendix A of CoC No. 1032, Amendment No. 5, including a single failure proof lifting system and redundant drop protection features in accordance with applicable codes and standards.

Additionally, Susquehanna referenced specific information from SSES's 72.212 Evaluation Report, Revision 0, that demonstrated the combined dose produced by the storage systems on the SSES ISFSI will not result in annual doses at the ISFSI controlled area boundary in excess of the limits specified in 10 CFR 72.104(a), ''Criteria for radioactive materials in effluents and direct radiation from an ISFSI or MRS,'' during normal and anticipated operational occurrences, or in excess of the limits specified in 72.106, ''Controlled area of an ISFSI or MRS,'' during design bases accidents. Specifically, Susquehanna described that, in the highly unlikely event of a tip-over, any potential fuel damage from a non-mechanistic tip-over event would be localized, the confinement barrier would be maintained, and the shielding material would remain intact. Susquehanna concluded that there is no adverse effect on the shielding or confinement functions since there is no effect on occupational or public exposures as a result of this accident condition.

The NRC staff reviewed the information provided by Susquehanna and concludes that issuance of the exemption would not endanger life or property because the administrative controls Susquehanna has in place at the SSES ISFSI sufficiently minimize the possibility of a tip-over or handling event, and that the containment boundary would be maintained in such an event. The staff confirmed that these administrative controls comply with the technical specifications and UFSAR for the HI–STORM FW MPC Storage System CoC No. 1032, Amendment No. 5, that is used at the SSES site. In addition, the staff confirmed that the information provided by Susquehanna regarding SSES's 72.212 Evaluation Report, Revision 0, demonstrates that the consequences of normal and accident conditions would be within the regulatory limits of the 10 CFR 72.104 and 10 CFR 72.106. The staff also determined that the requested exemption is not related to any aspect of the physical security or defense of the SSES ISFSI; therefore, granting the exemption would not result in any potential impacts to common defense and security.

For these reasons, the NRC staff determined that under the requested exemption, the storage system will continue to meet the safety requirements of 10 CFR part 72 and the offsite dose limits of 10 CFR part 20 and, therefore, will not endanger life or property or the common defense and security.

C. The Exemption Is Otherwise in the Public Interest

The proposed exemption would allow Susquehanna to load six new MPC–89–CBS in the HI–STORM FW MPC Storage System beginning in August 2024, at the SSES ISFSI, even though the CBS variant basket design is not part of the approved CoC No. 1032, Amendment No. 5. According to Susquehanna, the exemption is in the public interest because not being able to load fuel into dry storage in the future loading campaign would adversely impact Susquehanna's ability to maintain full core offload capability, consequently increasing risk and challenges to continued safe reactor operation.

Susquehanna stated that to delay the future loading would impact the ability to maintain a healthy margin in the spent fuel pools in support of a full core discharge for one reactor unit with a goal of providing a full core discharge for both reactor units. Susquehanna also stated that the inability to utilize the MPC–89 canister containing the CBS basket in the 2024 Spent Fuel Storage campaign significantly impacts the ability to effectively manage margin for full core discharge capability, because margin reduction results in increased inventory in the spent fuel pool that would likely require additional fuel moves and an increased reactivity management risk due to increased fuel handling operations. Additionally, Susquehanna notes that there are logistical concerns that the availability of the specialized equipment and personnel resources, which are secured years in advance of scheduled campaigns, would have a cascading impact on all other scheduled activities that utilize these specialized resources. Any delay would lead to a reduction in the margin to capacity in the spent fuel pool. Once the spent fuel pool capacity is reached, the ability to refuel the operating reactor is limited, thus affecting continued reactor operations.

For the reasons described by Susquehanna in the exemption request, the NRC agrees that it is in the public interest to grant the exemption. If the exemption is not granted, to comply with the CoC, SSES would have to keep spent fuel in the spent fuel pool if it is not permitted to be loaded into casks in a future loading, thus impacting Susquehanna's ability to effectively manage the margin for full core discharge capacity. As explained by Susquehanna, increased inventory of fuel in the spent fuel pool could result in the need for additional fuel moves and, therefore, an increase in worker doses and the potential for fuel handling accidents that accompany increased fuel handling operations. Moreover, should spent fuel pool capacity be reached, the ability to refuel an operating reactor unit is challenged, thus potentially impacting continued reactor operations.

Therefore, the staff concludes that approving the exemption is in the public interest.

Environmental Consideration

The NRC staff also considered whether there would be any significant environmental impacts associated with the exemption. For this proposed action, the NRC staff performed an environmental assessment pursuant to 10 CFR 51.30. The environmental assessment concluded that the proposed action would not significantly impact the quality of the human environment. The NRC staff concluded that the proposed action would not result in any changes in the types or amounts of any radiological or non-radiological effluents that may be released offsite, and there would be no significant increase in occupational or public radiation exposure because of the proposed action. The environmental assessment and the finding of no significant impact was published on April 22, 2024 (89 FR 29369).

IV. Conclusion

Based on these considerations, the NRC has determined that, pursuant to 10 CFR 72.7, the exemption is authorized by law, will not endanger life or property or the common defense and security, and is otherwise in the public interest. Therefore, the NRC grants Susquehanna an exemption from the requirements of §§ 72.212(a)(2), 72.212(b)(3), 72.212(b)(5)(i), 72.212(b)(11), and 72.214 with respect to the future loading in the HI–STORM FW MPC Storage System of six new MPC–89–CBS beginning in August 2024.

This exemption is effective upon issuance.

Dated: April 22, 2024.

For the Nuclear Regulatory Commission.

/RA/

Yoira Diaz-Sanabria,

Chief, Storage and Transportation Licensing Branch, Division of Fuel Management, Office of Nuclear Material Safety, and Safeguards.

[FR Doc. 2024–09275 Filed 4–29–24; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR WASTE TECHNICAL REVIEW BOARD

Board Meeting

The U.S. Nuclear Waste Technical Review Board will hold a hybrid (in-person/virtual) public meeting on May 21–22, 2024.

Board meeting: May 21–22, 2024—*The U.S. Nuclear Waste Technical Review Board will hold a hybrid (in-person/virtual) public meeting in Knoxville, TN, to review information on the U.S. Department of Energy's (DOE) research and development (R&D) activities (a) related to non-site-specific disposal of spent nuclear fuel and high-level radioactive waste in crystalline host rocks and (b) on corrosion of commercial SNF after disposal.*

Pursuant to its authority under section 5051 of Public Law 100–203, Nuclear Waste Policy Amendments Act (NWPAA) of 1987, the U.S. Nuclear Waste Technical Review Board will hold a hybrid (in-person/virtual) meeting in Knoxville, TN, on Tuesday, May 21, 2024, and Wednesday, May 22, 2024, to review information on the U.S. Department of Energy's (DOE) research and development (R&D) activities (a) related to non-site-specific disposal of spent nuclear fuel (SNF) and high-level radioactive waste (HLW) in crystalline host rocks and (b) on corrosion of commercial SNF after disposal.

The hybrid (in-person/virtual) meeting will be held at the Hilton Downtown Knoxville Hotel at 501 West Church Avenue in Knoxville, Tennessee. The hotel telephone number is 865–523–2300. The hotel website is *https://www.hilton.com/en/hotels/knxkhhf-hilton-knoxville/.* On Tuesday, May 21, the meeting will begin at 80 a.m. eastern daylight time (EDT) and is scheduled to adjourn at approximately 5 p.m. EDT. On Wednesday, May 22, the hybrid meeting will begin at 8 a.m. EDT and conclude at 12 p.m. EDT. On the first day, the initial speakers will provide an overview of DOE's SNF and HLW disposal research programs. Additional speakers representing the national laboratories conducting the work for DOE will report on R&D activities to advance the understanding of long-term waste disposal in crystalline rocks. They will also discuss

R&D efforts related to the corrosion of commercial SNF. This includes the development of a corrosion model capable of accounting for complex physical and chemical processes for a wide range of repository conditions. Speakers from Finland and Canada will present information on their countries' disposal programs. A detailed meeting agenda will be available on the Board's website at *www.nwtrb.gov* approximately one week before the meeting.

The meeting will be open to the public, and there will be an opportunity for public comment at the end of the meeting each day. Those attending the meeting in person and wishing to provide oral comments are encouraged to sign-in using the Public Comment Register at the check-in table near the entrance to the meeting room. Oral commenters will be taken in the order in which they signed in. Public comments may also be submitted during the meeting via the online meeting viewing platform, using the ''Comment for the Record'' form. Comments submitted online during the day of the meeting may be read into the record by Board staff during the public comment period if time allows. Depending on the number of speakers and online comments, a time limit on individual remarks may be set. Written comments of any length may be submitted to the Board staff by mail or electronic mail. Comments received in writing will be included in the meeting record, which will be posted on the Board's website. An archived recording of the meeting will be available on the Board's website following the meeting, and a transcript of the meeting will be available on the website by July 31, 2024.

The Board is an independent federal agency in the Executive Branch. It was established in the Nuclear Waste Policy Amendments Act of 1987 (Pub. L. 100–203) to perform ongoing evaluation of the technical and scientific validity of U.S. Department of Energy activities related to developing and implementing a program for the management and disposal of spent nuclear fuel and high-level radioactive waste, in accordance with the terms of the Nuclear Waste Policy Act of 1982. Board members serve part-time and are appointed by the President from a list of nominees submitted by the National Academy of Sciences. The Board reports its findings, conclusions, and recommendations to Congress and the Secretary of Energy. Board reports, correspondence, congressional testimony, meeting transcripts, and related materials are posted on the Board's website.

For information regarding the meeting, contact Mr. Christopher Burk at *burk@nwtrb.gov,* or by phone at 703–235–4486, or Ms. Chandrika Manepally at *manepally@nwtrb.gov,* or by phone at 703–235–4489. For information on meeting logistics, contact Davonya Barnes at *barnes@nwtrb.gov,* or by phone at 703–235–9141. All three may be reached by mail at 2300 Clarendon Boulevard, Suite 1300, Arlington, VA 22201–3367; or by fax at 703–235–4495.

Dated: April 22, 2024.

Daniel G. Ogg,

Executive Director, U.S. Nuclear Waste Technical Review Board.

[FR Doc. 2024–09249 Filed 4–29–24; 8:45 am]

BILLING CODE 6820–AM–P

OFFICE OF PERSONNEL MANAGEMENT

Submission for Review: 3206–0228, CSRS/FERS Documentation in Support of Disability Retirement Application, Standard Form 3112

AGENCY: Office of Personnel Management.

ACTION: 30-Day notice and request for comments.

SUMMARY: The Office of Personnel Management (OPM), Retirement Services, offers the general public and other Federal agencies the opportunity to comment on an expiring information collection request (ICR): CSRS/FERS Documentation in Support of Disability Retirement Application, Standard Form 3112.

DATES: Comments are encouraged and will be accepted until May 30, 2024.

ADDRESSES: Interested persons are invited to submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street NW, Washington, DC 20503, Attention: Desk Officer for the Office of Personnel Management or sent via electronic mail to: *oira_submission@omb.eop.gov* or faxed to (202) 395–6974.

FOR FURTHER INFORMATION CONTACT: A copy of this ICR with applicable supporting documentation may be obtained by contacting the Retirement Services Publications Team, Office of Personnel Management, 1900 E Street NW, Room 3316–L, Washington, DC 20415, Attention: Cyrus S. Benson, or sent via electronic mail to *Cyrus.Benson@opm.gov* or faxed to (202) 606–0910 or via telephone at (202) 936–0401.

SUPPLEMENTARY INFORMATION: As required by the Paperwork Reduction Act of 1995, OPM is soliciting comments for this collection. The information collection (OMB No. 3206–0228) was previously published in the **Federal Register** on May 3, 2023, at 88 FR 27931, allowing for a 60-day public comment period. No comments were received.

The Office of Management and Budget is particularly interested in comments that:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of functions of the agency, including whether the information will have practical utility;

2. Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

3. Enhance the quality, utility, and clarity of the information to be collected; and

4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submissions of responses.

Standard Form 3112, CSRS/FERS Documentation in Support of Disability Retirement Application, collects information from applicants for disability retirement so that OPM can determine whether to approve a disability retirement under 5 U.S.C. 8337 and 8455. The applicant will only complete Standard Form 3112A and 3112C. The applicant must obtain information from a physician as part of Standard Form 3112C. Standard Forms 3112B, 3112D and 3112E will be completed by the immediate supervisor and the employing agency of the applicant.

Analysis

Agency: Retirement Operations, Retirement Services, Office of Personnel Management.

Title: CSRS/FERS Documentation in Support of Disability Retirement.

OMB Number: 3206–0228.

Frequency: On occasion.

Affected Public: Individuals or Households.

Number of Respondents: 36,300 total respondents [12,100 (SF 3112A), 12,100 (SF 3112B) and 12,100 (SF 3112C)].

Estimated Time per Respondent: 30 minutes (SF 3112A) and 60 minutes (SF 3112C).

Total Burden Hours: 30,250 total hours [6,050 hours (SF 3112A), 12,100 (SF 3112B), and 12,100 hours (SF 3112C)].

Office of Personnel Management.

Kayyonne Marston,

Federal Register Liaison.

[FR Doc. 2024–09280 Filed 4–29–24; 8:45 am]

BILLING CODE 6325–38–P

OFFICE OF PERSONNEL MANAGEMENT

Submission for Review: 3206–0215, Verification of Full-Time School Attendance, RI 25–49

AGENCY: Office of Personnel Management.

ACTION: 30-Day notice and request for comments.

SUMMARY: The Office of Personnel Management (OPM), Retirement Services, offers the general public and other Federal agencies the opportunity to comment on the review of an expiring information collection request (ICR) without change: Verification of Full-Time School Attendance, RI 25–49.

DATES: Comments are encouraged and will be accepted until May 30, 2024.

ADDRESSES: Interested persons are invited to submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street NW, Washington, DC 20503, Attention: Desk Officer for the Office of Personnel Management or sent via electronic mail to: *oira_submission@omb.eop.gov* or faxed to (202) 395–6974.

FOR FURTHER INFORMATION CONTACT: A copy of this ICR with applicable supporting documentation may be obtained by contacting the Retirement Services Publications Team, Office of Personnel Management, 1900 E Street NW, Room 3316–L, Washington, DC 20415, Attention: Cyrus S. Benson, or via electronic mail at *RSPublicationsTeam@opm.gov,* fax at (202) 606–0910. or telephone at (202) 936–0401.

SUPPLEMENTARY INFORMATION: As required by the Paperwork Reduction Act of 1995 OPM is soliciting comments for this collection. The information collection (OMB No. 3206–0215) was previously published in the **Federal Register** on July 26, 2023, at 88 FR 48271, allowing for a 60-day public comment period. No comments were received. The Office of Management and Budget is particularly interested in comments that:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of functions of the agency, including whether the information will have practical utility;
2. Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
3. Enhance the quality, utility, and clarity of the information to be collected; and
4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submissions of responses.

RI 25–49 is used to verify that adult student annuitants are entitled to payment. The Office of Personnel Management must confirm that a full-time enrollment has been maintained.

Analysis

Agency: Office of Personnel Management, Retirement Services.

Title: Verification of Adult Student Enrollment Status.

OMB Number: 3206–0215.

Frequency: On occasion.

Affected Public: Individuals or Households.

Number of Respondents: 10,000.

Estimated Time per Respondent: 1 hour.

Total Burden Hours: 10,000.

Office of Personnel Management.

Kayyonne Marston,

Federal Register Liaison.

[FR Doc. 2024–09281 Filed 4–29–24; 8:45 am]

BILLING CODE 6325–38–P

OFFICE OF PERSONNEL MANAGEMENT

Submission for Review: 3206–0194, Annuity Supplement Earnings Report, RI 92–22

AGENCY: Office of Personnel Management.

ACTION: 30-Day notice and request for comments.

SUMMARY: The Office of Personnel Management (OPM), Retirement Services, offers the general public and other Federal agencies the opportunity to comment on the review of an expiring information collection request (ICR) with change: Annuity Supplement Earnings Report, RI 92–22.

DATES: Comments are encouraged and will be accepted until May 30, 2024.

ADDRESSES: Interested persons are invited to submit written comments on the proposed information collection to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street NW, Washington, DC 20503, Attention: Desk Officer for the Office of Personnel Management or sent via electronic mail to: *oira_submission@omb.eop.gov* or faxed to (202) 395–6974.

FOR FURTHER INFORMATION CONTACT: A copy of this ICR with applicable supporting documentation, may be obtained by contacting the Retirement Services Publications Team, Office of Personnel Management, 1900 E Street NW, Room 3316–L, Washington, DC 20415, Attention: Cyrus S. Benson, or via electronic mail to *Cyrus.Benson@opm.gov,* fax at (202) 606–0910, or telephone at (202) 936–0401.

SUPPLEMENTARY INFORMATION: As required by the Paperwork Reduction Act of 1995 OPM is soliciting comments for this collection. The information collection (OMB No. 3206–0194) was previously published in the **Federal Register** on September 6, 2023, at 88 FR 60991, allowing for a 60-day public comment period. No comments were received. The Office of Management and Budget is particularly interested in comments that:

1. Evaluate whether the proposed collection of information is necessary for the proper performance of functions of the agency, including whether the information will have practical utility;
2. Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
3. Enhance the quality, utility, and clarity of the information to be collected; and
4. Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submissions of responses.

Form RI 92–22, Annuity Supplement Earnings Report, is used to annually obtain the earned income of Federal Employees Retirement System (FERS) annuitants receiving an annuity supplement. The annuity supplement is paid to eligible FERS annuitants who are not retired on disability and are not yet age 62. The supplement approximates the portion of full career Social Security benefits earned while under FERS and ends at age 62. Like

Social Security benefits, the annuity supplement is subject to an earnings limitation.

Analysis

Agency: Retirement Operations, Retirement Services, Office of Personnel Management.

Title: Annuity Supplement Earnings Report.

OMB Number: 3206–0194.

Frequency: On occasion.

Affected Public: Individuals or Households.

Number of Respondents: 13,000.

Estimated Time per Respondent: 15 minutes.

Total Burden Hours: 3,250.

Office of Personnel Management.

Kayyonne Marston,

Federal Register Liaison.

[FR Doc. 2024–09282 Filed 4–29–24; 8:45 am]

BILLING CODE 6325–38–P

POSTAL REGULATORY COMMISSION

[Docket Nos. MC2024–248 and CP2024–254; MC2024–249 and CP2024–255]

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:* May 2, 2024.

ADDRESSES: Submit comments electronically via the Commission's Filing Online system at *http://www.prc.gov.* Those who cannot submit comments electronically should contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section by telephone for advice on filing alternatives.

FOR FURTHER INFORMATION CONTACT: David A. Trissell, General Counsel, at 202–789–6820.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Introduction

The Commission gives notice that the Postal Service filed request(s) for the Commission to consider matters related to negotiated service agreement(s). The request(s) may propose the addition or removal of a negotiated service agreement from the Market Dominant or the Competitive product list, or the modification of an existing product currently appearing on the Market Dominant or the Competitive product list.

Section II identifies the docket number(s) associated with each Postal Service request, the title of each Postal Service request, the request's acceptance date, and the authority cited by the Postal Service for each request. For each request, the Commission appoints an officer of the Commission to represent the interests of the general public in the proceeding, pursuant to 39 U.S.C. 505 (Public Representative). Section II also establishes comment deadline(s) pertaining to each request.

The public portions of the Postal Service's request(s) can be accessed via the Commission's website (*http://www.prc.gov*). Non-public portions of the Postal Service's request(s), if any, can be accessed through compliance with the requirements of 39 CFR 3011.301.[1]

The Commission invites comments on whether the Postal Service's request(s) in the captioned docket(s) are consistent with the policies of title 39. For request(s) that the Postal Service states concern Market Dominant product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3622, 39 U.S.C. 3642, 39 CFR part 3030, and 39 CFR part 3040, subpart B. For request(s) that the Postal Service states concern Competitive product(s), applicable statutory and regulatory requirements include 39 U.S.C. 3632, 39 U.S.C. 3633, 39 U.S.C. 3642, 39 CFR part 3035, and 39 CFR part 3040, subpart B. Comment deadline(s) for each request appear in section II.

II. Docketed Proceeding(s)

1. *Docket No(s).:* MC2024–248 and CP2024–254; *Filing Title:* USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage Contract 61 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* April 24, 2024; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Christopher C. Mohr; *Comments Due:* May 2, 2024.

2. *Docket No(s).:* MC2024–249 and CP2024–255; *Filing Title:* USPS Request to Add Priority Mail Express, Priority Mail & USPS Ground Advantage Contract 62 to Competitive Product List and Notice of Filing Materials Under Seal; *Filing Acceptance Date:* April 24, 2024; *Filing Authority:* 39 U.S.C. 3642, 39 CFR 3040.130 through 3040.135, and 39 CFR 3035.105; *Public Representative:* Christopher C. Mohr; *Comments Due:* May 2, 2024.

This Notice will be published in the **Federal Register**.

Erica A. Barker,

Secretary.

[FR Doc. 2024–09277 Filed 4–29–24; 8:45 am]

BILLING CODE 7710–FW–P

[1] *See* Docket No. RM2018–3, Order Adopting Final Rules Relating to Non-Public Information, June 27, 2018, Attachment A at 19–22 (Order No. 4679).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–100022; File No SR–FICC–2024–007]

Self-Regulatory Organizations; Fixed Income Clearing Corporation; Notice of Designation of Longer Period for Commission Action on Proposed Rule Change To Modify the GSD Rules (i) Regarding the Separate Calculation, Collection and Holding of Margin for Proprietary Transactions and That for Indirect Participant Transactions, and (ii) To Address the Conditions of Note H to Rule 15c3–3a

April 24, 2024.

On March 14, 2024, Fixed Income Clearing Corporation (''FICC'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change SR–FICC–2024–007 pursuant to Section 19(b) of the Securities Exchange Act of 1934 (''Exchange Act'') [1] and Rule 19b–4 [2] thereunder to modify FICC's Government Securities Division (''GSD'') Rulebook (''GSD Rules'') to calculate, collect, and hold margin for proprietary transactions of a Netting Member separately from margin that the Netting Member submits to FICC on behalf of indirect participants and to address conditions of Note H to Rule 15c3–3a [3] [4] under the Act.[5] The Proposed Rule Change was published for public comment in the **Federal Register** on March 28, 2024.[6] The Commission has received comments

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Notice of Filing *infra* note 5, at 89 FR 21363.

[4] *See* Securities Exchange Act Release No. 99149 (Dec. 13, 2023), 89 FR 2714 (Jan. 16, 2024) (S7–23–22) (''Adopting Release,'' and the rules adopted therein). *See also* 17 CFR 240.15c3–3a.

[5] *See* Notice of Filing *infra* note 6, at 89 FR 21363.

[6] Securities Exchange Act Release No. 99844 (March 22, 2024), 89 FR 21603 (March 28, 2024) (File No. SR–FICC–2024–007) (''Notice of Filing'').

regarding the substance of the changes proposed in the Proposed Rule Change.[7]

Section 19(b)(2)(i) of the Exchange Act[8] provides that, within 45 days of the publication of notice of the filing of a proposed rule change, the Commission shall either approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether the proposed rule change should be disapproved unless the Commission extends the period within which it must act as provided in Section 19(b)(2)(ii) of the Exchange Act.[9] Section 19(b)(2)(ii) of the Exchange Act allows the Commission to designate a longer period for review (up to 90 days from the publication of notice of the filing of a proposed rule change) if the Commission finds such longer period to be appropriate and publishes its reasons for so finding, or as to which the self-regulatory organization consents.[10]

The 45th day after publication of the Notice of Filing is May 12, 2024. In order to provide the Commission with sufficient time to consider the Proposed Rule Change, the Commission finds that it is appropriate to designate a longer period within which to take action on the Proposed Rule Change and therefore is extending this 45-day time period.

Accordingly, the Commission, pursuant to Section 19(b)(2) of the Exchange Act,[11] designates June 26, 2024, as the date by which the Commission shall either approve, disapprove, or institute proceedings to determine whether to disapprove proposed rule change SR–FICC–2024–007.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[12]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2024–09218 Filed 4–29–24; 8:45 am]

BILLING CODE 8011–01–P

[7] Comments on the Proposed Rule Change are available at *https://www.sec.gov/comments/sr-ficc-2024-007/srficc2024007.htm.*

[8] 15 U.S.C. 78s(b)(2)(i).

[9] 15 U.S.C. 78 s(b)(2)(ii).

[10] *Id.*

[11] *Id.*

[12] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 35175; 812–15524]

Venerable Insurance and Annuity Company, et al.

April 24, 2024.

AGENCY: Securities and Exchange Commission (''Commission'' or ''SEC'').

ACTION: Notice.

Notice of an application for an order pursuant to Section 6(c) of the Investment Company Act of 1940 (the ''Act'').

SUMMARY OF APPLICATION: Applicants request an order pursuant to Section 6(c) of the Act exempting them from the provisions of Sections 2(a)(32), 22(c), and 27(i)(2)(A) of the Act and Rule 22c–1 under the Act to the extent necessary to permit Applicants, under specified circumstances, to recapture certain bonus credits applied to purchase payments with respect to certain deferred annuity contracts issued by Venerable Insurance and Annuity Company.

APPLICANTS: Venerable Insurance and Annuity Company, Separate Account EQ of Venerable Insurance and Annuity Company, and Directed Services LLC.

FILING DATES: The application was filed on November 20, 2023, and amended on March 6, 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 20, 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.

ADDRESSES: The Commission: *Secretarys-Office@sec.gov.* Applicants: J. Neil McMurdie, *neil.mcmurdie@venerable.com.*

FOR FURTHER INFORMATION CONTACT: Jill Ehrlich, 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' amended application, dated March 6, 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 *https://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. 2024–09184 Filed 4–29–24; 8:45 am]

BILLING CODE 8011–01–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–100024; File Nos. SR–BOX–2024–07; SR–CBOE–2024–005; SR–ISE–2024–03; SR–ISE–2024–14; SR–MIAX–2024–03; SR–NYSEAMER–2024–10; SR–PEARL–2024–03]

Self-Regulatory Organizations; BOX Exchange LLC; Cboe Exchange, Inc.; MIAX International Securities Exchange LLC; MIAX PEARL LLC; Nasdaq ISE, LLC; NYSE American LLC; Order Instituting Proceedings To Determine Whether To Approve or Disapprove Proposed Rule Changes To Permit the Listing and Trading of Options on Trusts That Hold Bitcoin

April 24, 2024.

I. Introduction

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'' or ''Exchange Act'')[1] and Rule 19b–4 thereunder,[2] BOX Exchange LLC (''BOX''); Cboe Exchange, Inc. (''Cboe Options''); MIAX International Securities Exchange LLC (''MIAX''); MIAX PEARL LLC (''MIAX Pearl''); Nasdaq ISE, LLC (''ISE''); and NYSE American LLC (''NYSE American'') (collectively, the ''Exchanges'' and each an ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') proposed rule changes to list and trade options on exchange-

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

traded product (''ETP'') shares that represent interests in either a specified bitcoin trust or in any trust that holds bitcoin, as described below (each, a ''Proposal,'' and collectively, the ''Proposals''). Specifically, ISE proposed to list and trade options on shares that represent interests in the iShares Bitcoin Trust.[3] BOX, Cboe Options, MIAX, MIAX Pearl and, in a second filing, ISE, proposed to list and trade options on shares that represent interests in a trust that holds bitcoin.[4] NYSE American proposed to list and trade options on shares that represent interests in the Bitwise Bitcoin ETF, the Grayscale Bitcoin Trust, and on any trust that holds bitcoin.[5]

On January 25, 2024, the Cboe Options Proposal,[6] the ISE iShares Proposal,[7] the MIAX Proposal,[8] and the MIAX Pearl Proposal [9] were published for comment in the **Federal Register**. On March 6, 2024, pursuant to Section 19(b)(2) of the Act,[10] the Commission designated a longer period within which to approve these proposals, disapprove the proposals, or institute proceedings to determine whether to disapprove the proposals.[11] The NYSE American Proposal was published for comment in the **Federal Register** on February 29, 2024.[12] On April 8, 2024, pursuant to Section 19(b)(2) of the Act,[13] the Commission designated a longer period within which to approve the proposal, disapprove the proposal, or institute proceedings to determine whether to disapprove the NYSE American Proposal.[14] On March 25, 2024, the BOX Proposal [15] and the ISE Trust Proposal [16] were published for comment in the **Federal Register**.

The Commission received comments addressing the ISE iShares Proposal,[17] the NYSE American Proposal,[18] and the Cboe Proposal.[19] This order institutes proceedings pursuant to Section 19(b)(2)(B) of the Act [20] to determine whether to approve or disapprove the Proposals.

II. Description of the Proposals

As described in detail in the notices of their respective Proposals,[21] the Exchanges proposed to amend their rules to permit the listing and trading of options on shares that represent interests in any trust that holds spot bitcoin,[22] or options on shares that represent interests in specified trusts that hold spot bitcoin [23] (such trusts, collectively, the ''Bitcoin ETPs'').

The Exchanges stated that Bitcoin ETPs are trusts that hold spot bitcoin, and that the investment objective of a Bitcoin ETP is to reflect the performance of bitcoin (less the expenses of the trust's operations), offering investors an opportunity to gain exposure to bitcoin without the complexities of direct investment in bitcoin.[24] The Exchanges stated that the Bitcoin ETPs also would provide investors with a hedging and risk management tool to manage their exposure to the price of bitcoin and bitcoin-related products and positions.[25] Additionally, several Exchanges stated that the Proposals would provide investors with the ability to transact Bitcoin ETP options on a listed market rather than in the unregulated over-the-counter options market, which would increase market transparency and enhance the process of price discovery conducted on the Exchanges through increased order flow.[26] Several Exchanges stated that the primary substantive difference between the proposed Bitcoin ETPs and exchange-traded funds (''ETFs'') currently deemed appropriate for options trading on the Exchanges are that the ETFs may hold securities, certain financial instruments, and specified precious metals, while Bitcoin ETPs hold bitcoin.[27] The Exchanges

[3] *See* File No. SR–ISE–2024–03 (''ISE iShares Proposal''), filed Jan. 9, 2024. On January 10, 2024, the Commission approved proposals by NYSE Arca, Inc., The Nasdaq Stock Market LLC, and Cboe BZX Exchange, Inc. to list and trade the shares of 11 bitcoin-based commodity-based trust shares and trust units, including the iShares Bitcoin Trust, the Grayscale Bitcoin Trust, and the Bitwise Bitcoin ETF. *See* Securities Exchange Act Release No. 99306 (Jan. 10, 2024), 89 FR 3008 (Jan. 17, 2024) (order approving File Nos. SR–NYSEARCA–2021–90; SR–NYSEARCA–2023–44; SR–NYSEARCA–2023–58; SR–NASDAQ–2023–016; SR–NASDAQ–2023–019; SR–CboeBZX–2023–028; SR–CboeBZX–2023–038; SR–CboeBZX–2023–040; SR–CboeBZX–2023–042; SR–CboeBZX–2023–044; SR–CboeBZX–2023–072).

[4] *See* File Nos. SR–BOX–2024–07 (''BOX Proposal''), filed Mar. 11, 2024; SR–CBOE–2024–005 (''Cboe Options Proposal''), filed Jan 5, 2024; SR–ISE–2024–14 (''ISE Trust Proposal''), filed Mar. 19, 2024; SR–MIAX–2024–03 (''MIAX Proposal''), filed Jan. 12, 2024; SR–PEARL–2024–03 (''MIAX Pearl Proposal''), filed Jan. 12, 2024.

[5] *See* File No. SR–NYSEAMER–2024–10 (''NYSE American Proposal''), filed Feb. 9, 2024.

[6] *See* Securities Exchange Act Release Nos. 99395 (Jan. 19, 2024), 89 FR 5075 (''Cboe Options Notice'').

[7] *See.* Securities Exchange Act Release No. 99396 (Jan. 19, 2024), 89 FR 5047 (''ISE iShares Notice'').

[8] *See* Securities Exchange Act Release No. 99397 (Jan. 19, 2024), 89 FR 5079 (''MIAX Notice'').

[9] *See* Securities Exchange Act Release No. 99394 (Jan. 19, 2024), 89 FR 5058 (''MIAX Pearl Notice'').

[10] 15 U.S.C. 78s(b)(2).

[11] *See* Securities Exchange Act Release Nos. 99680 (Mar. 6, 2024), 89 FR 17887 (Mar. 12, 2024) (Cboe Options Proposal); 99682 (Mar. 6, 2024), 89 FR 17887 (Mar. 12, 2024) (MIAX Pearl Proposal); 99684 (Mar. 6, 2024), 89 FR 17887 (Mar. 12, 2024) (MIAX Proposal); 99681 (Mar. 6, 2024), 89 FR 17886 (Mar. 12, 2024) (ISE iShares Proposal). The Commission designated April 24, 2024, as the date by which the Commission shall approve or disapprove, or institute proceedings to determine whether to approve or disapprove, the proposed rule changes.

[12] *See* Securities Exchange Act Release No. 99593 (Feb. 23, 2024), 89 FR 14911 (''NYSE American Notice'').

[13] 15 U.S.C. 78s(b)(2).

[14] *See* Securities Exchange Act Release No. 99921 (April 8, 2024), 89 FR 25908 (April 12, 2024). The Commission designated May 29, 2024, as the date by which the Commission shall approve or disapprove, or institute proceedings to determine whether to approve or disapprove, the proposed rule change.

[15] *See* Securities Exchange Act Release No. 99777 (Mar. 19, 2024), 89 FR 20712 (''BOX Notice'').

[16] *See* Securities Exchange Act Release No. 99776 (Mar. 19, 2024), 89 FR 20717 (''ISE Trust Proposal Notice'').

[17] Comments may be accessed at *https://www.sec.gov/comments/sr-ise-2024-03/srise202403.htm.*

[18] Comments may be accessed at *https://www.sec.gov/comments/sr-nyseamer-2024-10/srnyseamer202410.htm.*

[19] Comments may be accessed at *https://www.sec.gov/comments/sr-cboe-2024-005/srcboe2024005.htm.*

[20] 15 U.S.C. 78s(b)(2)(B).

[21] *See* notes 6–9, 12, 15–16, *supra.*

[22] *See* BOX Proposal; Cboe Options Proposal; ISE Trust Proposal; MIAX Proposal; MIAX Pearl Proposal; and NYSE American Proposal.

[23] *See* ISE iShares Proposal and NYSE American Proposal.

[24] *See* BOX Notice, 89 FR at 20713; Cboe Options Notice, 89 FR at 5076; ISE Trust Proposal Notice 89 FR at 20717; MIAX Notice, 89 FR at 5080; MIAX Pearl Notice, 89 FR at 5058; NYSE American Notice, 89 FR at 14912.

[25] *See* BOX Notice, 89 FR at 20715; Cboe Options Notice, 89 FR at 5078; ISE iShares Notice, 89 FR at 5051; ISE Trust Proposal Notice, 89 FR at 20719; MIAX Notice, 89 FR at 5082; MIAX Pearl Notice, 89 FR at 5060–1; NYSE American Notice, 89 FR at 14912.

[26] *See* BOX Notice, 89 FR at 20714; Cboe Options Notice, 89 FR at 5077; ISE Trust Proposal Notice, 89 FR at 20719; MIAX Notice, 89 FR at 5081; MIAX PEARL Notice, 89 FR at 5061.

[27] *See* BOX Notice, 89 FR at 20713; Cboe Options Notice, 89 FR at 5076; ISE Trust Proposal Notice, 89 FR at 20717; MIAX Notice, 89 FR at 5080; NYSE American Notice, 89 FR at 14912. The Exchanges' rules use the term ''exchange traded fund'' to refer to several types of investment products. For example, BOX Rule 5020(h) provides: ''Securities deemed appropriate for options trading shall include shares or other securities (''Exchange-Traded Fund Shares'') that are traded on a national securities exchange and are defined as an ''NMS stock'' under Rule 600 of Regulation NMS and that (i) represent interests in registered investment companies (or series thereof) organized as open-end management investment companies, unit investment trusts or similar entities that hold portfolios of securities and/or financial instruments, including, but not limited to, stock index futures contracts, options on futures, options on securities and indices, equity caps, collars and floors, swap agreements, forward contracts, repurchase agreements and reverse repurchase agreements (the ''Financial Instruments'') and money market instruments, including, but not limited to, U.S. government securities and repurchase agreements (the ''Money Market Instruments'') comprising or otherwise based on or representing investments in broad-based indexes or portfolios of securities and/or Financial Instruments and Money Market Instruments (or that hold securities in one or more other registered investment companies that themselves hold such portfolios of securities and/or Financial Instruments and Money Market

Continued

stated that they have not identified any issues with the continued listing and trading of any ETF or ETP options currently trading on the Exchanges, including options on ETPs that hold commodities.[28]

Bitcoin ETP options will be physically settled with American-style exercise.[29] The Exchanges stated that Bitcoin ETP options will be subject to the Exchanges' respective initial and continued listing standards.[30] The Exchanges' initial listing standards require, among other things, that the security underlying a listed option be ''characterized by a substantial number of outstanding shares that are widely held and actively traded.'' [31] The Exchanges stated that Bitcoin ETP options will trade in the same manner as other ETF options, and that Bitcoin ETP options would be subject to the Exchanges' rules that currently apply to the listing and trading of all ETF options on the Exchanges, including, for example, exchange rules governing listing criteria, expiration and exercise prices, minimum increments, position and exercise limits, margin requirements, customer accounts and trading halt procedures.[32]

The Exchanges stated that position and exercise limits for Bitcoin ETP options would be determined pursuant to the Exchanges' existing rules.[33] Under these rules, the position limit applicable to an options class depends upon the trading volume and outstanding shares of the underlying security. The Exchanges stated that the highest option position and exercise limit—250,000 option contracts on the same side of the market—would apply to options on a Bitcoin ETP with the highest trading volume and number of shares outstanding.[34] Position and exercise limits of 200,000, 75,000, 50,000 or 25,000 contracts on the same side of the market would apply to Bitcoin ETP options with lower six-month trading volumes and numbers of shares outstanding.[35]

The Exchanges represented that the surveillance procedures that they apply to other ETF options would apply to options on Bitcoin ETPs, and that their existing surveillance and reporting safeguards are designed to deter and detect possible manipulative behavior that might arise from listing and trading options on ETFs.[36] In addition, several Exchanges stated that they may obtain information from contract markets that are members of the Intermarket Surveillance Group (''ISG'') related to any financial instrument that is based, in whole or in part, upon an interest in or the performance of bitcoin.[37] Each Exchange represented that it believed that both the Exchange and the Options Price Reporting Authority, LLC (''OPRA'') have the necessary systems capacity to handle the additional traffic associated with the listing of new series that may result from the introduction of options on Bitcoin ETPs.[38]

One Exchange acknowledged that options on the Bitcoin ETPs will not be available for trading until The Options Clearing Corporation (''OCC'') represents to the Exchange that it is able to clear and settle the options.[39]

III. Summary of Comments Received

The Commission received comments addressing the ISE iShares Proposal,[40] the NYSE American Proposal,[41] and both the Cboe and NYSE American Proposals.[42] Commenters stated the

Instruments); or (ii) represent interests in a trust that holds a specified non-U.S. currency deposited with the trust or similar entity when aggregated in some specified minimum number may be surrendered to the trust by the beneficial owner to receive the specified non-U.S. currency or currencies and pays the beneficial owner interest and other distributions on the deposited non-U.S. currency or currencies, if any, declared and paid by the trust (''Currency Trust Shares''); or (iii) represent commodity pool interests principally engaged, directly or indirectly, in holding and/or managing portfolios or baskets of securities, commodity futures contracts, options on commodity futures contracts, swaps, forward contracts and/or options on physical commodities and/or non-U.S. currency (''Commodity Pool ETFs'') or (iv) represent interests in the SPDR® Gold Trust, the iShares COMEX Gold Trust, the iShares Silver Trust, the ETFS Gold Trust, the ETFS Silver trust, the ETFS Palladium Trust, the ETFS Platinum Trust or the Sprott Physical Gold Trust; provided that all of the following conditions are met. . . .'' *See also* Cboe Rules 1.1 and 4.3, Interpretation and Policy .06; ISE Options 4, Section 3(h); MIAX Rule 402(i); MIAX Pearl Rule 402(i); NYSE American Rule 915, Commentary .06. In describing the Proposals, for purposes of this Order, the terms ''exchange-traded fund'' and ''ETF'' have the meaning set forth in the Exchanges' rules.

[28] *See* BOX Notice, 89 FR at 20714; Cboe Options Notice, 89 FR at 5077; ISE Trust Proposal Notice, 89 FR at 20717; MIAX Notice, 89 FR at 5080; MIAX Pearl Notice, 89 FR at 5060; NYSE American Notice, 89 FR at 14912.

[29] *See* BOX Notice, 89 FR at 20713; Cboe Options Notice, 89 FR at 5076; ISE iShares Notice, 89 FR at 5050; ISE Trust Notice, 89 FR at 20718; MIAX Notice, 89 FR at 5080; MIAX Pearl Notice, 89 FR at 5059; NYSE American Notice, 89 FR at 14913.

[30] *See* BOX Notice, 89 FR at 20713; Cboe Options Notice, 89 FR at 5076; ISE iShares Notice, 89 FR at 5049; ISE Trust Proposal Notice, 89 FR at 201717–8; MIAX Notice, 89 FR at 5080; MIAX Pearl Notice, 89 FR at 5059; NYSE American Notice, 89 FR at 14913.

[31] *See* BOX Notice, 89 FR at 20713; Cboe Options Notice, 89 FR at 5076; ISE iShares Notice, 89 FR at 5049; ISE Trust Proposal Notice, 89 FR at 201717–8; MIAX Notice, 89 FR at 5080; MIAX Pearl Notice, 89 FR at 5059; NYSE American Notice, 89 FR at 14913.

[32] *See* BOX Notice, 89 FR at 20714; Cboe Options Notice, 89 FR at 5077; ISE iShares Notice, 89 FR at 5050; ISE Trust Notice, 89 FR at 20718–9; MIAX Notice, 89 FR at 5081; MIAX Pearl Notice, 89 FR at 5059–60; NYSE American Notice, 89 FR at 14913–4.

[33] *See* BOX Notice, 89 FR at 20714; Cboe Options Notice, 89 FR at 5077; ISE iShares Notice, 89 FR at 5050; ISE Trust Notice, 89 FR at 20718–9; MIAX Notice, 89 FR at 5081; MIAX Pearl Notice, 89 FR at 5059–60; NYSE American Notice, 89 FR at 14913–4.

[34] *See* BOX Notice, 89 FR at 20714; Cboe Options Notice, 89 FR at 5077; ISE iShares Notice, 89 FR at 5050; ISE Trust Notice, 89 FR at 20718–9; MIAX Notice, 89 FR at 5081; MIAX Pearl Notice, 89 FR at 5059–60; NYSE American Notice, 89 FR at 14913–4. For an option to be eligible for the 250,000-contract limit, the security underlying the option must have most recent six-month trading volume of at least 100 million shares, or most recent six-month trading volume of at least 75 million shares and at least 300 million shares currently outstanding. *See* BOX Rule 3120(d); Cboe Rule 8.30, Interpretation and Policy .02; ISE Options 9, Section 13; MIAX Rule 307; MIAX Pearl Chapter III (incorporating MIAX Rule 307 by reference); NYSE American Rule 904, Commentary .07.

[35] For an option to be eligible for the 50,000-contract limit, the security underlying the option must have most recent six-month trading volume of at least 20,000,000 shares, or most recent six-month trading volume of at least 15,000,000 shares and at least 40,000,000 shares currently outstanding. For an option to be eligible for the 75,000-contract limit, the underlying security must have most recent six-month trading volume of at least 40,000,000 shares, or most recent six-month trading volume of at least 30,000,000 shares and at least 120,000,000 shares currently outstanding. For an option to be eligible for the 200,000-contract limit, the underlying security must have most recent six-month trading volume of at least 80,000,000 shares, or most recent six-month trading volume of at least 60,000,000 shares and at least 240,000,000 shares currently outstanding. The 25,000-contract limit applies to options on underlying securities that do not qualify for a higher contract limit. *See* BOX Rule 3120(d); Cboe Rule 8.30, Interpretation and Policy .02; ISE Options 9, Section 13; MIAX Rule 307; MIAX Pearl Chapter III (incorporating MIAX Rule 307 by reference); NYSE American Rule 904, Commentary .07.

[36] *See* BOX Notice, 89 FR at 20714; Cboe Notice, 89 FR at 5077; ISE iShares Notice, 89 FR at 5050; ISE Trust Notice, 89 FR at 20719; MIAX Notice, 89 FR at 5081; MIAX Pearl Notice, 89 FR at 5060; NYSE American Notice, 89 FR at 14914.

[37] *See* BOX Notice, 89 FR at 20714; Cboe Notice, 89 FR at 5077; ISE Trust Notice, 89 FR at 20719; MIAX Notice, 89 FR at 5081; MIAX Pearl Notice, 89 FR at 5060. NYSE American stated that it may obtain information from exchanges that are members of ISG or from other exchanges with which the NYSE American has entered into a comprehensive surveillance sharing agreement (''CSSA''). NYSE American further stated that it would implement any new surveillance procedures it deems necessary to effectively monitor the trading of options on Bitcoin ETPs. *See* NYSE American Notice, 89 FR at 14914.

[38] *See* BOX Notice, 89 FR at 20714; Cboe Notice, 89 FR at 5077; ISE iShares Notice, 89 FR at 5050; ISE Trust Notice, 89 FR at 20719; MIAX Notice, 89 FR at 5081; MIAX Pearl Notice, 89 FR at 5060; NYSE American Notice, 89 FR at 14914.

[39] *See* NYSE American Notice, 89 FR at 14914.

[40] *See* comments from Joseph Ferrucci (''Ferrucci Letter''); Benjamin Pincock (''Pincock Letter''); Derek Jerina, dated Feb. 10, 20240 (''Jerina Letter''); Xplorer Trading (''Xplorer Lettter''); and a comment submitted anonymously (''Anonymous Letter'').

[41] *See* letter to Vanessa Countryman, Secretary, Commission, from Michael Sonnenshein, on behalf of Grayscale Investments, LLC and GBTC investors, dated February 28, 2024 (''Grayscale Letter'').

[42] *See* letter to the Commission from James J. Angel, Associate Professor of Finance, Georgetown

options on spot Bitcoin ETPs would help investors hedge their positions in spot bitcoin and manage risk.[43] One commenter stated that permitting options on the iShares Bitcoin Trust would likely increase overall market liquidity, allow for arbitrage and increased market efficiency, and provide investors with additional investing tools to take exposure to spot bitcoin.[44] Other commenters stated the Commission should permit the listing of options on shares of spot bitcoin-based ETPs because options on shares of an ETF holding bitcoin futures already trade.[45] One commenter also stated that options on ETPs holding spot bitcoin and options on ETFs holding bitcoin futures are both subject to the risks presented by the spot bitcoin market,[46] and commenters further stated that options on extremely similar national market system (''NMS'') securities [47] should have the same regulatory treatment.[48] One commenter further stated that because ''the price trajectories of the spot- and futures-based bitcoin ETFs are virtually identical,'' options on these securities should have the same regulatory treatment.[49] The commenter also stated that the Commission should allow options exchanges to list options on any NMS security that meets the exchange's quantitative listing standards without filing a proposed rule change with the Commission.[50]

One commenter stated that options are an efficient risk management tool that give investors the ability to take on or reduce risk.[51] Another commenter stated that options on spot bitcoin ETPs would facilitate price discovery in the shares of the underlying ETP, improve market efficiency, and help investors achieve desired investment outcomes, such as generating income, hedging, or reducing volatility.[52] In addition, the commenter stated that approving the listing and trading of options on spot Bitcoin ETPs ''would further bring Bitcoin into the regulatory perimeter by allowing additional regulated market participants such as CFTC-regulated designated contract merchants and SEC-regulated broker-dealers to trade the products.'' [53]

IV. Proceedings To Determine Whether To Approve or Disapprove File Nos. SR–BOX–2024–07; SR–CBOE–2024–005; SR–ISE–2024–03; SR–ISE–2024–14; SR–MIAX–2024–03; SR–NYSEAMER–2024–10; and SR–PEARL–2024–03 and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act [54] to determine whether the Proposals should be approved or disapproved. Institution of proceedings is appropriate at this time in view of the legal and policy issues raised by the proposed rule change, as discussed below. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, as described below, the Commission seeks and encourages interested persons to provide comments on the proposed rule change.

Pursuant to Section 19(b)(2)(B) of the Act,[55] the Commission is providing notice of the grounds for disapproval under consideration. The Commission is instituting proceedings to allow for additional analysis of the Proposals' consistency with Section 6(b)(5) of the Act,[56] which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest.

Under the Commission's Rules of Practice, the ''burden to demonstrate that a proposed rule change is consistent with the [Act] and the rules and regulations issued thereunder . . . is on the self-regulatory organization that proposed the rule change.'' [57] The description of a proposed rule change, 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,[58] and any failure of a self-regulatory organization to provide this information may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Act and the applicable rules and regulations.[59]

As discussed above, the Exchanges' initial listing standards require, among other things, that the security underlying a listed option be ''characterized by a substantial number of outstanding shares that are widely held and actively traded.'' [60] Instituting proceedings allows for comment on whether the Proposals have demonstrated that spot Bitcoin ETP shares meet this standard. In addition, the Proposals stated that spot Bitcoin ETP options would be subject to the Exchanges' rules that currently apply to the listing of ETF options, including, among others, the Exchanges' option position and exercise limit rules.[61] Under the Exchanges' rules, options that have traded for less than six months would be subject to a position limit of 25,000 contracts on the same side of the market.[62] The Exchanges' rules provide higher position limits based on the six-month average daily volume and/or number of shares outstanding of the underlying security.[63] Instituting proceedings allows for comment on whether the Proposals have demonstrated that these position limits are appropriate for the proposed spot Bitcoin ETP options. In addition, instituting proceedings allows for comment on whether the Proposals have demonstrated that listing options on the Bitcoin ETPs would not result in adverse market impacts.

V. Procedure: Request for Written Comments

The Commission requests that interested persons provide written

University, to the Commission, dated March 10, 2024 (''Angel Letter'').

[43] *See* Ferrucci Letter (stating that options on the iShares Bitcoin Trust would be used to hedge long positions); Jerina Letter (stating that options would give investors a means to hedge their investment in the iShares Bitcoin Trust and other bitcoin-related positions); Anonymous Letter (stating that options on spot bitcoin ETPs would allow hedging and greater flexibility for retail investors to trade a volatile asset class at a more granular risk/reward trade-off profile); Pincock Letter (stating that options allow hedging strategies and mitigate risk during periods of market downtime); Xplorer Letter (stating that options make a product safer by providing the ability to hedge); Angel Letter at 8 (stating that options are efficient risk management tools and may be used as part of hedging strategies to reduce risk).

[44] *See* Jerina Letter.

[45] *See* Angel Letter and Grayscale Letter.

[46] *See* Grayscale Letter at 4. The commenter also stated that the spot bitcoin ETP market is ''far more liquid'' than the market for bitcoin futures ETFs. *Id.* at 4–5.

[47] 17 CFR 242.600(b)(54).

[48] *See* Grayscale Letter at 4; Angel Letter at 4.

[49] *See* Angel Letter at 4.

[50] *See* Angel Letter at 6.

[51] *See* Angel Letter at 8.

[52] *See* Grayscale Letter at 3.

[53] Grayscale Letter at 3.

[54] 15 U.S.C. 78s(b)(2)(B).

[55] 15 U.S.C. 78s(b)(2)(B).

[56] 15 U.S.C. 78f(b)(5).

[57] Rule 700(b)(3), Commission Rules of Practice, 17 CFR 201.700(b)(3).

[58] *See id.*

[59] *See id.*

[60] *See supra* note 31.

[61] *See supra* note 32.

[62] *See* BOX Rule 3120(d); Cboe Rule 8.30, Interpretation and Policy .02; ISE Options 9, Section 13; MIAX Rule 307; MIAX Pearl Chapter III (incorporating MIAX Rule 307 by reference); NYSE American Rule 904, Commentary .07.

[63] *See supra* note 35.

submissions of their data, views, and arguments with respect to the issues identified above, as well as any other concerns they may have with the Proposals. In particular, the Commission invites the written views of interested persons concerning whether the proposed rule changes are consistent with Section 6(b)(5), or any other provision of the Act, or the rules and regulations thereunder. Although there do not appear to be any issues relevant to approval or disapproval which would be facilitated by an oral presentation of data, views, and arguments, the Commission will consider, pursuant to Rule 19b–4 under the Act,[64] any request for an opportunity to make an oral presentation.[65]

Interested persons are invited to submit written data, views, and arguments regarding whether the proposed rule changes should be approved or disapproved by May 21, 2024. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by June 4, 2024. The Commission asks that commenters address the sufficiency of the Exchanges' statements in support of their respective Proposals, which are set forth in the Notices,[66] in addition to any other comments they may wish to submit about the proposed rule changes. In particular, the Commission seeks comment on the following questions and asks commenters to submit data where appropriate to support their views:

1. Whether the Proposals should include data demonstrating that the shares of each of the specified Bitcoin ETPs on which an Exchange proposes to list options are ''widely held and actively traded,'' as required by the Exchanges' rules;

2. Whether options on the specified Bitcoin ETPs should be subject to the same position limits as options on stock, and whether the available supply in the markets for bitcoin should be considered in establishing position limits for options on Bitcoin ETPs;

3. Whether the Proposals should analyze the potential impact that listing options on Bitcoin ETPs could have on bitcoin market quality and function, particularly during times of market stress, given the linkages between the options markets for Bitcoin ETPs, spot Bitcoin ETPs, and spot bitcoin;

4. Whether the Proposals should include representations regarding how the Exchanges would obtain information regarding trading in the Bitcoin ETPs from the exchanges where the Bitcoin ETPs trade; and

5. Whether the Proposals seeking to list options on any ETP that holds spot bitcoin provide an adequate basis for the Commission to find that it is consistent with Section 6(b)(5) of the Act to permit the listing of such options, rather than approving options on ETPs that hold bitcoin on a product-by-product basis.[67]

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 Nos. SR–BOX–2024–07; SR–CBOE–2024–005; SR–ISE–2024–03; SR–ISE–2024–14; SR–MIAX–2024–03; SR–NYSEAMER–2024–10; SR–PEARL–2024–03 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 numbers SR–BOX–2024–07; SR–CBOE–2024–005; SR–ISE–2024–03; SR–ISE–2024–14; SR–MIAX–2024–03; SR–NYSEAMER–2024–10; SR–PEARL–2024–03. These file numbers 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 submissions, all subsequent amendments, all written statements with respect to the proposed rule changes that are filed with the Commission, and all written communications relating to the proposed rule changes 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 offices of the Exchanges. 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 numbers SR–BOX–2024–07; SR–CBOE–2024–005; SR–ISE–2024–03; SR–ISE–2024–14; SR–MIAX–2024–03; SR–NYSEAMER–2024–10; SR–PEARL–2024–03 and should be submitted by May 21, 2024. Rebuttal comments should be submitted by June 4, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[68]

Sherry R. Haywood,

Assistant Secretary.

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[64] 17 CFR 240.19b–4.

[65] Section 19(b)(2) of the Act, as amended by the Securities Acts Amendments of 1975, Public Law 94–29 (June 4, 1975), grants to the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by a self-regulatory organization. *See* Securities Acts Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

[66] *See supra* notes 8–16.

[67] To date, options exchanges have proposed, and the Commission has approved, the listing and trading of options on commodity-based ETPs on a product-by-product basis. *See, e.g.,* Securities Exchange Act Release Nos. 94928 (May 17, 2022), 87 FR 31287 (May 23, 2022) (File No. SR–CBOE–2022–09) (order approving a proposed rule change to list and trade options on shares of the Goldman Sachs Physical Gold ETF); 61983 (Apr. 26, 2010), 75 FR 23314 (May 3, 2010) (File No. SR–ISE–2010–19) (order approving a proposed rule change to list and trade options on shares of the ETFS Palladium Trust and the ETFS Platinum Trust); 61483 (Feb. 3, 2010), 75 FR 6753 (Feb. 10, 2010) (File Nos. SR–SR–CBOE–2010–007; SR–ISE–2009–106; SR–NYSEAmex–2009–86; and SR–NYSEArca–2009–110) (order approving proposals to list and trade options on shares of the ETFS Gold Trust and the ETFS Silver Trust); 59055 (December 4, 2008), 73 FR 75148 (December 10, 2008) (File Nos. SR–Amex–2008–68; SR–BSE–2008–51; SR–CBOE–2008–72; SR–ISE–2008–58; SR–NYSEArca–2008–66; and SR–Phlx–2008–58) (order approving the listing and trading of options on shares of the iShares COMEX Gold Trust and the iShares Silver Trust); 57894 (May 30, 2008), 73 FR 32061 (June 5, 2008) (File Nos. SR–Amex–2008–15; SR–CBOE–2005–11; SR–ISE–2008–12; SR–NYSEArca–2008–52; and SR–Phlx–2008–17) (order approving the listing and trading of options on shares of the SPDR Gold Trust).

[68] 17 CFR 200.30–3(a)(57).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–100023; File No. SR–NYSEARCA–2024–06]

Self-Regulatory Organizations; NYSE Arca, Inc.; Order Instituting Proceedings To Determine Whether To Approve or Disapprove a Proposed Rule Change To Amend Exchange Rule 5.3–O To Permit the Listing and Trading of Options on Commodity-Based Trust Shares

April 24, 2024.

I. Introduction

On January 16, 2024, NYSE Arca, Inc. (''NYSE Arca'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] a proposed rule change to amend NYSE Arca Rule 5.3–O(g) to permit the listing and trading of options on Commodity-Based Trust Shares.[3] The proposed rule change was published for comment in the **Federal Register** on January 25, 2024.[4] The Commission received comment letters regarding the proposed rule change.[5] On March 6, 2024, pursuant to Section 19(b)(2) of the Act,[6] the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to approve or disapprove the proposed rule change.[7] This order institutes proceedings pursuant to Section 19(b)(2)(B) of the Act[8] to determine whether to approve or disapprove the proposed rule change.

II. Description of the Proposed Rule Change

As described in greater detail in the Notice,[9] Exchange Rule 5.3–O(g) deems appropriate for options trading certain Exchange-Traded Fund Shares (''ETFs'') that are traded on a national securities exchange and are defined as an ''NMS stock'' in Rule 600 of Regulation NMS.[10] The Exchange proposed to amend Exchange Rule 5.3–O(g) to expand the types of ETFs that may be approved for options trading to include Commodity-Based Trust Shares, as defined in Exchange Rule 8.201–E (''Commodity-Based Trust Shares'').[11] The Exchange stated that it would consider listing and trading options on Commodity-Based Trust that (1) meet the criteria for underlying securities set forth in Exchange Rule 5.3–O(a)[12]–(b),[13] or (2) are available for creation and redemption each business day as set forth in Exchange Rule 5.3–O(g)(1)(B).[14] The Exchange stated that the current continued listing standards for options on ETFs also will apply to options on Commodity-Based Trust Shares.[15] In addition, the Exchange stated that options on Commodity-Based Trust Shares would be subject to the Exchange's rules and procedures governing the trading of equity options, including margin requirements and position and exercise limits.[16]

Currently, the position limits for options on stocks and ETF shares are 25,000 contracts, 50,000 contracts, 75,000 contracts, 200,000 contracts, or 250,000 contracts on the same side of the market based on the six-month trading volume or the six-month trading volume and number of outstanding shares of the underlying security.[17] A position limit of 25,000 contracts on the same side of the market applies to

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* NYSE Arca Rule 8.201–E(c)(1).

[4] *See* Securities Exchange Act Release No. 99398 (Jan. 19, 2024), 89 FR 5029 (''Notice'').

[5] Comment letters can be accessed at *https://www.sec.gov/comments/sr-nysearca-2024-06/srnysearca202406.htm.*

[6] 15 U.S.C. 78s(b)(2).

[7] *See* Securities Exchange Act Release No. 99683 (Mar. 6, 2024), 89 FR 17888 (Mar. 12, 2024). The Commission designated April 24, 2024, as the date by which the Commission shall approve or disapprove, or institute proceedings to determine whether to approve or disapprove, the proposed rule change.

[8] 15 U.S.C. 78s(b)(2)(B).

[9] *See supra* note 4.

[10] 17 CFR 242.600. *See* Notice, 89 FR at 5029. The Exchange's rules use the term ''exchange traded fund'' to refer to several types of investment products. Exchange Rule 5.3–O(g) states that ''Securities deemed appropriate for options trading shall include shares or other securities (''Exchange-Traded Fund Shares'' or ''Fund Shares'') that are traded on a national securities exchange and are defined as an ''NMS stock'' in Rule 600(b)(55) of Regulation NMS, and that (i) represent an interest in a registered investment company organized as an open-end management investment company, a unit investment trust or a similar entity which holds securities and/or financial instruments, options on securities and indices, equity caps, collars and floors, swap agreements, forward contracts, repurchase agreements and reverse repurchase agreements (the ''Financial Instruments''), and money market instruments, including, but not limited to, U.S. government securities and repurchase agreements (the ''Money Market Instruments'') constituting or otherwise based on or representing an investment in an index or portfolio of securities and/or Financial Instruments and Money Market Instruments, or (ii) represent interests in a trust or similar entity that holds a specified non-U.S. currency deposited with the trust or similar entity when aggregated in some specified minimum number may be surrendered to the trust by the beneficial owner to receive the specified non-U.S. currency and pays the beneficial owner interest and other distributions on the deposited non-U.S. currency, if any, declared and paid by the trust; or (iii) represent commodity pool interests principally engaged, directly or indirectly, in holding and/or managing portfolios or baskets of securities, commodity futures contracts, options on commodity futures contracts, swaps, forward contracts and/or options on physical commodities and/or non-U.S. currency (''Commodity Pool Units''), or (iv) represent interests in the SPDR Gold Trust, or (v) represent interests in the iShares COMEX Gold Trust, or (vi) represent interests in the iShares Silver Trust, (vii) represents an interest in a registered investment company (''Investment Company'') organized as an open-end management investment company or similar entity, that invests in a portfolio of securities selected by the Investment Company's investment adviser consistent with the Investment Company's investment objectives and policies, which is issued in a specified aggregate minimum number in return for a deposit of a specified portfolio of securities and/or a cash amount with a value equal to the next determined net asset value (''NAV''), and when aggregated in the same specified minimum number, may be redeemed at a holder's request, which holder will be paid a specified portfolio of securities and/or cash with a value equal to the next determined NAV (''Managed Fund Share''), or, (viii) represents interests in the ETFS Silver Trust or ETFS Gold Trust, or, (ix) represents interests in the ETFS Palladium Trust or ETFS Platinum Trust, provided. . . .'' In describing the proposal, for purposes of this Order, the terms ''Exchange-Traded Fund'' and ''ETF'' have the meaning set forth in the Exchange's rules.

[11] *See* Notice, 89 FR at 5030. The Exchange stated that the term ''Commodity-Based Trust Shares'' means a security (a) that is issued by a trust (''Trust'') that holds (1) a specified commodity deposited with the Trust, or (2) a specified commodity and, in addition to such specified commodity, cash; (b) that is issued by such Trust in a specified aggregate minimum number in return for a deposit of a quantity of the underlying commodity and/or cash; and (c) that, when aggregated in the same specified minimum number, may be redeemed at a holder's request by such Trust which will deliver to the redeeming holder the quantity of the underlying commodity and/or cash. *See* Notice, 89 FR at 5029, n.4, and NYSE Arca Rule 8.201–E(c)(1).

[12] The Exchange stated that NYSE Arca Rule 5.3–O(a) sets forth minimum requirements for a security underlying an option, including that the underlying security have 7,000,000 shares, 2,000 shareholders, and trading volume of 2,400,000 shares over the preceding 12 months The Exchange stated that the rule requires that the market price per share of the underlying security be at least $7.50 for the majority of business days during the three calendar months preceding the date of selection of an option class. The Exchange stated that tor underlying securities that are deemed Covered Securities, as defined under Section 18(b)(1)(A) of the Securities Act of 1933, the closing market price of the underlying security must be at least $3.00 per share for the previous three consecutive business days prior to the date of selection of an option class. *See* Notice, 89 FR at 5030, n. 8.

[13] The Exchange stated that NYSE Arca Rule 5.3–O(b) states that the underlying securities will be registered and be an ''NMS Stock'' as defined in Rule 600 of Regulation NMS under the Act. *See* Notice, 89 FR at 5030, n. 9.

[14] *See* Notice, 89 FR at 5030.

[15] *See* Notice, 89 FR at 5030.

[16] *See* Notice, 89 FR at 5031. The Exchange stated that pursuant to NYSE Arca Rule 6.8–O, Commentary .05 and .06, Commodity-Based Trust Shares would be subject to the same position limits applicable to options on stocks and ETFs. In addition, the Exchange stated that NYSE Arca Rule 6.9–O provides that exercise limits for options on stocks and other securities, including Commodity-Based Trust Shares, will be the same as the position limits applicable under NYSE Arca Rule 6.8–O. *See* Notice, 89 FR at 5031, n. 14.

[17] *See* NYSE Arca Rule 6.8–O.

options on securities that do not qualify for a higher limit.[18] To be eligible for the 50,000-contract limit, the most recent six-month trading volume of the underlying security must have totaled at least 20,000,000 shares; or the most recent six-month trading volume of the underlying security must have totaled at least 15,000,000 shares and the underlying security must have at least 40,000,000 shares currently outstanding.[19] To be eligible for the 75,000-contract limit, the most recent six-month trading volume of the underlying security must have totaled at least 40,000,000 shares; or the most recent six-month trading volume of the underlying security must have totaled at least 30,000,000 shares and the underlying security must have at least 120,000,000 shares currently outstanding.[20] To be eligible for the 200,000-contract limit, the most recent six-month trading volume of the underlying security must have totaled at least 80,000,000 shares; or the most recent six-month trading volume of the underlying security must have totaled at least 60,000,000 shares and the underlying security must have at least 240,000,000 shares currently outstanding.[21] To be eligible for the 250,000-contract limit, the most recent six-month trading volume of the underlying security must have totaled at least 100,000,000 shares; or the most recent six-month trading volume of the underlying security must have totaled at least 75,000,000 shares and the underlying security must have at least 300,000,000 shares currently outstanding.[22]

The Exchange stated that options on Commodity-Based Trust Shares would not be available for trading until The Options Clearing Corporation (''OCC'') represented to the Exchange that OCC was fully able to clear and settle such options.[23] The Exchange further stated that it had analyzed its capacity and it represented that both the Exchange and the Options Price Reporting Authority LLC (''OPRA'') have the necessary systems capacity to handle the additional traffic that would be associated with the listing of options on Commodity-Based Trust Shares.[24]

The Exchange stated that it believes that its surveillance procedures are adequate to properly monitor the trading of options on Commodity-Based Trust Shares in all trading sessions and to deter and detect violations of the Exchange's rules.[25] The Exchange stated that it would utilize its existing surveillance procedures applicable to options on ETFs (which the Exchange stated will include Commodity-Based Trust Shares) to monitor such trading.[26] In addition, the Exchange stated that it would implement any new surveillance procedures it deemed necessary to effectively monitor the trading of options on Commodity-Based Trust Shares, including adequate comprehensive surveillance sharing agreements (''CSSA'') with markets trading in non-U.S. components, as applicable.[27] The Exchange stated that it may obtain trading information via the Intermarket Surveillance Group (''ISG'') from other exchanges who are members or affiliates of the ISG.[28] The Exchange represented that these procedures would be adequate to properly monitor Exchange trading of options on Commodity-Based Trust Shares and to deter and detect violations of Exchange rules.[29]

The Exchange stated that in approving Commodity-Based Trust Shares for equities exchange trading, the Commission thoroughly considered the structure of the Commodity-Based Trust Shares, their usefulness to investors and to the markets, and the exchange rules governing their trading.[30] The Exchange stated that amending Exchange Rule 5.3–O(g) to allow the listing of options on Commodity-Based Trust Shares would allow options on Commodity-Based Trust Shares that have satisfied the generic listing standards to commence trading without the need for a public comment period and Commission approval.[31] The Exchange further stated that the proposal has the potential to significantly reduce the time frame and costs associated with bringing options on Commodity-Based Trust Shares to market, thereby reducing the burden on issuers and other market participants, while also promoting competition among options exchanges.[32]

III. Summary of Comments Received

The Commission received comment letters regarding the proposal.[33] One commenter stated that ''option trading should be automatic for any NMS security that otherwise meets an exchange's quantitative listing standards.'' [34] Another commenter stated that although NYSE Arca Rule 5.3–O(g) permits options trading for entire classes of investment products, such as open-end investment companies or unit investment trusts, the listing of options on spot commodity-based exchange-traded products is subject to review on a product-by-product basis.[35] According to this commenter, this ''result[s] in a patchwork rule wherein additional individual commodity-based ETPs are tacked on to NYSE Arca Rule 5.3–O(g) and NYSE American Rule 915, rather than being approved as a class.'' [36] This commenter characterized this product-by-product approach for commodity-based exchange-traded products (''ETPs'') as expensive and time-consuming [37] and urged the Commission to ''update its outdated historical patchwork approach to approval of options on spot commodity-based ETPs that are structured identically to those spot commodity-ETPs for which the listing and trading on a national securities exchange has been approved . . . and permit national securities exchanges to update their rules to permit the deemed approval of the listing and trading of such options.'' [38]

One commenter stated that options are an efficient risk management tool that give investors the ability to take on or reduce risk.[39] The commenter further stated that because ''the price trajectories of the spot- and futures-based bitcoin ETFs are virtually identical,'' options on these securities should have the same regulatory treatment.[40] Another commenter stated that options on spot bitcoin ETPs would facilitate price discovery in the shares of the underlying ETP, improve market efficiency, and help investors achieve desired investment outcomes, such as

[18] *See* NYSE Arca Rule 6.8–O, Commentary .06(c).

[19] *See* NYSE Arca Rule 6.8–O, Commentary .06(b).

[20] *See* NYSE Arca Rule 6.8–O, Commentary .06(a).

[21] *See* NYSE Arca Rule 6.8–O, Commentary .06(d).

[22] *See* NYSE Arca Rule 6.8–O, Commentary .06(e).

[23] *See* Notice, 89 FR at 5031.

[24] *See* Notice, 89 FR at 5031.

[25] *See* Notice, 89 FR at 5031.

[26] *See* Notice, 89 FR at 5031.

[27] *See* Notice, 89 FR at 5031. The Exchange stated that NYSE Arca Rule 5.3–O(g)(2) provides the applicable CSSA requirements for options on ETFs. *See* Notice, 89 FR at 5031, n. 17.

[28] *See* Notice, 89 FR at 5031.

[29] *See* Notice, 89 FR at 5031.

[30] *See* Notice, 89 FR at 5031.

[31] *See* Notice, 89 FR at 5031.

[32] *See* Notice, 89 FR at 5031.

[33] *See supra* note 5.

[34] Letter from James J. Angel, Associate Professor of Finance, Georgetown University, to the Commission, dated March 10, 2024 (''Angel Letter'') at 6.

[35] *See* Letter from Michael Sonnenshein, on behalf of Grayscale Investments, LLC and GBTC investors, to Vanessa Countryman, Secretary, Commission, dated February 28, 2024 (''Grayscale Letter'') at 6.

[36] Grayscale Letter at 6.

[37] *See* Grayscale Letter at 5.

[38] Grayscale Letter at 2.

[39] *See* Angel Letter at 8.

[40] Angel Letter at 4.

generating income, hedging, or reducing volatility.[41] In addition, the commenter stated that approving the listing and trading of options on spot Bitcoin ETPs ''would further bring Bitcoin into the regulatory perimeter by allowing additional regulated market participants such as CFTC-regulated designated contract merchants and SEC-regulated broker-dealers to trade the products.[42]

IV. Proceedings To Determine Whether To Approve or Disapprove SR–NYSEARCA–2024–06 and Grounds for Disapproval Under Consideration

The Commission is instituting proceedings pursuant to Section 19(b)(2)(B) of the Act[43] to determine whether the proposed rule change should be approved or disapproved. Institution of proceedings is appropriate at this time in view of the legal and policy issues raised by the proposed rule change, as discussed below. Institution of proceedings does not indicate that the Commission has reached any conclusions with respect to any of the issues involved. Rather, as described below, the Commission seeks and encourages interested persons to provide comments on the proposed rule change.

Pursuant to Section 19(b)(2)(B) of the Act,[44] the Commission is providing notice of the grounds for disapproval under consideration. The Commission is instituting proceedings to allow for additional analysis of the proposed rule change's consistency with Section 6(b)(5) of the Act,[45] which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest.

Under the Commission's Rules of Practice, the ''burden to demonstrate that a proposed rule change is consistent with the [Act] and the rules and regulations issued thereunder . . . is on the self-regulatory organization that proposed the rule change.'' [46] The description of a proposed rule change, 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,[47] and any failure of a self-regulatory organization to provide this information may result in the Commission not having a sufficient basis to make an affirmative finding that a proposed rule change is consistent with the Act and the applicable rules and regulations.[48]

To date, the Commission has only approved listing rules for options on shares of spot commodity-based ETPs for specific ETPs, not classes of ETPs.[49] For example, Exchange Rule 5.3–O(g) currently permits the listing of options on securities that represent interests in the SPDR Gold Trust, the iShares COMEX Gold Trust, the iShares Silver Trust, the ETFS Silver Trust, the ETFS Palladium Trust, or ETFS Platinum Trust. The Exchange proposes to replace this product-by-product approach and amend Exchange Rule 5.3–O(g) to permit the listing of options on securities that represent interests in Commodity-Based Trust Shares, as defined in Exchange Rule 8.201–E. The proposal would allow the Exchange to list options on any Commodity-Based Trust Share without filing a proposed rule change with the Commission.[50] The Exchange stated that the Commission previously has approved generic listing standards pursuant to Rule 19b–4(e) under the Act[51] that permit the listing of options on ETFs based on indexes that consist of stocks listed on U.S. exchanges.[52] The Exchange stated that the Commission also previously has approved generic listing standards that permit the listing of options on ETFs based on international or global indexes.[53] In addition, in contrast to the product-by-product approval of options on spot-commodity-based ETPs, Exchange Rule 5.3–O(g) provides for the listing and trading of options on general groups of investment products, including, among others, open-end investment companies or unit investment trusts that may hold securities, certain financial instruments, and money market instruments.

Options on Commodity-Based Trusts could result in additional demand for creations and redemptions of shares of the underlying Commodity-Based Trust from options market makers seeking to hedge their positions. These additional creations and redemptions could increase demand for the underlying commodity. In addition, options market makers could seek to hedge their positions by transacting in the underlying commodity or using commodity derivatives. These additional demands for the underlying commodity have the potential to result in limited availability of the underlying commodity during times of market volatility which, in turn, could affect the creation and redemption process for Commodity-Based Shares. The spot markets for the underlying commodities that Commodity-Based Trusts may hold could vary significantly in terms of trading volumes, market concentration, market participants, commercial realities, and delivery practices, among other things. These dynamics raise questions as to whether, given the potentially significant differences in the spot markets for the underlying commodities, it is appropriate for the Commission to allow the Exchange to list options on any Commodity-Based Trust Share without filing a proposed rule change with the Commission, rather than continuing to review such proposals on a product-by-product basis. A product-specific approach would allow the Exchange to provide the Commission with information regarding the market for the underlying commodity that a trust holds and help to demonstrate that listing options on Commodity-Based Trust Shares representing interests in that trust would not result in adverse market impacts, such as a shortage in the supply of the underlying commodity, which, among other things, could affect the creation and redemption process for

[41] *See* Grayscale Letter at 3.

[42] Grayscale Letter at 3.

[43] 15 U.S.C. 78s(b)(2)(B).

[44] 15 U.S.C. 78s(b)(2)(B).

[45] 15 U.S.C. 78f(b)(5).

[46] Rule 700(b)(3), Commission Rules of Practice, 17 CFR 201.700(b)(3).

[47] *See id.*

[48] *See id.*

[49] *See, e.g.,* Securities Exchange Act Release Nos. 94928 (May 17, 2022), 87 FR 31287 (May 23, 2022) (File No. SR–CBOE–2022–09) (order approving a proposed rule change to list and trade options on shares of the Goldman Sachs Physical Gold ETF); 61983 (Apr. 26, 2010), 75 FR 23314 (May 3, 2010) (File No. SR–ISE–2010–19) (order approving a proposed rule change to list and trade options on shares of the ETFS Palladium Trust and the ETFS Platinum Trust); 61483 (Feb. 3, 2010), 75 FR 6753 (Feb. 10, 2010) (File Nos. SR–SR–CBOE–2010–007; SR–ISE–2009–106; SR–NYSEAmex–2009–86; and SR–NYSEArca–2009–110) (approving proposals to list and trade options on shares of the ETFS Gold Trust and the ETFS Silver Trust); 59055 (December 4, 2008), 73 FR 75148 (December 10, 2008) (File Nos. SR–Amex–2008–68; SR–BSE–2008–51; SR–CBOE–2008–72; SR–ISE–2008–58; SR–NYSEArca–2008–66; and SR–Phlx–2008–58) (order approving the listing and trading of options on shares of the iShares COMEX Gold Trust and the iShares Silver Trust); 57894 (May 30, 2008), 73 FR 32061 (June 5, 2008) (File Nos. SR–Amex–2008–15; SR–CBOE–2005–11; SR–ISE–2008–12; SR–NYSEArca–2008–52; and SR–Phlx–2008–17) (order approving the listing and trading of options on shares of the SPDR Gold Trust).

[50] *See* Notice, 89 FR at 5030, 5032.

[51] 17 CFR 240.19b–4(e).

[52] *See* Notice, 89 FR at 5031, and Securities Exchange Act Release No. 42787, 65 FR 33598 (May 24, 2000) (order approving File No. SR–Amex–00–14).

[53] *See* Securities Exchange Act Release No. 54379 (November 9, 2006), 71 FR 66993 (November 17, 2006) (order approving File No. SR–AMEX–2006–78).

the Commodity-Based Trust Shares. In addition, the proposal states that options on Commodity-Based Trust Shares would be subject to the same position limits applicable to options on stocks and ETFs.[54] Instituting proceedings allows for comment on whether those position limits are appropriate for options on Commodity-Based Trust Shares in light of the significant differences between the underlying stock and ETF markets versus the markets for physical commodities.

V. Procedure: Request for Written Comments

The Commission requests that interested persons provide written submissions of their data, views, and arguments with respect to the issues identified above, as well as any other concerns they may have with the proposal. In particular, the Commission invites the written views of interested persons concerning whether the proposed rule change is consistent with Section 6(b)(5), or any other provision of the Act, or the rules and regulations thereunder. Although there do not appear to be any issues relevant to approval or disapproval which would be facilitated by an oral presentation of data, views, and arguments, the Commission will consider, pursuant to Rule 19b–4 under the Act,[55] any request for an opportunity to make an oral presentation.[56]

Interested persons are invited to submit written data, views, and arguments regarding whether the proposed rule change should be approved or disapproved by May 21, 2024. Any person who wishes to file a rebuttal to any other person's submission must file that rebuttal by June 4, 2024. The Commission asks that commenters address the sufficiency of the Exchange's statements in support of the proposal, which are set forth in the Notice,[57] in addition to any other comments they may wish to submit about the proposed rule change. In particular, the Commission seeks comment on the following questions and asks commenters to submit data where appropriate to support their views:

1. Whether, given the potentially significant differences in the markets for the underlying commodities, the Exchange has provided sufficient data and analysis to support a conclusion that it is not necessary for the Commission to review and approve the listing and trading of options on ETPs, including Commodity-Based Trust Shares, on a product-by-product basis;

2. Whether options on Commodity-Based Trust Shares should be subject to the same position and exercise limits as options on stock, and whether the available supply in the markets for the commodity on which the Commodity-Based Trust Shares are based is relevant in determining the position and exercise limits for options on Commodity-Based Trust Shares; and

3. Whether the listing of options on Commodity-Based Trust Shares for certain commodities should be subject to scrutiny on a product-by-product basis because of the potential differences in the underlying spot markets, such as deliverable supply, trading volumes, and the involvement of commercial or financial participants.

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 No. SR–NYSEARCA–2024–06 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to file number SR–NYSEARCA–2024–06. This file number should be included on the subject line if email is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's internet website (*https://www.sec.gov/rules/sro.shtml*). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street NE, Washington, DC 20549, on official business days between the hours of 10 a.m. and 3 p.m. Copies of the filing also will be available for inspection and copying at the principal office of the Exchange. Do not include personal identifiable information in submissions; you should submit only information that you wish to make available publicly. We may redact in part or withhold entirely from publication submitted material that is obscene or subject to copyright protection. All submissions should refer to file number SR–NYSEARCA–2024–06 and should be submitted by May 21, 2024. Rebuttal comments should be submitted by June 4, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[58]

Sherry R. Haywood,

Assistant Secretary.

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[54] *See* Notice, 89 FR at 5031, n. 14.

[55] 17 CFR 240.19b–4.

[56] Section 19(b)(2) of the Act, as amended by the Securities Acts Amendments of 1975, Public Law 94–29 (June 4, 1975), grants to the Commission flexibility to determine what type of proceeding—either oral or notice and opportunity for written comments—is appropriate for consideration of a particular proposal by a self-regulatory organization. *See* Securities Acts Amendments of 1975, Senate Comm. on Banking, Housing & Urban Affairs, S. Rep. No. 75, 94th Cong., 1st Sess. 30 (1975).

[57] *See supra* note 4.

[58] 17 CFR 200.30–3(a)(57).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–100021; File No. SR–MEMX–2024–13]

Self-Regulatory Organizations; MEMX LLC; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change To Amend the Exchange's Fee Schedule To Adopt Connectivity and Application Session Fees for MEMX Options

April 24, 2024.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on April 12, 2024, MEMX LLC (''MEMX'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission'') the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is filing a proposal to amend the Fee Schedule to: (i) apply the Exchange's current Connectivity and

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

Application Session fees to MEMX Options Users, and (ii) make an organizational change to its existing fee schedule for the Exchange's pre-existing equities market (''MEMX Equities''), in order to create a separate fee schedule for Connectivity Fees (for both MEMX Equities and MEMX Options). The Exchange proposes to implement the changes to the Fee Schedule pursuant to this proposal immediately. The text of the proposed rule change is provided in Exhibit 5.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Background

The Exchange is filing a proposal to amend the Fee Schedule to: (i) apply the Exchange's current Connectivity and Application Session fees to MEMX Options Users, and (ii) make an organizational change to its existing fee schedule for the Exchange's pre-existing equities market (''MEMX Equities''), in order to create a separate fee schedule for Connectivity Fees (for both MEMX Equities and MEMX Options). The Exchange believes that these changes will provide greater transparency to Members about how the Exchange assesses fees, as well as allowing Members to more easily validate their bills on a monthly basis. The Exchange notes that none of these changes amend any existing fee applicable to MEMX Equities. The Exchange is proposing to implement the proposal immediately. The Exchange previously filed the proposal on October 24, 2023 (SR–MEMX–2023–29) (the ''Initial Proposal''). The Exchange withdrew the Initial Proposal and replaced the proposal with SR–MEMX–2023–39 (the ''Second Proposal''). The Exchange withdrew the Second Proposal and replaced it with SR–MEMX–2024–06 (the ''Third Proposal''). The Exchange recently withdrew the Third Proposal and is replacing it with the current filing (SR–MEMX–2024–13).

As set forth below, the Exchange believes that its proposal provides a great deal of transparency regarding the cost of providing connectivity services and anticipated revenue and that the proposal is consistent with the Act and associated guidance. The Exchange is re-filing this proposal promptly following the withdrawal of the Third Proposal in order to provide additional explanations related to the Cost Analysis.

(i) Fees for Connectivity to MEMX Options

As noted above, the Exchange is proposing to apply the current fees it charges to Members and non-Members [3] for physical connectivity to the Exchange and for application sessions (otherwise known as ''logical ports'') that a Member utilizes in connection with their participation on the Exchange (together with physical connectivity, collectively referred to in this proposal as ''connectivity services'', as described in greater detail below) to both Users of MEMX Equities and MEMX Options.[4] Specifically, the Exchange will continue to charge $6,000 per month for a physical connection in the data center where the Exchange primarily operates under normal market conditions (''Primary Data Center''), and $3,000 per month for a physical connection at the geographically diverse data center, which is operated for backup and disaster recovery purposes (''Secondary Data Center''). These physical connections can be used to access both platforms, accordingly, a firm that is a Member of both MEMX Equities and MEMX Options may use a single physical connection to access its application sessions at both MEMX Equities and MEMX Options. This differs from application sessions in that a firm that is a Member of both MEMX Equities and MEMX Options would need to purchase separate application sessions for each trading platform in order to access each such trading platform. These application session fees will continue to be $450 per month for an application session used for order entry (''Order Entry Port'') and $450 per month for an application session for receipt of drop copies (''Drop Copy Port''), to the extent such ports are in the Primary Data Center. As is true today for MEMX Equities, the Exchange will not charge for Order Entry Ports or Drop Copy Ports in the Secondary Data Center. The Exchange's proposal to apply the same fees to Equities and Options stems from the same cost analysis it conducted in adopting those fees to its Equities Members,[5] which the Exchange has reviewed and updated for 2024 as detailed below. Given that the Exchange has only recently launched MEMX Options, however, and the fact that its analysis is based on projections across all potential revenue streams, the Exchange is committing to conduct a one-year review after these fees are applied. The Exchange expects that it may propose to adjust fees at that time, to increase fees in the event that revenues fail to cover costs, or to decrease fees in the event that revenue materially exceeds expectations.

In general, the Exchange believes that exchanges, in setting fees of all types, should meet very high standards of transparency to demonstrate why each new fee or fee increase meets the Exchange Act requirements that fees be reasonable, equitably allocated, not unfairly discriminatory, and not create an undue burden on competition among members and markets. In particular, the Exchange believes that each exchange should take extra care to be able to demonstrate that these fees are based on its costs and reasonable business needs.

In proposing to charge fees for connectivity services to MEMX Options, the Exchange has sought to be especially diligent in assessing those fees in a transparent way against its own aggregate costs of providing the related services, and also carefully and transparently assessing the impact on Members—both generally and in relation to other Members, *i.e.,* to assure the fee will not create a financial burden on any participant and will not have an undue impact in particular on smaller Members and competition among Members in general. The Exchange believes that this level of diligence and transparency is called for by the requirements of Section 19(b)(1) under the Act,[6] and Rule 19b–4 thereunder,[7] with respect to the types of information self-regulatory organizations (''SROs'') should provide when filing fee changes,

[3] Types of market participants that obtain connectivity services from the Exchange but are not Members include service bureaus and extranets. Service bureaus offer technology-based services to other companies for a fee, including order entry services to Members, and thus, may access application sessions on behalf of one or more Members. Extranets offer physical connectivity services to Members and non-Members.

[4] MEMX Options launched on September 27, 2023.

[5] *See* Securities Exchange Act Release No. 59846 (September 27, 2022), 87 FR 59845 (October 3, 2022) (SR–MEMX–2022–026).

[6] 15 U.S.C. 78s(b)(1).

[7] 17 CFR 240.19b–4.

and Section 6(b) of the Act,[8] which requires, among other things, that exchange fees be reasonable and equitably allocated,[9] not designed to permit unfair discrimination,[10] and that they not impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Act.[11] This rule change proposal addresses those requirements, and the analysis and data in each of the sections that follow are designed to clearly and comprehensively show how they are met.[12]

As detailed below, MEMX calculated its aggregate annual costs for providing physical connectivity to both MEMX Equities and MEMX Options in 2024 at $14,970,454 and its aggregate annual costs for providing application sessions at $7,185,273. In order to cover the aggregate costs of providing connectivity to its Options and Equities Users (both Members and non-Members) going forward and to make a modest profit, as described below, the Exchange is proposing to modify its Fee Schedule, pursuant to MEMX Rules 15.1(a) and (c), to charge a fee to Options Users, as it currently does to Equities Users, of $6,000 per month for each physical connection in the Primary Data Center and of $3,000 per month for each physical connection in the Secondary Data Center. The Exchange also proposes to modify its Fee Schedule, pursuant to MEMX Rules 15.1(a) and (c), to charge a fee to Options Users, as it currently does to Equities Users, of $450 per month for each Order Entry Port and Drop Copy Port in the Exchange's Primary Data Center, as further described below.[13]

[8] 15 U.S.C. 78f(b).

[9] 15 U.S.C. 78f(b)(4).

[10] 15 U.S.C. 78f(b)(5).

[11] 15 U.S.C. 78f(b)(8).

[12] In 2019, Commission staff published guidance suggesting the types of information that SROs may use to demonstrate that their fee filings comply with the standards of the Exchange Act (''Fee Guidance''). While MEMX understands that the Fee Guidance does not create new legal obligations on SROs, the Fee Guidance is consistent with MEMX's view about the type and level of transparency that exchanges should meet to demonstrate compliance with their existing obligations when they seek to charge new fees. *See* Staff Guidance on SRO Rule Filings Relating to Fees (May 21, 2019) available at *https://www.sec.gov/tm/staff-guidancesro-rule-filings-fees.*

[13] As proposed, fees for connectivity services would be assessed based on each active connectivity service product at the close of business on the first day of each month. If a product is cancelled by a Member's submission of a written request or via the MEMX User Portal prior to such fee being assessed then the Member will not be obligated to pay the applicable product fee. MEMX will not return pro-rated fees even if a product is not used for an entire month.

Cost Analysis

Background on Cost Analysis

In February 2024, MEMX completed an updated study of its aggregate projected costs to produce market data and connectivity across both its Equities and Options platforms in 2024 (the ''Cost Analysis'').[14] The Cost Analysis required a detailed analysis of MEMX's aggregate baseline costs, including a determination and allocation of costs for core services provided by the Exchange—transaction execution, market data, membership services and trading permits, regulatory services, physical connectivity, and application sessions (which provide order entry, cancellation and modification functionality, risk functionality, ability to receive drop copies, and other functionality). MEMX separately divided its costs between those costs necessary to deliver each of these core services, including infrastructure, software, human resources (*i.e.,* personnel), and certain general and administrative expenses (''cost drivers''). Next, MEMX adopted an allocation methodology with various principles to guide how much of a particular cost should be allocated to each core service. For instance, fixed costs that are not driven by client activity (*e.g.,* message rates), such as data center costs, were allocated more heavily to the provision of physical connectivity (80%), with smaller allocations to logical ports (11%), and the remainder to the provision of transaction execution, regulatory services, and market data services (9%).[15] In contrast, costs that are driven largely by client activity (*e.g.,* message rates), were not allocated to physical connectivity at all but were allocated primarily to the provision of transaction execution and market data services (80%) with a smaller allocation to application sessions (20%). The allocation methodology was decided through conversations with senior management familiar with each area of the Exchange's operations. After adopting this allocation methodology, the Exchange then applied an estimated allocation of each cost driver to each core service, resulting in the cost allocations described below.

By allocating segmented costs to each core service, MEMX was able to estimate by core service the potential margin it might earn based on different fee models. The Exchange notes that as a non-listing venue it has four primary sources of revenue that it can potentially use to fund its operations: transaction fees, fees for connectivity services, membership and regulatory fees, and market data fees. Accordingly, the Exchange must cover its expenses from these four primary sources of revenue. The Exchange also notes that as a general matter each of these sources of revenue is based on services that are interdependent. For instance, the Exchange's system for executing transactions is dependent on physical hardware and connectivity; only Members and parties that they sponsor to participate directly on the Exchange may submit orders to the Exchange; many Members (but not all) consume market data from the Exchange in order to trade on the Exchange; and the Exchange consumes market data from external sources in order to comply with regulatory obligations. Accordingly, given this interdependence, the allocation of costs to each service or revenue source required judgment of the Exchange and was weighted based on estimates of the Exchange that the Exchange believes are reasonable, as set forth below.

Through the Exchange's extensive Cost Analysis, the Exchange analyzed every expense item in the Exchange's general expense ledger to determine whether each such expense relates to the provision of connectivity services, and, if such expense did so relate, what portion (or percentage) of such expense actually supports the provision of connectivity services, and thus bears a relationship that is, ''in nature and closeness,'' directly related to network connectivity services. In turn, the Exchange allocated certain costs more to physical connectivity and others to application sessions, while certain costs were only allocated to such services at a very low percentage or not at all, using consistent allocation methodologies as described above. Based on this analysis, MEMX estimates that the cost drivers to provide connectivity services in 2024, including both physical connections and application sessions, will result in an aggregate annual cost of $22,155,727, as further detailed below. The Exchange notes that it utilized the same principles to generate the 2021 Cost Analysis, applicable to Equities only, and at that time, the estimated annual aggregate cost to provide connectivity services

[14] The updated Cost Analysis completed in February 2024 is based on the same principles applied to the Cost Analysis completed in September 2023 that was included in the Initial Proposal but contains updated figures now that MEMX Options has been operational for several months.

[15] The Exchange notes that these allocation percentages differ from the allocations noted in the 2021 Cost Analysis, and the reasons for these differences are explained more specifically below.

was $13,724,580. The differences between such estimated costs and the overall analysis are primarily based on: (1) the addition of MEMX Options, (ii) increased, and in some cases decreased, costs projected by the Exchange, (iii) and changes made to reallocate certain costs into categories that more closely align the Exchange's audited financial statements, as further described below.

Costs Related to Offering Physical Connectivity

The following chart details the individual line-item costs considered by MEMX to be related to offering physical connectivity as well as the percentage of the Exchange's overall costs such costs represent for such area (*e.g.,* as set forth below, the Exchange allocated approximately 18% of its overall Human Resources cost to offering physical connectivity).

COSTS DRIVER	COSTS	% of ALL
Human Resources	$ 6,374,100	18%
Connectivity	$ 732,216	75%
Data Center	$ 2,824,425	80%
Technology (Hardware, Software Licenses, etc.)	$ 1,075,518	25%
Depreciation	$ 2,808,173	39%
External Market Data	$ -	0%
Allocated Shared Expenses	$ 1,156,022	15%
TOTAL	**$14,970,454**	**23.5%**

Below are additional details regarding each of the line-item costs considered by MEMX to be related to offering physical connectivity, as well as any relevant discussion of how the costs projected for 2024 differ, if any, from the Exchange's previous Cost Analysis conducted in 2021 in adopting Connectivity Fees for its Equities platform, which are the same fees the Exchange is proposing to apply for its Options platform in this filing.[16]

Human Resources

In allocating personnel (Human Resources) costs, in order to not double count any allocations, the Exchange first excluded any employee time allocated towards options regulation in order to recoup costs via the Options Regulatory Fee (''ORF'').[17] Of the remaining employee time left over, MEMX then calculated an allocation of employee time for employees whose functions include providing and maintaining physical connectivity and performance thereof (primarily the MEMX network infrastructure team, which spends most of their time performing functions necessary to provide physical connectivity) and for which the Exchange allocated 80% of each employee's time. The Exchange also allocated Human Resources costs to provide physical connectivity to a limited subset of personnel with ancillary functions related to establishing and maintaining such connectivity (such as information security and finance personnel), for which the Exchange allocated cost on an employee-by-employee basis (*i.e.,* only including those personnel who do support functions related to providing physical connectivity) and then applied a smaller allocation to such employees (30%).[18] The Exchange notes that it has fewer than 100 employees and each department leader has direct knowledge of the time spent by those spent by each employee with respect to the various tasks necessary to operate the Exchange. The estimates of Human Resources cost were therefore determined by consulting with such department leaders, determining which employees are involved in tasks related to providing physical connectivity, and confirming that the proposed allocations were reasonable based on an understanding of the percentage of their time such employees devote to tasks related to providing physical connectivity. The Exchange notes that senior level executives were only allocated Human Resources costs to the extent the Exchange believed they are involved in overseeing tasks related to providing physical connectivity. The Human Resources cost was calculated using a blended rate of compensation reflecting salary, equity and bonus compensation, benefits, payroll taxes, and 401(k) matching contributions.

In 2021, 13.8% of the Exchange's Human Resources costs were allocated towards the provision of physical connectivity, which is slightly lower than the 18% allocation in the current Cost Analysis. The Exchanges notes that this increase is due to additional hiring necessary to support network infrastructure, and that in advance of the launch of MEMX Options, this hiring started at the beginning of 2023.

Connectivity

The Connectivity cost includes external fees paid to connect to other exchanges and third parties. The Exchange notes that its connectivity to external markets is required in order to receive market data to run the Exchange's matching engine and basic operations compliant with existing regulations, primarily Regulation NMS. Approximately 75% of the Exchange's connectivity costs are allocated towards the provision of physical connectivity, which is the same percentage identified in the 2021 Cost Analysis. Of note, the 2021 Cost Analysis allocated approximately $162,000 per month of connectivity costs towards physical connectivity, which is notably higher than the $61,018[19] per month allocated under the current Cost Analysis. The Exchange notes that this is due to a substantial redesign in the Exchange's connectivity plan which achieved the cost savings noted. Additionally, in the

[16] *See supra* note 5.

[17] *See* Securities Exchange Act Release No. 99259 (January 2, 2024), 89 FR 965 (January 8, 2024) (SR–MEMX–2023–38).

[18] To reiterate, these allocations are applied to the percentage of employee time left over after the ORF allocation. As such, if 10% of an employee's time was allocated towards options regulation, the percentage of time allocated to physical connectivity in this example would apply to the 90% of the employee's time left over.

[19] This figure is arrived at by dividing the annual allocated Connectivity costs in the table on page 12 ($732,216) by 12.

2021 Cost Analysis, certain costs were included in the Connectivity category that have since been moved into the broader Technology category.

Data Center

Data Center costs include an allocation of the costs the Exchange incurs to provide physical connectivity in the third-party data centers where it maintains its equipment (such as dedicated space, security services, cooling and power). The Exchange notes that it does not own the Primary Data Center or the Secondary Data Center, but instead, leases space in data centers operated by third parties. The Exchange has allocated a high percentage of the Data Center cost (80%) to physical connectivity because the third-party data centers and the Exchange's physical equipment contained therein is the most direct cost in providing physical access to the Exchange. In other words, for the Exchange to operate in a dedicated space with connectivity of participants to a physical trading platform, the data centers are a very tangible cost, and in turn, if the Exchange did not maintain such a presence then physical connectivity would be of no value to market participants. This slight increase over the allocation of Data Center costs to physical connectivity from 2021 (75%) is due to the Exchange's determination that the Data Center is more directly linked to physical connectivity than any other core service provided by the Exchange. The Exchange notes that its Data Center costs are fixed and do not vary based upon any individual Member's or group of Members' physical connectivity. Accordingly, the Exchange believes that 80% is a more accurate representation of the percentage of costs to the Exchange in order to provide physical connectivity to market participants.

Technology

The Technology category includes the Exchange's network infrastructure, other hardware, software, and software licenses used to operate and monitor physical assets necessary to offer physical connectivity to the Exchange. Of note, certain of these costs were included in the Connectivity and a separate Hardware and Software Licenses category in the 2021 Cost Analysis; however, in order to align more closely with the Exchange's audited financial statements these costs were combined into the broader Technology category. The Exchange allocated approximately 25% of its Technology costs to physical connectivity in 2024.

Depreciation

All physical assets and software, which also includes assets used for testing and monitoring of Exchange infrastructure, were valued at cost, depreciated or leased over periods ranging from three to five years. Thus, the depreciation cost primarily relates to servers necessary to operate the Exchange, some of which are owned by the Exchange and some of which are leased by the Exchange in order to allow efficient periodic technology refreshes. As noted above, the Exchange allocated 39% of all depreciation costs to providing physical connectivity. This is a higher percentage than was allocated to providing physical connectivity in 2021 (18.5%), and this increase is due to a high amount of capital expenditures required to build the Exchange's options platform, none of which began to depreciate until the launch of options in September 2023. The Exchange notes, however, that it did not allocate depreciation costs for any internally developed software to build the Exchange's trading platforms to physical connectivity, as such software does not impact the provision of physical connectivity.

External Market Data

External Market Data includes fees paid to third parties, including other exchanges, to receive and consume market data from other markets. The Exchange notes that it did not allocate any External Market Data fees to the provision of physical connectivity as market data is not related to such services.

Allocated Shared Expenses

Finally, a limited portion of general shared expenses was allocated to physical connectivity as without these general shared costs the Exchange would not be able to operate in the manner that it does and provide physical connectivity. The costs included in general shared expenses include general expenses of the Exchange, including office space and office expenses (*e.g.,* occupancy and overhead expenses), utilities, recruiting and training, marketing and advertising costs, professional fees for legal, tax and accounting services (including external and internal audit expenses), and telecommunications costs. The Exchange notes that the cost of paying directors to serve on its Board of Directors is also included in the Exchange's general shared expenses, and thus a portion of such overall cost amounting to 7% of the overall cost for directors was allocated to providing physical connectivity.

As a final part of the Exchange's analysis related to physical connectivity, the Exchange determined the total *monthly* cost of providing physical connections, (*i.e.,* the annual cost of $14,970,454 noted in the table above divided by 12), $1,247,537.83, and projected average monthly revenue for physical connections under the proposed pricing herein of approximately $1,413,500.[20] Thus, the Exchange calculated an average monthly profit of $165,962, resulting in a physical connectivity profit margin of approximately 11.7%.[21] The Exchange notes that this projected profit margin represents an increase over the projected profit margin noted in the 2021 Cost Analysis related to physical connectivity,[22] which is in part due to certain cost savings noted above associated with a redesign in the Exchange's external connectivity plan. Nevertheless, the Exchange believes that the projected profit margin is reasonable and well within the range of where a similarly situated company would expect to be after three years of growth, especially upon launching a new trading platform that provides scale. While the Exchange does not anticipate a significant change to physical connectivity during 2024 (*i.e.,* neither a significant increase nor a significant decrease), it is possible that participants will shift the way that they connect to the Exchange and a reduction occurs or that additional connectivity is established, resulting in an increase.

Costs Related to Offering Application Sessions

The following chart details the individual line-item costs considered by MEMX to be related to offering

[20] This projection was based off of actuals earned in January and February 2024 and revenue projections for the remainder of the year based off the number of primary and secondary connections maintained as of February 1, 2024, in both Equities and Options. The Exchange notes that it previously utilized a different method to estimate potential profit, specifically by dividing the cost of providing physical connectivity by the number of physical connections maintained as of the date of proposed pricing, and then subtracting that number from the cost [sic] of the provision of physical connectivity. At this time, however, due to the complexities associated with the pricing of physical connections (*i.e.,* not all physical connections cost $6,000), and the fact that the Exchange did not begin charging for physical connections used solely for Options until March 1, 2024, the Exchange believes the method utilized in this proposal provides a more accurate estimation of projected profit and resulting profit margin.

[21] The Exchange calculated margin by dividing the total profit ($165,962) by the total revenue ($1,413,500) and multiplying by 100.

[22] The 2021 Cost Analysis projected a profit margin for physical connections of 8%.

application sessions as well as the percentage of the Exchange's overall costs such costs represent for such area (*e.g.,* as set forth below, the Exchange allocated approximately 11% of its overall Human Resources cost to offering application sessions).

COSTS DRIVER	COSTS	% of ALL
Human Resources	$ 3,664,157	11%
Connectivity	$ 36,020	4%
Data Center	$ 380,202	11%
Technology (Hardware, Software Licenses, etc.)	$ 527,533	12%
Depreciation	$ 1,000,287	14%
External Market Data	$ 367,952	20%
Allocated Shared Expenses	$ 1,209,122	15%
TOTAL	**$7,185,273**	**11.3%**

Human Resources

With respect to application sessions, MEMX calculated Human Resources cost by taking an allocation of employee time for employees whose functions include providing application sessions and maintaining performance thereof (including a broader range of employees such as technical operations personnel, market operations personnel, and software engineering personnel) as well as a limited subset of personnel with ancillary functions related to maintaining such connectivity (such as sales, membership, and finance personnel). The estimates of Human Resources cost were again determined by consulting with department leaders, determining which employees are involved in tasks related to providing application sessions and maintaining performance thereof, and confirming that the proposed allocations were reasonable based on an understanding of the percentage of their time such employees devote to tasks related to providing application sessions and maintaining performance thereof. The Exchange notes that senior level executives were only allocated Human Resources costs to the extent the Exchange believed they are involved in overseeing tasks related to providing application sessions and maintaining performance thereof. The Human Resources cost was again calculated using a blended rate of compensation reflecting salary, equity and bonus compensation, benefits, payroll taxes, and 401(k) matching contributions. As shown in the table above, for 2024, the Exchange allocated approximately 11% of its Human Resources costs to providing application sessions, which is higher than the 7.7% it allocated in 2021. This increase is again due to additional hiring needed to support the addition of MEMX Options.

Connectivity

The Connectivity cost includes external fees paid to connect to other exchanges, as described above. The Exchange allocated approximately 4% of its Connectivity costs to providing application sessions, which represents a slight increase over the 2.6% allocated in the 2021 Cost Analysis. The Exchange notes this increase reflects that application sessions require information ultimately obtained from other exchanges through such Connectivity and the Exchange's costs increased with respect to such Connectivity in order to provide Members the ability to access both MEMX Equities and MEMX Options. Thus, the Exchange believes that 4% is a more accurate reflection of the costs required to provide Members with the ability to access each platform.

Data Center

Data Center costs include an allocation of the costs the Exchange incurs to provide physical connectivity in the third-party data centers where it maintains its equipment as well as related costs (the Exchange does not own the Primary Data Center or the Secondary Data Center, but instead, leases space in data centers operated by third parties). As shown in the table, the Exchange allocated 11% of its Data Center costs to application sessions in the current Cost Analysis, which represents an increase over the 2.6% it allocated in the 2021 Cost Analysis. The Exchange believes this increased allocation is a more accurate representation of the resources in the Data Center which are used to support application sessions because Data Center costs are fixed costs and without devoting significant time and resources to maintaining the Data Center and the hardware maintained therein, Members' use of application sessions could not be properly supported.

Technology

The Technology category includes the Exchange's network infrastructure, other hardware, software, and software licenses used to monitor the health of the order entry services provided by the Exchange. The Exchange allocated 12% of its Technology costs to the provision of application sessions, which represents a slight increase over the 10.1% it allocated in the 2021 Cost Analysis.

External Market Data

External Market Data includes fees paid to third parties, including other exchanges, to receive and consume market data from other markets. The Exchange allocated 20% of External Market Data fees to the provision of application sessions as such market data is necessary to offer certain services related to such sessions, such as validating orders on entry against the National Best Bid and National Best Offer (''NBBO'') and checking for other conditions (*e.g.,* whether a symbol is halted or subject to a short sale circuit breaker). Thus, as market data from other exchanges is consumed at the application session level in order to validate orders before additional processing occurs with respect to such orders, the Exchange believes it is reasonable to allocate a small amount of such costs to application sessions. The increase in allocation of External Market Data costs to the provision of application sessions compared to the 2021 Cost Analysis, in which 7.5% of its

External Market Data costs were allocated, is due to a restructuring of the category. Specifically, in 2021, External Market Data only included those costs incurred to receive data from other exchanges, while costs to receive the SIP feeds and other non-exchange data feeds were categorized under Hardware and Software Licenses. These costs are now all categorized under External Market Data.

Depreciation

All physical assets and software, which also includes assets used for testing and monitoring of order entry infrastructure, were valued at cost, depreciated or leased over periods ranging from three to five years. Thus, the depreciation cost primarily relates to servers necessary to operate the Exchange, some of which is owned by the Exchange and some of which is leased by the Exchange in order to allow efficient periodic technology refreshes. The Exchange allocated 14% of all depreciation costs to providing application sessions, which represents an increase over the 8.3% allocated in the 2021 Cost Analysis. In contrast to physical connectivity, described above, the Exchange did allocate depreciation costs for depreciated internally developed software to build the Exchange's platforms to application sessions because such software is related to the provision of such connectivity.

Allocated Shared Expenses

Finally, a limited portion of general shared expenses was allocated to overall application session costs as without these general shared costs the Exchange would not be able to operate in the manner that it does and provide application sessions. The costs included in general shared expenses include general expenses of the Exchange, including office space and office expenses (*e.g.,* occupancy and overhead expenses), utilities, recruiting and training, marketing and advertising costs, professional fees for legal, tax and accounting services (including external and internal audit expenses), and telecommunications costs. The Exchange again notes that the cost of paying directors to serve on its Board of Directors is included in the calculation of Allocated Shared Expenses, and thus a portion of such overall cost amounting to less than 5% of the overall cost for directors was allocated to providing application sessions.

Lastly, the Exchange determined the total *monthly* cost of providing application sessions, (*i.e.,* the annual cost of $7,185,273 noted in the table above divided by 12), $598,772.75, and estimated an average monthly revenue from application sessions under the proposed pricing herein of $662,738. Thus, the Exchange calculated an average monthly profit of $63,965, resulting in an application session profit margin of approximately 9.7%.[23] This profit margin for application sessions is slightly higher than the projected profit margin noted in the 2021 Cost Analysis,[24] which the Exchange believes is reasonable and well within the range of where the Exchange would expect it to be at this time.

Cost Analysis—Additional Discussion

In conducting its Cost Analysis, the Exchange did not allocate any of its expenses in full to any core services (including physical connectivity or application sessions) and did not double-count any expenses. Instead, as described above, the Exchange allocated applicable cost drivers across its core services and used the same Cost Analysis to form the basis of this proposal and the filing it recently submitted proposing the establishment of an ORF.[25] For instance, in calculating the Human Resources expenses to be allocated to physical connections, the Exchange has a team of employees dedicated to network infrastructure and with respect to such employees the Exchange allocated network infrastructure personnel with a high percentage of the time of such personnel (80%) given their focus on functions necessary to provide physical connections. The time of those same personnel were allocated only 4% to application sessions and the remaining 16% was allocated to transactions and market data. Of note, this allocation applied only to the network infrastructure employee's time that was left over after allocating for options regulation support. The Exchange did not allocate any other Human Resources expense for providing physical connections to any other employee group outside of a smaller allocation (30%) of the employee time associated with certain specified personnel who work closely with and support network infrastructure personnel. In contrast, the Exchange allocated much smaller percentages of employee time (15% or less) across a wider range of personnel groups in order to allocate Human Resources costs to providing application sessions. This is because a much wider range of personnel are involved in functions necessary to offer, monitor and maintain application sessions but the tasks necessary to do so are not a primary or full-time function.

In total, the Exchange allocated 18% of its Human Resources costs to providing physical connections and 11% of its Human Resources costs to providing application sessions, for a total allocation of 29% of its Human Resources expense to provide connectivity services. In turn, the Exchange allocated the remaining 71% of its Human Resources expense to Regulatory Services (21%), membership (2%) and transactions and market data (48%). Thus, again, the Exchange's allocations of cost across core services were based on real costs of operating the Exchange and were not double-counted across the core services or their associated revenue streams.

As another example, the Exchange allocated depreciation expense to all core services, including physical connections and application sessions, but in different amounts. The Exchange believes it is reasonable to allocate the identified portion of such expense because such expense includes the actual cost of the computer equipment, such as dedicated servers, computers, laptops, monitors, information security appliances and storage, and network switching infrastructure equipment, including switches and taps that were purchased to operate and support the network. Without this equipment, the Exchange would not be able to operate the network and provide connectivity services to its Members and non-Members and their customers. However, the Exchange did not allocate all of the depreciation and amortization expense toward the cost of providing connectivity services, but instead allocated approximately 53% of the Exchange's overall depreciation and amortization expense to connectivity services (39% attributed to physical connections and 14% to application sessions). The Exchange allocated the remaining depreciation and amortization expense (approximately 47%) toward regulatory services (approximately 6%), and to providing transaction services and market data (approximately 41%).

Looking at the Exchange's operations holistically, the estimated total monthly costs to the Exchange for offering core services in 2024 is $5,299,754, compared to the $3,954,537 noted in the 2021 Cost Analysis. Based on its projections, the Exchange expects to collect approximately $2,076,238 on a monthly basis for connectivity services.

[23] The Exchange calculated margin by dividing the total profit ($63,965) by the total revenue ($662,738) and multiplying by 100.

[24] The 2021 Cost Analysis projected an application session profit margin of approximately 8%.

[25] See *supra* note 17.

Incorporating this amount into the Exchange's overall projected revenue, including projections related to the ORF, the Exchange anticipates monthly revenue of approximately $6,080,631 from all sources (*i.e.,* connectivity fees and membership fees, transaction fees, ORF, and revenue from market data, both through the fees adopted in April 2022 [26] and through the revenue received from the SIPs). As such, applying the Exchange's holistic Cost Analysis to a holistic view of anticipated revenues, the Exchange would earn approximately 13% margin on its operations as a whole. The Exchange believes that this amount is reasonable.

The Exchange notes that its revenue estimates are based on projections across all potential revenue streams and will only be realized to the extent such revenue streams actually produce the revenue estimated. As a new entrant to the hyper-competitive exchange environment, and an exchange focused on driving competition, the Exchange does not yet know whether such expectations will be realized. For instance, in order to generate the revenue expected from connectivity, the Exchange will have to be successful in retaining existing options clients that wish to maintain physical connectivity and/or application sessions or in obtaining new clients that will purchase such services. Similarly, the Exchange will have to be successful in retaining a positive net capture on transaction fees in order to realize the anticipated revenue from transaction pricing.

The Exchange notes that the Cost Analysis was based on the Exchange's current operations and projections for the remainder of 2024. As such, the Exchange believes that its costs will remain relatively similar in future years (as demonstrated by the comparison of the 2021 Cost Analysis to the 2024 Cost Analysis). It is possible however that such costs will either decrease or increase. To the extent the Exchange sees growth in use of connectivity services it will receive additional revenue to offset future cost increases. However, if use of connectivity services is static or decreases, the Exchange might not realize the revenue that it anticipates or needs in order to cover applicable costs. Accordingly, the Exchange is committing to conduct a one-year review after implementation of these fees. The Exchange expects that it may propose to adjust fees at that time, to increase fees in the event that revenues fail to cover costs and a reasonable mark-up of such costs. Similarly, the Exchange would propose to decrease fees in the event that revenue materially exceeds our current projections. In addition, the Exchange will periodically conduct a review to inform its decision making on whether a fee change is appropriate (*e.g.,* to monitor for costs increasing/decreasing or subscribers increasing/decreasing in ways that suggest the then-current fees are becoming dislocated from the prior cost-based analysis) and would propose to increase fees in the event that revenues fail to cover its costs and a reasonable mark-up, or decrease fees in the event that revenue or the mark-up materially exceeds our current projections. In the event that the Exchange determines to propose a fee change, the results of a timely review, including an updated cost estimate, will be included in the rule filing proposing the fee change. More generally, the Exchange believes that it is appropriate for an exchange to refresh and update information about its relevant costs and revenues in seeking any future changes to fees, and the Exchange commits to do so.

Proposed Fees

Physical Connectivity Fees

MEMX offers its Members the ability to connect to the Exchange in order to transmit orders to and receive information from the Exchange. Members can also choose to connect to MEMX indirectly through physical connectivity maintained by a third-party extranet. Extranet physical connections may provide access to one or multiple Members on a single connection. Users of MEMX physical connectivity services (both Members and non-Members)[27] seeking to establish one or more connections with the Exchange submit a request to the Exchange via the MEMX User Portal or directly to Exchange personnel. Upon receipt of the completed instructions, MEMX establishes the physical connections requested by the User. The number of physical connections assigned to each User (for both equities and options) as of October 1, 2023, ranges from one (1) to 46, depending on the scope and scale of the Member's trading activity on the Exchange as determined by the Member, including the Member's determination of the need for redundant connectivity. Separate physical connections are not required to access the Exchange's Options and Equities platforms, as such, a User could use a single connection to access both platforms. The Exchange notes that 50% of its Members do not maintain a physical connection directly with the Exchange in the Primary Data Center (though many such Members have connectivity through a third-party provider) and 21 members, or 27.6% have either one or two physical ports to connect to the Exchange in the Primary Data Center.[28] Thus, only a limited number of Members, (17 members, or 22%), maintain three or more physical ports to connect to the Exchange in the Primary Data Center.[29]

As described above, the Exchange has previously justified its pricing with respect to MEMX Equities and believes the most fair approach, absent a significant differentiation between application costs to Equities and Options, is to apply the same pricing to all participants of either platform. As such, in order to cover the aggregate costs of providing physical connectivity to Options and Equities Users and make a modest profit, as described below, the Exchange is proposing to charge a fee of $6,000 per month for each physical connection in the Primary Data Center and a fee of $3,000 per month for each physical connection in the Secondary Data Center for connections to its Options platform, as it currently charges for connections to its Equities platform. There is no requirement that any Member maintain a specific number of physical connections and a Member may choose to maintain as many or as few of such connections as each Member deems appropriate. Further, as noted above, existing Equities Members may choose to use their existing physical connection(s) to access the Exchange's Options platform.

The Exchange notes, however, that pursuant to Rule 2.4 (Mandatory Participation in Testing of Backup Systems), the Exchange does require a small number of Members to connect and participate in functional and performance testing as announced by the Exchange, which occurs at least once every 12 months. Specifically, Members that have been determined by the Exchange to contribute a meaningful percentage of the Exchange's overall volume must participate in mandatory testing of the Exchange's backup systems (*i.e.,* such Members must connect to the Secondary Data Center). The Exchange notes that designated Members are still able to use third-party providers of connectivity to access the

[26] *See* Securities Exchange Act Release No. 97130 (March 13, 2013), 88 FR 16491 (March 17, 2023) (SR–MEMX–2023–04).

[27] *See supra* note 4.

[28] Of those 21 members, four (4) have designated certain of their physical ports will be used to connect to MEMX Options.

[29] Of those 17 members, thirteen (13) have designated certain of their physical ports will be used to connect to MEMX Options.

Exchange at its Secondary Data Center, and that for its Equities platform, one of eight such designated Members does use a third-party provider instead of connecting directly to the Secondary Data Center through connectivity provided by the Exchange. Nonetheless, because some Members are required to connect to the Secondary Data Center pursuant to Rule 2.4 and to encourage Exchange Members to connect to the Secondary Data Center generally, the Exchange has proposed to charge one-half of the fee for a physical connection in the Primary Data Center for its Options platform, as it currently charges for Equities. The Exchange notes that its costs related to operating the Secondary Data Center were not separately calculated for purposes of this proposal, but instead, all costs related to providing physical connections were considered in the aggregate. The Exchange believes this is appropriate because had the Exchange calculated such costs separately and then determined the fee per physical connection that would be necessary for the Exchange to cover its costs for operating the Secondary Data Center, the costs would likely be much higher than those proposed for connectivity at the Primary Data Center because Members maintain significantly fewer connections at the Secondary Data Center. The Exchange believes that charging a higher fee for physical connections at the Secondary Data Center would be inconsistent with its objective of encouraging Members to connect at such data center and is inconsistent with the fees charged by other exchanges, which also provide connectivity for disaster recovery purposes at a discounted rate.[30]

The proposed fee will not apply differently based upon the size or type of the market participant, but rather based upon the number of physical connections a User requests, based upon factors deemed relevant by each User (either a Member, service bureau or extranet). The Exchange believes these factors include the costs to maintain connectivity, business model and choices Members make in how to participate on the Exchange, as further described below.

The proposed fee of $6,000 per month for physical connections at the Primary Data Center is designed to permit the Exchange to cover the costs allocated to providing connectivity services with a modest profit margin (approximately 11.7%), which would also help fund future expenditures (increased costs, improvements, etc.). The Exchange believes it is appropriate to charge fees that represent a reasonable markup over cost given the other factors discussed above and the need for the Exchange to maintain a highly performant and stable platform to allow Members to transact with determinism.

As noted above, the Exchange proposes a discounted rate of $3,000 per month for physical connections at its Secondary Data Center. The Exchange has proposed this discounted rate for Secondary Data Center connectivity in order to encourage Members to establish and maintain such connections. Also, as noted above, a small number of Members are required pursuant to Rule 2.4 to connect and participate in testing of the Exchange's backup systems, and the Exchange believes it is appropriate to provide a discounted rate for physical connections at the Secondary Data Center given this requirement. The Exchange notes that this rate is well below the cost of providing such services and the Exchange will operate its network and systems at the Secondary Data Center without recouping the full amount of such cost through connectivity services.

The proposed fee for physical connections is effective on filing and will become operative immediately.

Application Session Fees

Similar to other exchanges, MEMX offers its Members application sessions, also known as logical ports, for order entry and receipt of trade execution reports and order messages. Members can also choose to connect to MEMX indirectly through a session maintained by a third-party service bureau. Service bureau sessions may provide access to one or multiple Members on a single session. Users of MEMX connectivity services (both Members and non-Members)[31] seeking to establish one or more application sessions with the Exchange submit a request to the Exchange via the MEMX User Portal or directly to Exchange personnel. Upon receipt of the completed instructions, MEMX assigns the User the number of sessions requested by the User. The number of sessions assigned to each User as of February 1, 2024, ranges from one (1) to more than 300 depending on the scope and scale of the Member's trading activity on the Exchange (either through a direct connection or through a service bureau) as determined by the Member. For example, by using multiple sessions, Members can segregate order flow from different internal desks, business lines, or customers. The Exchange does not impose any minimum or maximum requirements for how many application sessions a Member or service bureau can maintain, and it is not proposing to impose any minimum or maximum session requirements for its Members or their service bureaus. The same application session cannot be used to access both MEMX Equities and MEMX Options, as such, Users will need to purchase separate application sessions for MEMX Options, which differs from physical connections.

As described above, in order to cover the aggregate costs of providing application sessions to Options Users and to make a modest profit, as described below, the Exchange is proposing to charge a fee of $450 per month for each Order Entry Port and Drop Copy Port in the Primary Data Center for Options application sessions, which is the same fee it currently charges for Equities application sessions. The Exchange notes that it does not propose to charge for: (1) Order Entry Ports or Drop Copy Ports in the Secondary Data Center, or (2) any Test Facility Ports or MEMOIR Gap Fill Ports, again, which it does not charge for Equities Users. The Exchange has proposed to continue to provide Order Entry Ports and Drop Copy Ports in the Secondary Data Center for Options free of charge in order to encourage Members to connect to the Exchange's backup trading systems. Similarly, because the Exchange wishes to encourage Members to conduct appropriate testing of their use of the Exchange, the Exchange has not proposed to charge for Test Facility Ports. With respect to MEMOIR Gap Fill ports, such ports are exclusively used in order to receive information when a market data recipient has temporarily lost its view of MEMX market data. The Exchange has not proposed charging for such ports because the costs of providing and maintaining such ports is more directly related to producing market data.

The proposed fee of $450 per month for each Order Entry Port and Drop Copy Port in the Primary Data Center is designed to permit the Exchange to cover the costs allocated to providing application sessions with a modest profit margin (approximately 9.7%), which would also help fund future expenditures (increased costs, improvements, etc.).

The proposed fee is also designed to encourage Users to be efficient with their application session usage, thereby resulting in a corresponding increase in the efficiency that the Exchange would

[30] *See, e.g.,* the BZX options fee schedule, available at: *https://www.cboe.com/us/options/membership/fee_schedule/bzx/.*

[31] *See supra* note 3.

be able to realize in managing its aggregate costs for providing connectivity services. There is no requirement that any Member maintain a specific number of application sessions and a Member may choose to maintain as many or as few of such ports as each Member deems appropriate. The Exchange has designed its platform such that Order Entry Ports can handle a significant amount of message traffic (*i.e.,* over 50,000 orders per second), and has no application flow control or order throttling. In contrast, other exchanges maintain certain thresholds that limit the amount of message traffic that a single logical port can handle.[32] As such, while several Members maintain a relatively high number of ports because that is consistent with their usage on other exchanges and is preferable for their own reasons, the Exchange believes that it has designed a system capable of allowing such Members to significantly reduce the number of application sessions maintained.

The proposed fee will not apply differently based upon the size or type of the market participant, but rather based upon the number of application sessions a User requests, based upon factors deemed relevant by each User (either a Member or service bureau on behalf of a Member). The Exchange believes these factors include the costs to maintain connectivity and choices Members make in how to segment or allocate their order flow.[33]

The proposed fee for application sessions is effective on filing and will become operative immediately.

Proposed Fees—Additional Discussion

As discussed above, the proposed fees for connectivity services do not by design apply differently to different types or sizes of Members. As discussed in more detail in the Statutory Basis section, the Exchange believes that the likelihood of higher fees for certain Members subscribing to connectivity services usage than others is not unfairly discriminatory because it is based on objective differences in usage of connectivity services among different Members. The Exchange's incremental aggregate costs for all connectivity services are disproportionately related to Members with higher message traffic and/or Members with more complicated connections established with the Exchange, as such Members: (1) consume the most bandwidth and resources of the network; (2) transact the vast majority of the volume on the Exchange; and (3) require the high-touch network support services provided by the Exchange and its staff, including network monitoring, reporting and support services, resulting in a much higher cost to the Exchange to provide such connectivity services. For these reasons, MEMX believes it is not unfairly discriminatory for the Members with higher message traffic and/or Members with more complicated connections to pay a higher share of the total connectivity services fees. While Members with a business model that results in higher relative inbound message activity or more complicated connections are projected to pay higher fees, the level of such fees is based solely on the number of physical connections and/or application sessions deemed necessary by the Member and not on the Member's business model or type of Member. The Exchange notes that the correlation between message traffic and usage of connectivity services is not completely aligned because Members individually determine how many physical connections and application sessions to request, and Members may make different decisions on the appropriate ways based on facts unique to their individual businesses. Based on the Exchange's architecture, as described above, the Exchange believes that a Member even with high message traffic would be able to conduct business on the Exchange with a relatively small connectivity services footprint.

Finally, the fees for connectivity services will help to encourage connectivity services usage in a way that aligns with the Exchange's regulatory obligations. As a national securities exchange, the Exchange is subject to Regulation Systems Compliance and Integrity (''Reg SCI'').[34] Reg SCI Rule 1001(a) requires that the Exchange establish, maintain, and enforce written policies and procedures reasonably designed to ensure (among other things) that its Reg SCI systems have levels of capacity adequate to maintain the Exchange's operational capability and promote the maintenance of fair and orderly markets.[35] By encouraging Users to be efficient with their usage of connectivity services, the proposed fee will support the Exchange's Reg SCI obligations in this regard by ensuring that unused application sessions are available to be allocated based on individual User needs and as the Exchange's overall order and trade volumes increase. Additionally, because the Exchange will charge a lower rate for a physical connection to the Secondary Data Center and will not charge any fees for application sessions at the Secondary Data Center or its Test Facility, the proposed fee structure will further support the Exchange's Reg SCI compliance by reducing the potential impact of a disruption should the Exchange be required to switch to its Disaster Recovery Facility and encouraging Members to engage in any necessary system testing with low or no cost imposed by the Exchange.[36]

(ii) Organizational Fee Schedule Changes

The Exchange is proposing to more clearly separate Connectivity Fees from the Exchange's current fee schedule. Currently, the Exchange has separate transaction fee schedules for Equities and Options, and the current Connectivity Fees appear solely on the Equities fee schedule. The Exchange proposes to remove the Connectivity Fees section from the Equities fee schedule, and add hyperlinks at the bottom of the Equities and Options fee schedules that direct the User to a single Connectivity fee schedule. The Exchange believes this format is appropriate given that the same Connectivity Fees apply to both Equities and Options Users, and separating out the fee schedule for Connectivity Fees will reduce potential confusion (*e.g.,* as to which fees a Member that participates on both MEMX Equities and MEMX

[32] *See, e.g.,* Cboe US Options BOE Specification, *available at: https://cdn.cboe.com/resources/membership/US_Options_BOE_Specification.pdf* (describing a 5,000 message per second Port Order Rate Threshold on Cboe BOE ports).

[33] The Exchange understands that some Members (or service bureaus) may also request more Order Entry Ports to enable the ability to send a greater number of simultaneous order messages to the Exchange by spreading orders over more Order Entry Ports, thereby increasing throughput (*i.e.,* the potential for more orders to be processed in the same amount of time). The degree to which this usage of Order Entry Ports provides any throughput advantage is based on how a particular Member sends order messages to MEMX, however the Exchange notes that its architecture reduces the impact or necessity of such a strategy. All Order Entry Ports on MEMX provide the same throughput, and as noted above, the throughput is likely adequate even for a Member sending a significant amount of volume at a fast pace, and is not artificially throttled or limited in any way by the Exchange.

[34] 17 CFR 242.1000–1007.

[35] 17 CFR 242.1001(a).

[36] While some Members might directly connect to the Secondary Data Center and incur the proposed $3,000 per month fee, there are other ways to connect to the Exchange, such as through a service bureau or extranet, and because the Exchange is not imposing fees for application sessions in the Secondary Data Center, a Member connecting through another method would not incur any fees charged directly by the Exchange. However, the Exchange notes that a third-party service provider providing connectivity to the Exchange likely would charge a fee for providing such connectivity; such fees are not set by or shared in by the Exchange.

Options must pay on a monthly basis to maintain connectivity to the Exchange).

The Exchange also proposes to add two additional bullet points to the new Connectivity Fee Schedule related to MEMX Options. The first will notify Members that a physical connection can be used to access MEMX Equities and/or MEMX Options. The second will clarify that an application session can only be used to access one MEMX platform, *i.e.,* MEMX Equities or MEMX Options.[37] The Exchange notes that the existing bullet points related to Connectivity and application sessions will be included on the proposed separate Connectivity Fee Schedule, (*i.e.,* detailing the Exchange's billing practices, and making clear that that the Exchange does not charge for: (1) Order Entry Ports or Drop Copy Ports in the Secondary Data Center, or (2) any Test Facility Ports or MEMOIR Gap Fill Ports.

2. Statutory Basis

The Exchange believes that the proposed fees for connectivity services to MEMX Options are reasonable, equitable and not unfairly discriminatory because, as described above, the proposed pricing for connectivity services is directly related to the relative costs to the Exchange to provide those respective services and does not impose a barrier to entry to smaller participants.

The Exchange recognizes that there are various business models and varying sizes of market participants conducting business on the Exchange. The Exchange's incremental aggregate costs for all connectivity services are disproportionately related to Members with higher message traffic and/or Members with more complicated connections established with the Exchange, as such Members: (1) consume the most bandwidth and resources of the network; (2) transact the vast majority of the volume on the Exchange; and (3) require the high-touch network support services provided by the Exchange and its staff, including network monitoring, reporting and support services, resulting in a much higher cost to the Exchange to provide such connectivity services. Accordingly, the Exchange believes the allocation of the proposed fees that increase based on the number of physical connections or application sessions is reasonable based on the resources consumed by the respective type of market participant (*i.e.,* lowest resource consuming Members will pay the least, and highest resource consuming Members will pay the most), particularly since higher resource consumption translates directly to higher costs to the Exchange.

With regard to reasonableness, the Exchange understands that when appropriate given the context of a proposal the Commission has taken a market-based approach to examine whether the SRO making the proposal was subject to significant competitive forces in setting the terms of the proposal. In looking at this question, the Commission considers whether the SRO has demonstrated in its filing that: (i) there are reasonable substitutes for the product or service; (ii) ''platform'' competition constrains the ability to set the fee; and/or (iii) revenue and cost analysis shows the fee would not result in the SRO taking supra-competitive profits. If the SRO demonstrates that the fee is subject to significant competitive forces, the Commission will next consider whether there is any substantial countervailing basis to suggest the fee's terms fail to meet one or more standards under the Exchange Act. If the filing fails to demonstrate that the fee is constrained by competitive forces, the SRO must provide a substantial basis, other than competition, to show that it is consistent with the Exchange Act, which may include production of relevant revenue and cost data pertaining to the product or service.

MEMX believes the proposed fees for connectivity services are fair and reasonable as a form of cost recovery for the Exchange's aggregate costs of offering connectivity services to Members and non-Members. The proposed fees are expected to generate monthly revenue of $2,076,238 providing cost recovery to the Exchange for the aggregate costs of offering connectivity services, based on a methodology that narrowly limits the cost drivers that are allocated cost to those closely and directly related to the particular service. In addition, this revenue will allow the Exchange to continue to offer, to enhance, and to continually refresh its infrastructure as necessary to offer a state-of-the-art trading platform. The Exchange believes that, consistent with the Act, it is appropriate to charge fees that represent a reasonable markup over cost given the other factors discussed above. The Exchange also believes the proposed fee is a reasonable means of encouraging Users to be efficient in the connectivity services they reserve for use, with the benefits to overall system efficiency to the extent Members and non-Members consolidate their usage of connectivity services or discontinue subscriptions to unused physical connectivity.

The Exchange further believes that the proposed fees, as they pertain to purchasers of each type of connectivity alternative, constitute an equitable allocation of reasonable fees charged to the Exchange's Members and non-Members and are allocated fairly amongst the types of market participants using the facilities of the Exchange.

As described above, the Exchange believes the proposed fees are equitably allocated because the Exchange's incremental aggregate costs for all connectivity services are disproportionately related to Members with higher message traffic and/or Members with more complicated connections established with the Exchange, as such Members: (1) consume the most bandwidth and resources of the network; (2) transact the vast majority of the volume on the Exchange; and (3) require the high-touch network support services provided by the Exchange and its staff, including network monitoring, reporting and support services, resulting in a much higher cost to the Exchange to provide such connectivity services.

Commission staff previously noted that the generation of supra-competitive profits is one of several potential factors in considering whether an exchange's proposed fees are consistent with the Act.[38] As described in the Fee Guidance, the term ''supra-competitive profits'' refers to profits that exceed the profits that can be obtained in a competitive market. The proposed fee structure would not result in excessive pricing or supra-competitive profits for the Exchange. The proposed fee structure is merely designed to permit the Exchange to cover the costs allocated to providing connectivity services with a modest margin (approximately 11.7% for physical connectivity and 9.7% for application sessions), which would also help fund future expenditures (increased costs, improvements, etc.). While the Fee Guidance did not establish a guideline as to what constitutes supra-competitive pricing through analyzing margin (nor does the Exchange believe it should

[37] The Initial, Second, and Third Proposals included proposed waivers of Options Connectivity Fees that have since expired, and most recently, on March 1, 2024, the Exchange filed a proposed rule change to implement a waiver of Application Session fees used solely for participation on MEMX Options until April 1, 2024. Given that the Application Session fee waiver period has passed, the Exchange is proposing to delete that language from the Options Connectivity Fee Schedule in connection with this proposal. *See* Securities Exchange Act Release No. 99699 (March 8, 2024), 89 FR 18687 (March 14, 2024) (SR–MEMX–2024–08).

[38] *See* Fee Guidance, *supra* note 13.

have), the Exchange does not believe that it would be reasonable to consider the aforementioned margins to constitute supra-competitive pricing. As noted above, the increase in margin for connectivity services is primarily driven by certain cost savings that the Exchange has been able to achieve as compared to the 2021 Cost Analysis, and the Exchange does not believe it should be penalized, and instead should be rewarded for identifying and realizing such savings. Of course, should the Exchange find opportunities to dramatically reduce costs or increase revenues such that it believes the cost it is charging for physical connections or applications sessions is inconsistent with the cost of providing such connectivity or resulting in unreasonable margin, the Exchange will seek to lower its fees in order to pass savings on to its constituents. Thus, the Exchange believes that its proposed pricing for Connectivity Fees is fair, reasonable, and equitable. Further, the Exchange notes that certain of its competitors have connectivity fees that were approved without the presentation of a cost-based analysis, but it is reasonable to assume that certain of those competitors with significantly higher fees also operate with significantly higher profit margins. Accordingly, the Exchange believes that its proposal is consistent with Section 6(b)(4) [39] of the Act because the proposed fees will permit recovery of the Exchange's costs and will not result in excessive pricing or supra-competitive profit.

The proposed fees for Options connectivity services will allow the Exchange to cover certain costs incurred by the Exchange associated with providing and maintaining necessary hardware and other network infrastructure as well as network monitoring and support services; without such hardware, infrastructure, monitoring and support the Exchange would be unable to provide the connectivity services. The Exchange routinely works to improve the performance of the network's hardware and software. The costs associated with maintaining and enhancing a state-of-the-art exchange network is a significant expense for the Exchange, and thus the Exchange believes that it is reasonable and appropriate to help offset those costs by adopting fees for connectivity services. As detailed above, the Exchange has four primary sources of revenue that it can potentially use to fund its operations: transaction fees, fees for connectivity services, membership and regulatory fees, and market data fees. Accordingly, the Exchange must cover its expenses from these four primary sources of revenue. The Exchange's Cost Analysis estimates the monthly costs to provide connectivity services at $1,846,310.58. Based on current connectivity services usage, the Exchange would generate monthly revenues of approximately $2,076,238. This represents a modest profit when compared to the cost of providing connectivity services and that profit represents a modest increase over the profit estimated in the 2021 Cost Analysis (a reasonable goal for a newly formed business, *i.e.,* growing from non-profitable, to break-even to modestly profitable).[40] Even if the Exchange earns that amount or incrementally more, the Exchange believes the proposed fees for connectivity services are fair and reasonable because they will not result in excessive pricing or supra-competitive profit, when comparing the total expense of MEMX associated with providing connectivity services versus the total projected revenue of the Exchange associated with network connectivity services.

As noted above, when incorporating the projected revenue from connectivity services into the Exchange's overall projected revenue, including projections related to recently adopted market data fees, the Exchange anticipates monthly revenue of $6,080,631 from all sources. As such, applying the Exchange's holistic Cost Analysis to a holistic view of anticipated revenues, the Exchange would earn approximately 13% margin on its operations as a whole. The Exchange believes that this amount is reasonable and is again evidence that the Exchange will not earn a supra-competitive profit.

The Exchange notes that other exchanges offer similar connectivity options to market participants and that the Exchange's fees are a discount as compared to the majority of such fees.[41] With respect to physical connections, MIAX Options (''MIAX''), MIAX Pearl, LLC (''MIAX Pearl''), MIAX Emerald, LLC (''MIAX Emerald''), each of the Nasdaq Stock Market LLC (''Nasdaq'') options exchanges,[42] NYSE American Options (''NYSE American''), NYSE Arca Options (''NYSE Arca''), Cboe Exchange, Inc. (''Cboe Options''), Cboe BZX Options (''BZX Options''), and Cboe EDGX Options (''EDGX Options'') charge between $7,000–$22,000 per month for physical connectivity at their primary data centers that is comparable to that offered by the Exchange.[43] Nasdaq, NYSE American and NYSE Arca also charge installation fees, which are not proposed to be charged by the Exchange. With respect to application sessions, BX, PHLX, GEMX, MRX, BOX Options (''BOX''), Cboe Options, BZX Options and EDGX charge between $500–$800 per month for order entry and drop ports.[44] The Exchange further notes that several of these exchanges each charge for other logical ports that the Exchange will continue to provide for free, such as application sessions for testing and disaster recovery purposes.[45] While the Exchange's proposed Options Connectivity Fees are lower than certain of the fees charged by the Nasdaq options exchanges, MIAX Options, MIAX Pearl, MIAX Emerald, NYSE American, NYSE Arca, BOX, Cboe, BZX and EDGX, MEMX believes that it offers significant value to

[39] 15 U.S.C. 78f(b)(4).

[40] Specifically, in the 2021 Cost Analysis, the Exchange estimated the total costs to provide connectivity services at $1,143,715 and estimated monthly revenues of $1,233,750.

[41] One significant differentiation between the Exchanges is that while it offers different types of physical connections, including 10Gb, 25Gb, 40Gb, and 100Gb connections, the Exchange does not propose to charge different prices for such connections. In contrast, most of the Exchange's competitors provide scaled pricing that increases depending on the size of the physical connection. The Exchange does not believe that its costs increase incrementally based on the size of a physical connection but instead, that individual connections and the number of such separate and disparate connections are the primary drivers of cost for the Exchange.

[42] Including Nasdaq PHLX (''PHLX''), Nasdaq Options Market (''NOM''), Nasdaq BX Options (''BX''), Nasdaq ISE (''ISE''), Nasdaq GEMX (''GEMX''), and Nasdaq MRX (''MRX'').

[43] *See* the MIAX fee schedule, available at: *https://www.miaxglobal.com/sites/default/files/fee_schedule-files/MIAX__Options__Fee__Schedule_10022023.pdf;* the MIAX Pearl fee schedule, available at: *https://www.miaxglobal.com/sites/default/files/fee_schedule-files/MIAX_Pearl_Options_Fee_Schedule_09122023.pdf;* the MIAX Emerald fee schedule, available at: *https://www.miaxglobal.com/sites/default/files/fee_schedule-files/MIAX_Emerald_Fee_Schedule_10122023_3.pdf;* the Nasdaq Options markets fee schedule, at *http://www.nasdaqtrader.com/trader.aspx?id=pricelisttrading2;* the NYSE Connectivity fee schedule, at: *https://www.nyse.com/publicdocs/Wireless_Connectivity_Fees_and_Charges.pdf;* the Cboe fee schedule, at: *https://www.cboe.com/us/options/membership/fee_schedule/cone/;* the BZX Options fee schedule, available at: *https://www.cboe.com/us/options/membership/fee_schedule/bzx/;* the EDGX Options fee schedule, available at: *https://www.cboe.com/us/options/membership/fee_schedule/edgx/,* and the BOX Options fee schedule, available at: *https://boxoptions.com/fee-schedule/.* This range is based on a review of the fees charged for 10–40Gb connections at each of these exchanges and relates solely to the physical port fee or connection charge, excluding co-location fees and other fees assessed by these exchanges. The Exchange notes that it does not offer physical connections with lower bandwidth than 10Gb and that Members and non-Members with lower bandwidth requirements typically access the Exchange through third-party extranets or service bureaus.

[44] *See id.*

[45] *See id.*

Members over these other exchanges in terms of bandwidth available over such connectivity services, which the Exchange believes is a competitive advantage, and differentiates its connectivity versus connectivity to other exchanges.[46] Additionally, the Exchange's proposed Connectivity Fees to its disaster recovery facility are within the range of the fees charged by other exchanges for similar connectivity alternatives.[47] The Exchange believes that its proposal to offer certain application sessions free of charge is reasonable, equitably allocated and not unfairly discriminatory because such proposal is intended to encourage Member connections and use of backup and testing facilities of the Exchange, and, with respect to MEMOIR Gap Fill ports, such ports are used exclusively in connection with the receipt and processing of market data from the Exchange.

In conclusion, the Exchange submits that its proposed fee structure satisfies the requirements of Sections 6(b)(4) and 6(b)(5) of the Act [48] for the reasons discussed above in that it provides for the equitable allocation of reasonable dues, fees and other charges among its Members and other persons using its facilities, does not permit unfair discrimination between customers, issuers, brokers, or dealers, and is designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and in general to protect investors and the public interest, particularly as the proposal neither targets nor will it have a disparate impact on any particular category of market participant.

The Exchange believes that the proposed reorganization of its fee schedule to establish a separate fee schedule for Connectivity Fees is reasonable and equitable because it is a non-substantive change and does not involve changing any existing fees or rebates that apply to trading activity on MEMX Equities. Further, the changes are designed to make the fee schedule easier to read and for Members to validate the bills they receive from the Exchange. The Exchange also believes this reorganization is non-discriminatory because it applies uniformly to all Members. The Exchange believes the proposed fee schedule will be clearer and less confusing for Members of the Exchange and will eliminate potential Member confusion, thereby removing impediments to and perfecting the mechanism of a free and open market and a national market, and in general, protecting investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

In accordance with Section 6(b)(8) of the Act,[49] the Exchange does not believe that the proposed rule change would impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

Intramarket Competition

The Exchange does not believe that the proposed rule change to apply the same Connectivity Fees to Options Users as it does to Equities Users would place certain market participants at the Exchange at a relative disadvantage compared to other market participants because the proposed connectivity pricing is associated with relative usage of the Exchange by each market participant and does not impose a barrier to entry to smaller participants. As noted above, the Exchange has previously justified its pricing with respect to MEMX Equities and believes the most fair approach, absent a significant differentiation between application costs to Equities and Options, is to apply the same pricing to all participants of either platform. The Exchange believes its proposed pricing is reasonable and lower than what other options exchanges charge and, when coupled with the availability of third-party providers that also offer connectivity solutions, that participation on the Exchange is affordable for all market participants, including smaller trading firms. Therefore, the fees may stimulate intramarket competition by attracting additional firms to become Members of MEMX Options. As described above, the connectivity services purchased by market participants typically increase based on their additional message traffic and/or the complexity of their operations. The market participants that utilize more connectivity services typically utilize the most bandwidth, and those are the participants that consume the most resources from the network. Accordingly, the proposed fees for connectivity services do not favor certain categories of market participants in a manner that would impose a burden on competition; rather, the allocation of the proposed Connectivity Fees reflects the network resources consumed by the various size of market participants and the costs to the Exchange of providing such connectivity services.

As it relates to the reorganization of the fee schedule, as discussed above, the Exchange does not believe that the proposed change would impose any burden on competition because such change serves to create an easier to read fee schedule to avoid any Member confusion.

Intermarket Competition

The Exchange does not believe the proposed fees for Options Connectivity place an undue burden on competition on other SROs that is not necessary or appropriate. Additionally, other exchanges have similar connectivity alternatives for their participants, but with higher rates to connect.[50] The Exchange is also unaware of any assertion that the proposed fees for connectivity services would somehow unduly impair its competition with other exchanges. As a new entrant in an already highly competitive environment for equity options trading, MEMX does not have the market power necessary to set prices for services that are unreasonable or unfairly discriminatory in violation of the Exchange Act. In sum, MEMX's proposed Connectivity Fees for Options Members are comparable to and generally lower than fees charged by other options exchanges for the same or similar services.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

The Exchange neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act [51] and Rule 19b–4(f)(2) [52] thereunder.

[46] As noted above, all physical connections offered by MEMX are at least 10Gb capable and physical connections provided with larger bandwidth capabilities will be provided at the same rate as such connections. In contrast to other exchanges, MEMX has not proposed different types of physical connections with higher pricing for those with greater capacity. *See supra* note 41. The Exchange also reiterates that MEMX application sessions are capable of handling significant amount of message traffic (*i.e.,* over 50,000 orders per second), and have no application flow control or order throttling, in contrast to competitors that have imposed message rate thresholds. *See supra* note 33 and accompanying text.

[47] *See supra* note 43.

[48] 15 U.S.C. 78f(b)(4) and (5).

[49] 15 U.S.C. 78f(b)(8).

[50] *See supra* notes 42–47 and accompanying text.

[51] 15 U.S.C. 78s(b)(3)(A)(ii).

[52] 17 CFR 240.19b–4(f)(2).

At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule change should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's internet comment form (*https://www.sec.gov/rules/sro.shtml*); or
- Send an email to *rule-comments@sec.gov.* Please include file number SR–MEMX–2024–13 on the subject line.

Paper Comments

- Send paper comments in triplicate to Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090.

All submissions should refer to file number SR–MEMX–2024–13. 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–MEMX–2024–13 and should be submitted on or before May 21, 2024.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[53]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2024–09221 Filed 4–29–24; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–100020; File No. SR–MEMX–2024–06]

Self-Regulatory Organizations; MEMX LLC; Notice of Withdrawal of a Proposed Rule Change To Amend the Exchange's Fee Schedule To Adopt Connectivity and Application Session Fees for MEMX Options

April 24, 2024.

On February 15, 2024, MEMX LLC (''MEMX'' or the ''Exchange'') filed with the Securities and Exchange Commission (the ''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (the ''Act'')[1] and Rule 19b–4 thereunder,[2] a proposed rule change (File No. SR–MEMX–2024–06) to adopt connectivity and application session fees for MEMX Options.[3] The proposed rule change was immediately effective upon filing with the Commission pursuant to Section 19(b)(3)(A) of the Act.[4] The proposed rule change was published for comment in the **Federal Register** on March 6, 2024.[5] On April 12, 2024, the Exchange withdrew the proposed rule change (SR–MEMX–2024–06).

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.[6]

Sherry R. Haywood,

Assistant Secretary.

[FR Doc. 2024–09219 Filed 4–29–24; 8:45 am]

BILLING CODE 8011–01–P

SMALL BUSINESS ADMINISTRATION

[License No. 02/02–0647]

Praesidian Capital Opportunity Fund III, LP; Surrender of License of Small Business Investment Company

Pursuant to the authority granted to the United States Small Business Administration under section 309 of the Small Business Investment Act of 1958, as amended, and 13 CFR 107.1900 of the Code of Federal Regulations to function as a small business investment company under the Small Business Investment Company license number 02/02–0647 issued to *Praesidian Capital Opportunity Fund III, LP,* said license is hereby declared null and void.

Bailey Devries,

Associate Administrator, Office of Investment and Innovation, United States Small Business Administration.

[FR Doc. 2024–09256 Filed 4–29–24; 8:45 am]

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DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

Notice of Intent To Prepare an Environmental Impact Statement, Orange and Sullivan Counties, NY

AGENCY: Federal Highway Administration (FHWA), U.S. Department of Transportation (DOT).

ACTION: Notice of intent to prepare an environmental impact statement.

SUMMARY: The FHWA, in coordination with the New York State Department of Transportation (NYSDOT), is issuing this Notice of Intent (NOI) to solicit comments and advise the public, agencies, and stakeholders that an Environmental Impact Statement (EIS) will be prepared for the proposed NYS Route 17 Mobility and Access Improvements Project (the Project) located on NYS Route 17 between Exit 113, U.S. Route 209 in Sullivan County and Interstate 87 (I–87) in Orange County, New York (transportation corridor). The purpose of the Project is to address operational mobility

[53] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] *See* Securities Exchange Act Release No. 99635 (February 29, 2024), 89 FR 16049 (March 6, 2024) (''Notice'').

[4] 15 U.S.C. 78s(b)(3)(A). A proposed rule change may take effect upon filing with the Commission if it is designated by the exchange as ''establishing or changing a due, fee, or other charge imposed by the self-regulatory organization on any person, whether or not the person is a member of the self-regulatory organization.'' 15 U.S.C. 78s(b)(3)(A)(ii).

[5] *See* Notice, *supra* note 3.

[6] 17 CFR 200.30–3(a)(12).

deficiencies that exist on NYS Route 17 between U.S. Route 209 and Interstate 87 (transportation corridor). This NOI contains a summary of the information required in the Council on Environmental Quality (CEQ) regulations. This NOI should be reviewed together with the NOI Additional Project Information document, which contains important details about the proposed project and compliments the information in this NOI. Persons and agencies who may be interested in or affected by the proposed project are encouraged to comment on the information in this NOI and the NOI Additional Project Information document. All comments received in response to this NOI will be considered and any information presented herein may be revised in consideration of the comments.

DATES: Publication of this NOI initiates a 30-day public comment period. Comments on this NOI and the NOI Additional Project Information document are to be received through the methods below by May 30, 2024.

ADDRESSES: This NOI and the NOI Additional Project Information document are also available on the project website located at *www.route17.dot.ny.gov/#/mobility-access.* The NOI Additional Project Information document will be mailed upon request. Interested parties are invited to submit comments by any of the following methods:

- For access to the documents, go to the Project website located at *www.route17.dot.ny.gov/#/mobility-access.* Follow the online instructions for submitting comments.
- *Mail:* Federal Highway Administration, New York Division, Attention: NYS Route 17 Mobility & Access Improvements Project (PIN 8065.12), Leo W. O'Brien Federal Building, 11A Clinton Avenue, Suite 719, Albany, New York 12207.
- *Mail:* New York State Department of Transportation, Region 8, Attention: NYS Route 17 Mobility & Access Improvements Project (PIN 8065.12), 4 Burnett Boulevard, Poughkeepsie, NY 12603.
- *Email: Rt17MobilityAccess@dot.ny.gov*.

A summary of the comments received during the 30-day comment period will be included in the Draft EIS (DEIS).

FOR FURTHER INFORMATION CONTACT: Richard J. Marquis, Division Administrator, Federal Highway Administration, New York Division, Leo W. O'Brien Federal Building, 11A Clinton Avenue, Suite 719, Albany, NY 12207, Telephone: (518) 431–4127, Email: *Rick.Marquis@dot.gov;* or Mark Kruk, Project Manager, New York State Department of Transportation, Region 8, 4 Burnett Boulevard, Poughkeepsie, NY 12603, Telephone: (845) 431–5749, Email: *Mark.Kruk@dot.ny.gov*.

Interested persons can also be added to the project mailing list by sending a request to the NYS Route 17 Mobility and Access Improvements Project email address referenced above.

SUPPLEMENTARY INFORMATION: The FHWA and NYSDOT are committed to public involvement for this study. The FHWA, as Federal lead agency, and the New York State Department of Transportation (NYSDOT), as joint lead agency and project sponsor, are preparing an EIS for the NYS Route 17 Mobility and Access Improvements Project located in Orange and Sullivan Counties, New York, in accordance with the requirements of the National Environmental Policy Act (NEPA) of 1969, as amended (42 U.S.C. 4321, *et seq.*), 23 U.S.C. 139, CEQ regulations implementing NEPA (40 CFR 1500–1508), FHWA regulations implementing NEPA (23 CFR 771.101–771.139) and applicable Federal, State, and local governmental laws and regulations. The Project is classified as a NEPA Class I action under 23 CFR part 771 and a State Environmental Quality Review Act (SEQRA) non-Type II action under 17 NYCRR part 15. To ensure that a full range of issues are addressed in the EIS and potential issues are identified, comments and suggestions are invited from all interested parties. The NOI Additional Project Information document provides additional details on the Purpose and Need for the proposed action, alternatives considered, and expected impacts on the human environment. The FHWA requests identification of potential alternatives, information, and analyses relevant to the proposed action. The purpose of this request is to bring relevant comments, information, and analyses to the FHWA's attention, as early in the process as possible, to enable the agency to make maximum use of this information in decision making. All public comments received in response to this NOI will be considered, and changes may be made as appropriate.

The Project is informed by the findings of the 2021 Route 17 Transportation Planning and Environment Linkage (PEL) Study; the final report is available on the project website. The intent of the PEL Study was to assess and document existing conditions, identify transportation needs, and update conceptual transportation solutions developed in prior studies of the NYS Route 17 corridor that would address existing safety and operational deficiencies in the corridor, improve mobility, enhance transit infrastructure, and support future demand on the existing transportation network, in consideration of public input received.

1. Purpose and Need for the Proposed Action

NYS Route 17 is a major State highway that extends through the Southern Tier and Downstate regions of New York. Construction of the original NYS Route 17 began in 1949 and was completed in the 1960s. The majority of the transportation corridor consists of two travel lanes while short sections include a third travel lane or auxiliary lane. The typical section generally consists of 12-foot travel lanes with 4-foot left shoulders and 10-foot right shoulders. Many of the roadway sections in the transportation corridor remain as they were originally constructed.

The purpose of the Project is to address operational mobility deficiencies that exist on NYS Route 17 between US Route 209 and Interstate 87 (transportation corridor). The objectives of the Project are to address the operational and safety deficiencies that result from the insufficient acceleration and deceleration lanes at interchange ramps and short weaving sections, address geometric design elements to achieve interstate designation, and improve congestion-related travel times during peak travel periods within the transportation corridor. Detailed project need may be reviewed in the NOI Additional Project Information document available on the project website as noted in the **ADDRESSES** section. Comments on the Purpose and Need for the Proposed Action are welcomed during the 30-day comment period on this NOI. The Purpose and Need may be revised based on consideration of public and agency comments received during the comment period for this NOI and during the Scoping process for the DEIS.

2. Preliminary Description of the Proposed Action and Alternatives the Environmental Impact Statement Will Consider

The range of reasonable alternatives for detailed study in the EIS is currently being evaluated and will be refined in consideration of agency and public comments received during the 30-day comment period on this NOI. In addition to the No Action (No Build) Alternative, potential project alternatives include construction of

operational improvements in three locations (Concept 1), construction of a peak period shoulder lane (Concept 2), and construction of a general use third lane (Concept 3). A preliminary description of these potential alternatives is provided below. Additional information on the proposed potential alternatives is included in the NOI Additional Project Information document available for review on the project website, as noted in the **ADDRESSES** section.

The No Build Alternative assumes no improvements would be made to the transportation corridor other than those already programmed for construction, those proposed by others, and routine maintenance.[1]

Concept 1 proposes the construction of operational improvements, such as auxiliary lanes and collector-distributor roads, at three locations along NYS Route 17. NYS Route 17 would remain as two mainline travel lanes in each direction. Mainline operational improvements would be constructed along NYS Route 17 in both directions from Exit 120, NYS Route 211 to Exit 122, Crystal Run Road, from Exit 122A, Fletcher Street to Exit 124, NYS Route 207, and from Exit 130, NYS Route 208 to Exit 130A, U.S. Route 6 at the eastern end of the Project in order to adequately address operational and safety needs related to the close proximity of the interchanges and the volume of entering and exiting traffic at these three locations. Interchange improvements would be included to improve the interchanges along the transportation corridor to address non-standard and non-conforming features as well as operational issues. Multimodal improvements would be assessed and considered as part of this concept.

Concept 2 proposes construction of a peak period shoulder lane in both directions of NYS Route 17 from Exit 122, Crystal Run Road, to Exit 130, NYS Route 208. Peak period shoulder lanes would provide additional mobility during periods of high traffic volume. A full-time general use third lane would be added along NYS Route 17 in both directions from Exit 120, NYS Route 211 to Exit 122, Crystal Run Road, and from Exit 130, NYS Route 208, to I–87 at the eastern end of the Project in order to adequately address operational and safety needs related to the close proximity of the interchanges and the volume of entering and exiting traffic at these two locations. Interchange improvements would be included to improve the interchanges along the transportation corridor to address non-standard and non-conforming features as well as operational issues. Multimodal improvements would be assessed and considered as part of this concept.

Concept 3 proposes construction of a continuous third general use travel lane along NYS Route 17 in each direction between Exit 120, NYS Route 211 in Wallkill to the eastern limit of the Project at I–87 in Woodbury. Interchange improvements would be included to improve the interchanges along the transportation corridor to address non-standard and non-conforming features as well as operational issues. Multimodal improvements would be assessed and considered as part of this concept.

The range of alternatives includes three Build Alternatives described above as the proposed action, and the No Build Alternative. The No Build Alternative, which assumes no improvements other than those already programmed for construction; those implemented as part of routine maintenance and to keep the roadway safe and open to traffic in the near term, and those planned by others, will be carried forward for study in the DEIS as a baseline for comparison to the Build Alternative(s).

The alternatives may be revised based on the consideration of public and agency comments. The range of reasonable alternatives to be carried forward and documented in the DEIS will be finalized after consideration of comments received during the comment period on this NOI and after conclusion of the scoping process. Comments on the range of alternatives are welcomed during the 30-day comment period on this NOI.

3. Brief Summary of Expected Impacts

The FHWA and NYSDOT have initiated data collection and agency coordination to identify the types of environmental, cultural, and socio-economic resources present in the project areas and those likely to be impacted. Potential indirect and cumulative effects of the Project will be assessed and documented in the EIS. Based on preliminary review of existing conditions within and in proximity to the transportation corridor, the implementation of the Project could result in effects to the following:

- *Environmental justice populations:* Minority or low-income (environmental justice) populations have been identified within the vicinity of the Project, specifically within the City of Middletown, Town of Palm Tree/Village of Kiryas Joel, Town of Woodbury, Village of Woodbury, Town of Wallkill, Village of Bloomingburg, Town of Mamakating, and Village of Wurtsboro. An assessment of the potential for disproportionately high and adverse effects on environmental justice populations will be conducted, as described in section 4 of the NOI Additional Project Information document.
- *Regional and local economies:* Industrial, commercial, retail, entertainment, and healthcare uses exist along the transportation corridor and serve as employment and commerce centers that are important to both the regional and local economies in the vicinity of the Project. Some of these developments include LEGOLAND, the Galleria at Crystal Run, Garnet Health Medical Center, and Woodbury Common Premium Outlets. An assessment of the Project's potential effects on regional and local economies will be conducted, as described in section 4 of the NOI Additional Project Information document.
- *Wetlands and surface waters:* State and Federal regulated freshwater wetlands and waterways are present in the vicinity of the Project, including but not limited to Orange Rockland Lake, Youngs Brook, Seely Brook, Black Meadow Creek, Otter Kill, Wallkill River, Shawangunk Kill, and Basher Kill. A surface water and wetland delineation will be conducted to identify all state-regulated wetlands and Waters of the U.S. within and adjacent to the transportation corridor. An assessment of the Project's potential effects on wetlands and surface waters will be conducted, as described in section 4 of the NOI Additional Project Information document.
- *Endangered and threatened species:* Federally and State-listed threatened and/or endangered species have the potential to occur within the vicinity of the Project. Review of the U.S. Fish and Wildlife Service's (USFWS) Information for Planning and Consultation (IPaC) system preliminarily identified the following threatened, endangered, and/or candidate species as having the potential to occur in the vicinity of the Project: Indiana bat; northern long-eared bat; tricolored bat; bog turtle; dwarf wedgemussel; monarch butterfly; and small whorled pogonia. A review of the NY Natural Heritage Program (NYNHP) database identified additional State-listed threatened and/or endangered species as having the potential to occur in the vicinity of the Project. An assessment of the Project's potential effects on threatened and endangered

[1] The NY Route 17 at Exit 122 Project (NYSDOT PIN 8065.10) is a separate action that is currently programmed for construction and lies within the limits of the NYS Route 17 Mobility and Access Improvements Project.

species will be conducted, as described in section 4 of the NOI Additional Project Information document.

- *Historic properties:* A preliminary review of the NYS Office of Parks, Recreation and Historic Preservation (OPRHP) Cultural Resource Information System (CRIS) identified properties within or immediately adjacent to the transportation corridor that are listed on or eligible for inclusion in the National Register of Historic Places. An Area of Potential Effects (APE) will be established for the Project and an assessment will be conducted to identify the potential for effects on historic properties, as described in section 4 of the NOI Additional Project Information document.
- *Visual resources:* Visually sensitive resources are present in the vicinity of the Project, including but not limited to historic properties, the Bashakill Wildlife Management Area, and Orange Heritage Trail. An assessment of the Project's potential effects on visual resources will be conducted, as described in section 4 of the NOI Additional Project Information document.
- *Air quality:* The Project lies within Orange and Sullivan counties. Sullivan County is classified as ''attainment'' for all current National Ambient Air Quality Standards (NAAQS). Orange County is classified as a maintenance area for particulate matter with a diameter smaller than or equal to 2.5 microns ($PM_{2.5}$). Orange County is classified as ''attainment'' for all other NAAQS. An assessment of the Project's potential effects on air quality will be conducted, as described in section 4 of the NOI Additional Project Information document.
- *Traffic noise:* Noise sensitive receptors, as described in 23 CFR 772, are present within the vicinity of the Project and include, but are not limited to residences, schools, medical facilities, daycare centers, hotels, restaurants, and trails. An assessment of the Project's potential effects on traffic noise will be conducted, as described in section 4 of the NOI Additional Project Information document.
- *Construction effects:* Construction of the Project has the potential to effect noise, air quality, traffic and transportation, local and regional economies, water quality, and other environmental resources. Construction effects would be temporary and would cease with the completion of construction. An assessment of the Project's potential construction-related effects will be conducted, as described in section 4 of the NOI Additional Project Information document.

The analyses and evaluations conducted for the EIS will identify the potential for construction-related (short-term) and operational (long-term) effects (direct, indirect, and cumulative); whether the anticipated effects would be adverse; and mitigation measures for adverse effects. Evaluations under section 4(f) of the USDOT Act of 1966, 23 CFR part 774, and section 6(f) of the Land and Water Conservation Fund Act of 1965, 54 U.S.C. 200302, will be prepared, and consultation under section 106 of the National Historic Preservation Act of 1966, 54 U.S.C. 300101–307108, will be undertaken concurrently with the NEPA process. Comments on the potential impacts to be assessed in the Draft EIS are welcomed during the 30-day comment period on this NOI. The identification of impacts for analysis in the DEIS may be revised due to the consideration of public comments.

4. Anticipated Permits and Other Authorizations

Anticipated Federal and State permits and authorizations for the NYS Route 17 Mobility and Access Improvements Project include:

- U.S. Army Corps of Engineers (USACE) permits under section 404 of the Clean Water Act, 33 U.S.C. 1344, for construction in the transportation corridor and potential impacts to Waters of the United States;
- U.S. Fish and Wildlife Service (USFWS) consultation under section 7 of the Endangered Species Act, 16 U.S.C. 1536, for potential impacts to federally-listed threatened and/or endangered species;
- New York State Department of Environmental Conservation (NYSDEC) Clean Water Act section 401 WQC for potential impacts to water quality resulting from discharge into waters due to construction in the transportation corridor; as well as any other relevant New York State permits.

The USACE, USFWS, United States Environmental Protection Agency (USEPA), NYSDEC, and New York State Historic Preservation Office (SHPO) at New York State Office of Parks, Recreation, and Historic Preservation (NYSOPRHP) were invited to participate as Cooperating Agencies for the Project.

Invited Participating Agencies include New York State Department of Agriculture and Markets (NYS AGM), New York Metropolitan Transportation Council (NYMTC), New York State Thruway Authority (NYSTA), Orange County Department of Planning, Sullivan County Division of Planning & Community Development, Town of Blooming Grove, Town of Chester, Town of Goshen, Town of Mamakating, Town of Monroe, Town of Palm Tree & Village of Kiryas Joel, Town of Wallkill, Town of Woodbury, Village of Bloomingburg, Village of Chester, Village of Goshen, Village of Monroe, Village of South Blooming Grove, Village of Woodbury, City of Middletown, Delaware Nation, Delaware Tribe, Saint Regis Mohawk Tribe, and Stockbridge-Munsee Community Band of Mohican Indians.

Coordination with Cooperating and Participating Agencies has begun as part of the pre-NOI scoping and will continue throughout the environmental review process. The draft Project Purpose and Need and draft Permitting Timetable were distributed to the Cooperating Agencies on February 16, 2024, for review and concurrence. The Joint Agency Coordination Plan and Public Involvement Plan were distributed to the Cooperating Agencies for review on March 14, 2024. Refer to the NOI Additional Project Information document for additional information on coordination with Cooperating and Participating Agencies.

5. Schedule for the Decision-Making Process

The Project schedule will be established as part of the requirements of the environmental review process under 23 U.S.C. 139 and will comply with 40 CFR 1501.10(b)(2), which requires that environmental reviews and authorization decisions for major projects occur within 2 years (from the date of publication of the NOI to the date of issuance of the Record of Decision [ROD]), and all necessary authorizations be issued in 90 days from the ROD, in cooperation with the FHWA. A current draft of the Joint Agency Coordination Plan and Public Involvement Plan and project schedule are included in the NOI Additional Project Information document, which is available for review on the project website as noted in the **ADDRESSES** section.

The anticipated project schedule is outlined below:

- Public Scoping Meeting (May 2024)
- Project Scoping Report Publication (August 2024)
- Notice of Availability of the Draft EIS (DEIS) (August 2025)
- Public Hearing (September 2025)
- 45-day DEIS Comment Period (begins with the Notice of Availability of the DEIS) (August–October 2025)
- Submit Final EIS (FEIS) to FHWA (December 2025)
- Publish Single FEIS and ROD (February 2026)

- Issue all Project Permits and Authorization Decisions (May 2026)

6. Description of the Public Scoping Process, Including Scoping Meetings

Scoping is an early and open process to determine the scope of issues for analysis in an EIS, including identifying the significant issues and eliminating from further study non-significant issues. During the scoping process, FHWA and NYSDOT will determine the range of reasonable alternatives to be studied in the Draft EIS for the Project, in consideration of public and agency input received. Persons and agencies who may be interested in or affected by the proposed project are encouraged to comment on the information in this NOI and the NOI Additional Project Information document during the 30-day comment period. A formal public scoping meeting will be held after publication of the NOI. Advanced notice of the date, time, and location of the public scoping meeting will be provided to the public through the Project website and in public notices published in local newspapers, as described in Attachment A of the NOI Additional Project Information document. The intent of this meeting is to provide information and gather input on the Project during this early phase of the decision-making process. Interested parties will have the opportunity to submit formal comments at the meeting.

As described in the **ADDRESSES** section, the NOI Additional Project Information document is located on the project website. The NOI Additional Project Information document includes the complete Draft Purpose and Need for the Proposed Action; Extent of Analysis for Resources; Identification of Cooperating and Participating Agencies; Permitting Timetable; Joint Agency Coordination Plan and Public Involvement Plan; Environmental Justice Public Engagement Plan; and Project Maps/Figures.

7. Request for Identification of Potential Alternatives, Information, and Analyses Relevant to the Proposed Action

With this Notice, the FHWA and NYSDOT request and encourage State, Tribal, and local government agencies, and the public, to review the NOI and NOI Additional Project Information document and submit comments. Specifically, agencies and the public are asked to identify and submit potential alternatives for consideration and information, such as anticipated significant issues or environmental impacts and analyses relevant to the proposed action, for consideration by the Lead and Cooperating Agencies in developing the Draft EIS. Any information presented herein, including the Purpose and Need, proposed potential alternatives and identification of impacts by be revised after consideration of the comments. The purpose of this request is to bring relevant comments, information, and analyses to the attention of FHWA as early in the process as possible to enable FHWA to make maximum use of this information in decision making. Comments must be received by May 30, 2024. Comments or questions concerning this proposed action, including comments relative to potential alternatives, information and analyses, should be directed to the FHWA and NYSDOT at the addresses provided in the **FOR FURTHER INFORMATION CONTACT** section of this notice.

Authority: 42 U.S.C. 4321 *et seq.;* 23 U.S.C. 139; 23 CFR part 771.

Richard J. Marquis,

Division Administrator, Albany, NY.

[FR Doc. 2024–09293 Filed 4–29–24; 8:45 am]

BILLING CODE 4910–22–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket Number FRA–2010–0031]

Long Island Rail Road's Request To Amend Its Positive Train Control Safety Plan and Positive Train Control System

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Notice of availability and request for comments.

SUMMARY: This document provides the public with notice that, on April 19, 2024, Long Island Rail Road (LIRR) submitted a request for amendment (RFA) to its FRA-approved Positive Train Control Safety Plan (PTCSP). As this RFA involves a request for FRA's approval of proposed material modifications to an FRA-certified positive train control (PTC) system, FRA is publishing this notice and inviting public comment on the railroad's RFA to its PTCSP.

DATES: FRA will consider comments received by May 20, 2024. FRA may consider comments received after that date to the extent practicable and without delaying implementation of valuable or necessary modifications to a PTC system.

ADDRESSES:

Comments: Comments may be submitted by going to *https://www.regulations.gov* and following the online instructions for submitting comments.

Instructions: All submissions must include the agency name and the applicable docket number. The relevant PTC docket number for this host railroad is Docket No. FRA–2010–0031. For convenience, all active PTC dockets are hyperlinked on FRA's website at *https://railroads.dot.gov/research-development/program-areas/train-control/ptc/railroads-ptc-dockets.* All comments received will be posted without change to *https://www.regulations.gov;* this includes any personal information.

FOR FURTHER INFORMATION CONTACT: Gabe Neal, Staff Director, Signal, Train Control, and Crossings Division, telephone: 816–516–7168, email: *Gabe.Neal@dot.gov.*

SUPPLEMENTARY INFORMATION: In general, title 49 United States Code (U.S.C.) section 20157(h) requires FRA to certify that a host railroad's PTC system complies with title 49 Code of Federal Regulations (CFR) part 236, subpart I, before the technology may be operated in revenue service. Before making certain changes to an FRA-certified PTC system or the associated FRA-approved PTCSP, a host railroad must submit, and obtain FRA's approval of, an RFA to its PTCSP under 49 CFR 236.1021.

Under 49 CFR 236.1021(e), FRA's regulations provide that FRA will publish a notice in the **Federal Register** and invite public comment in accordance with 49 CFR part 211, if an RFA includes a request for approval of a material modification of a signal or train control system. Accordingly, this notice informs the public that, on April 19, 2024, LIRR submitted an RFA to its PTCSP for its Advanced Civil Speed Enforcement System II (ACSES II), which seeks FRA's approval for the release of updated onboard software modifying safety critical and non-safety critical functionality to address known software defects. That RFA is available in Docket No. FRA–2010–0031.

Interested parties are invited to comment on LIRR's RFA to its PTCSP by submitting written comments or data. During FRA's review of this railroad's RFA, FRA will consider any comments or data submitted within the timeline specified in this notice and to the extent practicable, without delaying implementation of valuable or necessary modifications to a PTC system. *See* 49 CFR 236.1021; *see also* 49 CFR 236.1011(e). Under 49 CFR 236.1021, FRA maintains the authority to approve,

approve with conditions, or deny a railroad's RFA to its PTCSP at FRA's sole discretion.

Privacy Act Notice

In accordance with 49 CFR 211.3, FRA solicits comments from the public to better inform its decisions. DOT posts these comments, without edit, including any personal information the commenter provides, to *https://www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *https://www.transportation.gov/privacy.* See *https://www.regulations.gov/privacy-notice* for the privacy notice of *regulations.gov*. To facilitate comment tracking, we encourage commenters to provide their name, or the name of their organization; however, submission of names is completely optional. If you wish to provide comments containing proprietary or confidential information, please contact FRA for alternate submission instructions.

Issued in Washington, DC.

Carolyn R. Hayward-Williams,

Director, Office of Railroad Systems and Technology.

[FR Doc. 2024–09301 Filed 4–29–24; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket Number FRA–2010–0034]

Port Authority Trans-Hudson's Request To Amend Its Positive Train Control Safety Plan and Positive Train Control System

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Notice of availability and request for comments.

SUMMARY: This document provides the public with notice that, on April 19, 2024, Port Authority Trans-Hudson (PATH) submitted a request for amendment (RFA) to its FRA-approved Positive Train Control Safety Plan (PTCSP). As this RFA may involve a request for FRA's approval of proposed material modifications to an FRA-certified positive train control (PTC) system, FRA is publishing this notice and inviting public comment on the railroad's RFA to its PTCSP.

DATES: FRA will consider comments received by May 20, 2024. FRA may consider comments received after that date to the extent practicable and without delaying implementation of valuable or necessary modifications to a PTC system.

ADDRESSES:

Comments: Comments may be submitted by going to *https://www.regulations.gov* and following the online instructions for submitting comments.

Instructions: All submissions must include the agency name and the applicable docket number. The relevant PTC docket number for this host railroad is Docket No. FRA–2010–0034. For convenience, all active PTC dockets are hyperlinked on FRA's website at *https://railroads.dot.gov/research-development/program-areas/train-control/ptc/railroads-ptc-dockets.* All comments received will be posted without change to *https://www.regulations.gov;* this includes any personal information.

FOR FURTHER INFORMATION CONTACT: Gabe Neal, Staff Director, Signal, Train Control, and Crossings Division, telephone: 816–516–7168, email: *Gabe.Neal@dot.gov.*

SUPPLEMENTARY INFORMATION: In general, title 49 United States Code (U.S.C.) section 20157(h) requires FRA to certify that a host railroad's PTC system complies with title 49 Code of Federal Regulations (CFR) part 236, subpart I, before the technology may be operated in revenue service. Before making certain changes to an FRA-certified PTC system or the associated FRA-approved PTCSP, a host railroad must submit, and obtain FRA's approval of, an RFA to its PTCSP under 49 CFR 236.1021.

Under 49 CFR 236.1021(e), FRA's regulations provide that FRA will publish a notice in the **Federal Register** and invite public comment in accordance with 49 CFR part 211, if an RFA includes a request for approval of a material modification of a signal or train control system. Accordingly, this notice informs the public that, on April 19, 2024, PATH submitted an RFA to its PTCSP for its Communication Based Train Control (CBTC), which seeks FRA's approval to deploy new software, including ''the release from Mid-A car function,'' and resolve known software issues identified through previous revenue service to improve CBTC system performance. That RFA is available in Docket No. FRA–2010–0034.

Interested parties are invited to comment on PATH's RFA to its PTCSP by submitting written comments or data. During FRA's review of this railroad's RFA, FRA will consider any comments or data submitted within the timeline specified in this notice and to the extent practicable, without delaying implementation of valuable or necessary modifications to a PTC system. *See* 49 CFR 236.1021; *see also* 49 CFR 236.1011(e). Under 49 CFR 236.1021, FRA maintains the authority to approve, approve with conditions, or deny a railroad's RFA to its PTCSP at FRA's sole discretion.

Privacy Act Notice

In accordance with 49 CFR 211.3, FRA solicits comments from the public to better inform its decisions. DOT posts these comments, without edit, including any personal information the commenter provides, to *https://www.regulations.gov,* as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at *https://www.transportation.gov/privacy.* See *https://www.regulations.gov/privacy-notice* for the privacy notice of *regulations.gov*. To facilitate comment tracking, we encourage commenters to provide their name, or the name of their organization; however, submission of names is completely optional. If you wish to provide comments containing proprietary or confidential information, please contact FRA for alternate submission instructions.

Issued in Washington, DC.

Carolyn R. Hayward-Williams,

Director, Office of Railroad Systems and Technology.

[FR Doc. 2024–09300 Filed 4–29–24; 8:45 am]

BILLING CODE 4910–06–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

Extended Application Period; Solicitation of Application for the Award of One Tanker Security Program Operating Agreement

AGENCY: Maritime Administration, Department of Transportation.

ACTION: Notice of application period for the Tanker Security Program (TSP).

SUMMARY: On March 1, 2024, the Maritime Administration published a notice in the **Federal Register** providing how to apply to MARAD's Tanker Security Program (TSP). By this follow-on notice, MARAD is extending the application period for eligible candidates for one TSP Operating Agreement and is republishing the same information soliciting applications. The FY21 NDAA authorized the Secretary of Transportation to establish a fleet of active, commercially viable, militarily useful, privately owned product tank vessels of the United States. The fleet will meet national defense and other

security requirements and maintain a United States presence in international commercial shipping. The FY22 NDAA made minor adjustments related to the participation of long-term charters in the TSP. This request for applications provides, among other things, application criteria and a deadline for submitting applications for the enrollment of one vessel in the TSP.

DATES: Applications for enrollment must be received no later than May 30, 2024. Applications should be submitted to the address listed in the **ADDRESSES** section below.

ADDRESSES: Applications may be submitted electronically to *sealiftsupport@dot.gov* or in hard copy to the Tanker Security Program, Maritime Administration, U.S. Department of Transportation, 1200 New Jersey Avenue SE, Washington, DC 20590. Application forms are available upon request or may be downloaded from MARAD's website.

FOR FURTHER INFORMATION CONTACT: David Hatcher, Director, Office of Sealift Support, Maritime Administration, Telephone (202) 366–0688. For legal questions, call Joseph Click, Office of Chief Counsel, Division of Maritime Programs, Maritime Administration, (202) 366–5882.

SUPPLEMENTARY INFORMATION: Section 53402(a) of Title 46, United States Code, requires that the Secretary of Transportation (Secretary), in consultation with the Secretary of Defense (SecDef), establish a fleet of active, commercially viable, militarily useful, privately-owned product tank vessels to meet national defense and other security requirements. The TSP will provide a stipend to tanker operators of U.S.-flagged vessels that meet certain qualifications.

Congress appropriated $60,000,000 for the TSP in the Consolidated Appropriations Act of 2022, Public Law 117–269, to remain available until expended. Authorized payments to participating operators are limited to $6 million per ship, per fiscal year and are subject to annual appropriations. Participating operators will be required to make their commercial transportation resources available upon request of the SecDef during times of war or national emergency.

Application Criteria

Section 53403(b)(2)(A) of Title 46, United States Code directs the Secretary in consultation with the SecDef to consider applicant vessel qualifications as they relate to 46 CFR 294.9 and give priority to applications based on the following criteria:

(1) Vessel capabilities, as established by SecDef;

(2) Applicant's record of vessel ownership and operation of tanker vessels; and

(3) Applicant's citizenship, with preference for Section 50501 Citizens.

Vessel Requirements

Acceptable vessels for a TSP Operating Agreement must meet the requirements of 46 U.S.C. 53402(b) and 46 CFR 294.9. The Commander, USTRANSCOM, has provided vessel suitability standards for eligible TSP vessels for use during the application selection process. The following suitability standards, consistent with the requirements of 46 U.S.C. 53402(b)(5), will apply to vessel applications:

- Medium Range (MR) tankers between 30,000–60,000 deadweight tons, with fuel cargo capacity of 230,000 barrels or greater.
- Deck space and size to accept installation of Consolidation (CONSOL) stations, two on each side for a total of four stations.
- Ability to accommodate up to an additional 12 crew for CONSOL, security, and communication crew augmentation.
- Communication facilities capable of integrating secure communications equipment.
- Does not engage in commerce or acquire any supplies or services if any proclamation, Executive order, or statute administered by Office of Foreign Assets Control (OFAC), or if OFAC's implementing regulations at 31 CFR Chapter V, would prohibit such a transaction by a person subject to the jurisdiction of the United States, except as authorized by the OFAC in the Department of the Treasury.
- Operate in the Indo-Pacific region.
- Maximum draft of no more than 44 feet. Preference will be given to vessels that can transport the most fuel at the shallowest draft.
- Sustained service speed of at least 14 knots, with higher speeds preferred.
- Carry only clean refined products.
- Capable of carrying more than two separated grades of refined petroleum products with double valve protection between tanks. Additionally, the vessel must meet the standards of 46 U.S.C. 53401(4).

National Security Requirements

The applicant chosen to receive a TSP Operating Agreement will be required to enter into an Emergency Preparedness Agreement (EPA) under 46 U.S.C. 53407, or such other agreement as may be approved by the Secretaries. The current EPA approved by the Secretary and SecDef is the Voluntary Tanker Agreement (VTA), publicly available for review at 87 FR 67119 (November 7, 2022).

Documentation

A vessel chosen to receive the TSP Operating Agreement must be documented as a U.S.-flag vessel under 46 U.S.C. chapter 121 to operate under the Operating Agreement. An applicant proposing a vessel registered under the laws of a foreign country at the time of application must demonstrate the vessel owner's intent to have the vessel documented under United States law and must demonstrate that the vessel is U.S. registered by the time the applicant enters into a TSP Operating Agreement for the vessel. Proof of U.S. Coast Guard vessel documentation and inspection and all relevant charter and management agreements for a chosen vessel must be approved by MARAD before the vessel will be eligible to operate under a TSP Operating Agreement and receive TSP payments.

Vessel Operation

A vessel selected for award of a TSP Operating Agreement must be operated in foreign commerce, in mixed foreign commerce and domestic trade of the United States permitted under a registry endorsement issued under 46 U.S.C. 12111, or between U.S. ports and those points identified in 46 U.S.C. 55101(b), or in foreign-to-foreign commerce, and must not otherwise operate in the coastwise trade of the United States. Further, in accordance with the FY22 NDAA, no vessel may operate under a TSP Operating Agreement while it is also operating under charter to the United States Government for a period that, together with options, exceeds 180 continuous days.

Protection of Confidential Commercial or Financial Information

If the application includes information that the applicant considers to be a trade secret or confidential commercial or financial information, the applicant should do the following: (1) Note on the front cover that the submission ''Contains Confidential Commercial or Financial Information (CCFI)''; (2) mark each affected page ''CCFI''; and (3) highlight or otherwise denote the CCFI portions. MARAD will protect such information from disclosure to the extent allowed under applicable law. In the event MARAD receives a Freedom of Information Act (FOIA) request for the information, procedures described in the Department's FOIA regulation at 49 CFR

7.29 will be followed. Only information that is ultimately determined to be confidential under that procedure will be exempt from disclosure under FOIA.

Award of Operating Agreements

MARAD will make every effort to expedite the review of applications and an award of a TSP Operating Agreement. MARAD, however, does not guarantee the award of an TSP Operating Agreement in response to applications submitted under this Notice. If no awards are made, or an application is not selected for an award, the applicant will be provided with a written reason why the application was denied, consistent with the requirements of 46 U.S.C. 53403.

(Authority: 46 U.S.C. chapter 534, 49 CFR 1.92 and 1.93, 46 CFR 294)

By order of the Maritime Administrator.

T. Mitchell Hudson, Jr.

Secretary, Maritime Administration.

[FR Doc. 2024–09232 Filed 4–29–24; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

Agency Information Collection Activities: Information Collection Renewal; Submission for OMB Review; Uniform Interagency Transfer Agent Registration and Deregistration Forms

AGENCY: Office of the Comptroller of the Currency (OCC), Treasury.

ACTION: Notice and request for comment.

SUMMARY: The OCC, as part of its continuing effort to reduce paperwork and respondent burden, invites comment on a continuing information collection, as required by the Paperwork Reduction Act of 1995 (PRA). In accordance with the requirements of the PRA, the OCC may not conduct or sponsor, and the respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (OMB) control number. The OCC is soliciting comment concerning the renewal of its information collection titled, ''Uniform Interagency Transfer Agent Registration and Deregistration Forms.'' The OCC also is giving notice that it has sent the collection to OMB for review.

DATES: Comments must be received by May 30, 2024.

ADDRESSES: Commenters are encouraged to submit comments by email, if possible. You may submit comments by any of the following methods:

- *Email: prainfo@occ.treas.gov.*
- *Mail:* Chief Counsel's Office, Attention: Comment Processing, Office of the Comptroller of the Currency, Attention: 1557–0124, 400 7th Street SW, Suite 3E–218, Washington, DC 20219.
- *Hand Delivery/Courier:* 400 7th Street SW, Suite 3E–218, Washington, DC 20219.
- *Fax:* (571) 293–4835.

Instructions: You must include ''OCC'' as the agency name and ''1557–0124'' in your comment. In general, the OCC will publish comments on *www.reginfo.gov* without change, including any business or personal information provided, such as name and address information, email addresses, or phone numbers. Comments received, including attachments and other supporting materials, are part of the public record and subject to public disclosure. Do not include any information in your comment or supporting materials that you consider confidential or inappropriate for public disclosure.

Written comments and recommendations for the proposed information collection should also be sent within 30 days of publication of this notice to *www.reginfo.gov/public/do/PRAMain.* You can find this information collection by selecting ''Currently under 30-day Review—Open for Public Comments'' or by using the search function.

You may review comments and other related materials that pertain to this information collection following the close of the 30-day comment period for this notice by the method set forth in the next bullet.

- *Viewing Comments Electronically:* Go to *www.reginfo.gov.* Hover over the ''Information Collection Review'' tab and click on ''Information Collection Review'' from the drop-down menu. From the ''Currently under Review'' drop-down menu, select ''Department of Treasury'' and then click ''submit.'' This information collection can be located by searching OMB control number ''1557–0124'' or ''Uniform Interagency Transfer Agent Registration and Deregistration Forms.'' Upon finding the appropriate information collection, click on the related ''ICR Reference Number.'' On the next screen, select ''View Supporting Statement and Other Documents'' and then click on the link to any comment listed at the bottom of the screen.
- For assistance in navigating *www.reginfo.gov,* please contact the Regulatory Information Service Center at (202) 482–7340.

FOR FURTHER INFORMATION CONTACT: Shaquita Merritt, Clearance Officer, (202) 649–5490, Chief Counsel's Office, Office of the Comptroller of the Currency, 400 7th Street SW, Washington, DC 20219. If you are deaf, hard of hearing, or have a speech disability, please dial 7–1–1 to access telecommunications relay services.

SUPPLEMENTARY INFORMATION: Under the PRA (44 U.S.C. 3501 *et seq.*), Federal agencies must obtain approval from the OMB for each collection of information that they conduct or sponsor. ''Collection of information'' is defined in 44 U.S.C. 3502(3) and 5 CFR 1320.3(c) to include agency requests or requirements that members of the public submit reports, keep records, or provide information to a third party. The OCC asks the OMB to extend its approval of the collection in this notice.

Title: Uniform Interagency Transfer Agent Registration and Deregistration Forms.

Form Numbers: Form TA–1 & TA–W.

Estimated Frequency of Response: On occasion.

Affected Public: National banks and their subsidiaries, Federal savings associations and their subsidiaries.

OMB Control No.: 1557–0124.

Type of Review: Regular.

Form TA–1

Estimated Number of Respondents: Registrations: 1; Amendments: 17.

Estimated Average Time per Response: Registrations: 1.25 hours; Amendments: 10 minutes.

Estimated Total Annual Burden: 4 hours.

Form TA–W

Estimated Number of Respondents: Deregistrations: 5.

Estimated Average Time per Response: Deregistrations: 30 minutes.

Estimated Total Annual Burden: 2.5 hours.

Section 17A(c) of the Securities Exchange Act of 1934 (the Act) requires all transfer agents for qualifying securities registered under section 12 of the Act, as well as for securities that would be required to be registered except for the exemption from registration provided by section 12(g)(2)(B) or section 12(g)(2)(G), to file with the appropriate regulatory agency (ARA) an application for registration in such form and containing such information and documents as the ARA may prescribe as necessary or appropriate in furtherance of the purposes of this section.[1] In general, an entity performing transfer agent

[1] 15 U.S.C. 78q–1(c).

functions for a qualifying security is required to register with its ARA. The OCC's regulations at 12 CFR 9.20 implement these provisions of the Act.

To accomplish the registration of transfer agents, Form TA–1 was developed in 1975 as an interagency effort by the Securities and Exchange Commission (SEC) and the Federal banking agencies (the OCC, the Board of Governors of the Federal Reserve System, and the Federal Deposit Insurance Corporation). The agencies primarily use the data collected on Form TA–1 to determine whether an application for registration should be approved, denied, accelerated, or postponed, and they use the data in connection with their supervisory responsibilities. In addition, when a national bank or Federal savings association no longer acts as a transfer agent for qualifying securities or when the national bank or Federal savings association is no longer supervised by the OCC, *i.e.,* liquidates or converts to another form of financial institution, the national bank or Federal savings association must file Form TA–W with the OCC requesting withdrawal from registration as a transfer agent.

Forms TA–1 and TA–W are mandatory, and their collection is authorized by sections 17A(c), 17(a)(3), and 23(a)(1) of the Act, as amended (15 U.S.C. 78q–1(c), 78q(a)(3), and 78w(a)(1)). Additionally, section 3(a)(34)(B)(i) of the Act (15 U.S.C. 78c(a)(34)(B)(i)) provides that the OCC is the ARA in the case of a national banks and Federal savings associations and subsidiaries of such institutions. The registrations are public filings and are not considered confidential. The OCC needs the information contained in this collection to fulfill its statutory responsibilities. Section 17A(c)(2) of the Act (15 U.S.C. 78q–1(c)(2)), as amended, provides that all those authorized to transfer securities registered under section 12 of the Act (transfer agents) shall register by filing with the ARA an application for registration in such form and containing such information and documents as such ARA may prescribe to be necessary or appropriate in furtherance of the purposes of this section.

Comments: On February 12, 2024, the OCC published a 60-day notice for this information collection, 89 FR 9908. There were no comments received.

Comments continue to be invited on:

(a) Whether the collection of information is necessary for the proper performance of the functions of the OCC, including whether the information has practical utility;

(b) The accuracy of the OCC's estimate of the burden of the collection of information;

(c) Ways to enhance the quality, utility, and clarity of the information to be collected;

(d) Ways to minimize the burden of the collection on respondents, including through the use of automated collection techniques or other forms of information technology; and

(e) Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Patrick T. Tierney,

Assistant Director, Office of the Comptroller of the Currency.

[FR Doc. 2024–09210 Filed 4–29–24; 8:45 am]

BILLING CODE 4810–33–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Notice of OFAC Sanctions Actions

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice

SUMMARY: The Department of the Treasury's Office of Foreign Assets Control (OFAC) is publishing the names of ten entities, three individuals, and five vessels that have been placed on OFAC's Specially Designated Nationals and Blocked Persons List (SDN List) based on OFAC's determination that one or more applicable legal criteria were satisfied. All property and interests in property subject to U.S. jurisdiction of these persons and vessels are blocked, and U.S. persons are generally prohibited from engaging in transactions with them.

DATES: See **SUPPLEMENTARY INFORMATION** section for applicable date(s).

FOR FURTHER INFORMATION CONTACT: OFAC: Bradley Smith, Director, tel.: 202–622–2490; Associate Director for Global Targeting, tel.: 202–622–2420; Assistant Director for Licensing, tel.: 202–622–2480; Assistant Director for Regulatory Affairs, tel.: 202–622–4855; or Assistant Director for Compliance, tel.: 202–622–2490.

SUPPLEMENTARY INFORMATION:

Electronic Availability

The SDN List and additional information concerning OFAC sanctions programs are available on OFAC's website (*https://www.treasury.gov/ofac*).

Notice of OFAC Action(s)

On April 25, 2024, OFAC determined that the property and interests in property subject to U.S. jurisdiction of the following persons and vessels are blocked under the relevant sanctions authority listed below.

BILLING CODE 4810–AL–P

Individuals

1. ABDULAHI FARD, Hojat (Arabic: حجت عبدالهی فرد) (a.k.a. ABDOLLAHI FARD, Hojjat; a.k.a. ABDOLLAHIFARD, Hojat), Tehran, Iran; DOB 22 Dec 1964; nationality Iran; Gender Male; Secondary sanctions risk: section 1(b) of Executive Order 13224, as amended by Executive Order 13886; National ID No. 4072184535 (Iran) (individual) [SDGT] [IFSR] [RUSSIA-EO14024] (Linked To: SAHARA THUNDER).

   Designated pursuant to section 1(a)(iii)(E) of Executive Order 13224 of September 23, 2001, "Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten to Commit, or Support Terrorism" (E.O. 13224), 3 CFR, 2019 Comp., p. 356., as amended by Executive Order 13886 of September 9, 2019, "Modernizing Sanctions To Combat Terrorism," 84 FR 48041 (E.O. 13224, as amended), for being a leader or official of SAHARA THUNDER, a person whose property and interests in property are blocked pursuant to E.O. 13224, as amended.

2. BAKHSHAYESH, Hossein (Arabic: حسین□خشایش) (a.k.a. BAKHSHAISH, Hussein), Tehran, Iran; DOB 22 May 1964; nationality Iran; Gender Male; Secondary sanctions risk: section 1(b) of Executive Order 13224, as amended by Executive Order 13886; National ID No. 1189810190 (Iran) (individual) [SDGT] [IFSR] [RUSSIA-EO14024] (Linked To: SAHARA THUNDER).

   Designated pursuant to section 1(a)(iii)(A) of E.O. 13224, as amended, for having acted or purported to act for or on behalf of, directly or indirectly, SAHARA THUNDER, a person whose property and interests in property are blocked pursuant to E.O. 13224, as amended.

3. MIRZAI KONDORI, Kazem (Arabic: کاظم میرزایی کندری) (a.k.a. MIRZAEI KONDORI, Kazem; a.k.a. MIRZAI KANDARI, Kazem), Tehran, Iran; DOB 11 Jul 1958; nationality Iran; Gender Male; Secondary sanctions risk: section 1(b) of Executive Order 13224, as amended by Executive Order 13886; Passport V52950311 (Iran) expires 29 Jul 2025; National ID No. 0046310622 (Iran) (individual) [SDGT] [IFSR] [RUSSIA-EO14024] (Linked To: SAHARA THUNDER).

   Designated pursuant to section 1(a)(iii)(A) of E.O. 13224, as amended, for having acted or purported to act for or on behalf of, directly or indirectly, SAHARA THUNDER, a person whose property and interests in property are blocked pursuant to E.O. 13224, as amended.

Entities

1. ONDEN GENERAL TRADING FZE (Arabic: اوندين جنرال تريدينغ م م ح), P2-ELOB Office No. E-21F-10, Hamriyah Free Zone, Sharjah, United Arab Emirates; Secondary sanctions risk: section 1(b) of Executive Order 13224, as amended by Executive Order 13886; Organization Established Date 26 Jul 2023; Registration Number 29197 (United Arab Emirates); Economic Register Number (CBLS) 12130484 (United Arab Emirates) [SDGT] [IFSR] (Linked To: SEPEHR ENERGY JAHAN NAMA PARS COMPANY).

   Designated pursuant to section 1(a)(iii)(C) of E.O. 13224, as amended, for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, SEPEHR ENERGY JAHAN NAMA PARS COMPANY, a person whose property and interests in property are blocked pursuant to E.O. 13224, as amended.

2. SAONE SHIPPING CORPORATION (a.k.a. SAONE SHIPPING CORP), 60th Floor, BICSA Financial Center, Avenida Balboa, Panama City, Panama; Secondary sanctions risk: section 1(b) of Executive Order 13224, as amended by Executive Order 13886; Organization Established Date 10 Jan 2020; Identification Number IMO 6381530; Registration Number 155689977 (Panama) [SDGT] [IFSR] (Linked To: SEPEHR ENERGY JAHAN NAMA PARS COMPANY).

   Designated pursuant to section 1(a)(iii)(C) of E.O. 13224, as amended, for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, SEPEHR ENERGY JAHAN NAMA PARS COMPANY, a person whose property and interests in property are blocked pursuant to E.O. 13224, as amended.

3. SAFE SEAS SHIP MANAGEMENT FZE (Arabic: سيف سيز شيب مانجمينت م م ح), P1-ELOB Office No. E-19F-34, Hamriyah Free Zone, Sharjah, United Arab Emirates; Office Building 2G-02, Hamriyah Free Zone, PO Box 53269, Sharjah, United Arab Emirates; Secondary sanctions risk: section 1(b) of Executive Order 13224, as amended by Executive Order 13886; Organization Established Date 14 Jun 2017; Identification Number IMO 5993126; License 16065 (United Arab Emirates); Economic Register Number (CBLS) 11582160 (United Arab Emirates) [SDGT] [IFSR] (Linked To: SAHARA THUNDER).

   Designated pursuant to section 1(a)(iii)(C) of E.O. 13224, as amended, for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, SAHARA THUNDER, a person whose property and interests in property are blocked pursuant to E.O. 13224, as amended.

4. ARSANG SAFE TRADING CO. (Arabic: شزكت ايمن تجارت ارسنگ), 901, Negin Saii Tower, Vali-asr St., Tehran 14338, Iran; Website www.arsangco.com; Secondary sanctions risk: section 1(b) of Executive Order 13224, as amended by Executive Order 13886; Organization Established Date 03 Mar 2014; National ID No. 14003927492 (Iran); Business Registration Number 450913 (Iran) [SDGT] [IFSR] (Linked To: SAHARA THUNDER).

Designated pursuant to section 1(a)(iii)(C) of E.O. 13224, as amended, for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, SAHARA THUNDER, a person whose property and interests in property are blocked pursuant to E.O. 13224, as amended.

5. ASIA MARINE CROWN AGENCY (Arabic: شركت تاج دريای آسيا) (a.k.a. TAJ DARYAE ASIA COMPANY), First Floor, Khalij Abi Complex, No. 0, Imam Khomeini Street, Shahid Jahan Ara Street, Manazel 38 Ghermez Neighborhood, Bandar Imam Khomeini City, Bandar Imam Khomeini Section, Bandar Mahshahr, Khuzestan 6356174826, Iran; Apt. 7, 1st Floor, South Wing, Bldg. No. 21, Kar Va Tejarat St., Vanak Sq., Tehran 1991943845, Iran; Secondary sanctions risk: section 1(b) of Executive Order 13224, as amended by Executive Order 13886; Organization Established Date 09 Jan 2019; National ID No. 14008069775 (Iran); Business Registration Number 10977 (Iran) [SDGT] [IFSR] (Linked To: SAHARA THUNDER).

   Designated pursuant to section 1(a)(iii)(C) of E.O. 13224, as amended, for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, SAHARA THUNDER, a person whose property and interests in property are blocked pursuant to E.O. 13224, as amended.

6. SAHARA THUNDER (Arabic: شركت تندر صحرا) (a.k.a. DESERT THUNDER COMPANY; a.k.a. TONDAR SAHARA CO.; a.k.a. TONDAR SAHRA PRIVATE LIMITED COMPANY), No. 2, Moghadas Alley (4), Ghasir St., Beheshti St., Tehran, Iran; Fifth Floor, No 2, Shahid Hassan Moghadam Alley, Shahid Ahmad Ghasir St, Argentine, Saei St, Tehran, Iran; Website www.saharathunder.com; Secondary sanctions risk: section 1(b) of Executive Order 13224, as amended by Executive Order 13886; Organization Established Date 07 Dec 1992; National ID No. 10101382714 (Iran); Chamber of Commerce Number 131454 (Iran); Business Registration Number 94186 (Iran) [SDGT] [IFSR] [RUSSIA-EO14024] (Linked To: MINISTRY OF DEFENSE AND ARMED FORCES LOGISTICS).

   Designated pursuant to section 1(a)(iii)(C) of E.O. 13224, as amended, for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, the MINISTRY OF DEFENSE AND ARMED FORCES LOGISTICS, a person whose property and interests in property are blocked pursuant to E.O. 13224.

7. ZEN SHIPPING & PORT INDIA PRIVATE LIMITED (a.k.a. ZEN SHIPPING & PORTS INDIA PVT LTD; a.k.a. ZEN SHIPPING AND PORT INDIA PRIVATE LIMITED; a.k.a. ZEN SHIPPING AND PORTS INDIA PVT LTD), Unit 002, B-wing Ground Floor, 215 Atrium, Andheri Kurla Road, Andheri (East), Mumbai, Maharashtra 400 059, India; Website www.zenships.com; Secondary sanctions risk: section 1(b) of Executive Order 13224, as amended by Executive Order 13886; Organization Established Date 05 Apr 2011; Business Registration Number 215807 (India) [SDGT] [IFSR] (Linked To: SAHARA THUNDER).

   Designated pursuant to section 1(a)(iii)(C) of E.O. 13224, as amended, for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, SAHARA THUNDER, a person whose property and interests in property are blocked pursuant to E.O. 13224, as amended.

8. SEA ART SHIP MANAGEMENT OPC PRIVATE LIMITED (a.k.a. SEA ART SHIP MANAGEMENT OPC), 511A, Shelton Sapphire, Sector 15, Plot No. 18&19, CBD Belapur, Navi Mumbai, Thane, Thane, Maharashtra 400614, India; Secondary sanctions risk: section 1(b) of Executive Order 13224, as amended by Executive Order 13886; Organization Established Date 20 Aug 2021; Identification Number IMO 6249053; Business Registration Number 366117 (India) [SDGT] [IFSR] (Linked To: SAHARA THUNDER).

   Designated pursuant to section 1(a)(iii)(C) of E.O. 13224, as amended, for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, SAHARA THUNDER, a person whose property and interests in property are blocked pursuant to E.O. 13224, as amended.

9. CORAL TRADING EST (Arabic: موسسة كورال للتجارة), Deira Riggat Al Batten, Dubai, United Arab Emirates; Unit 4, 2nd Floor, No 18, East Nahid, Jordan Street, Tehran, Iran; Secondary sanctions risk: section 1(b) of Executive Order 13224, as amended by Executive Order 13886; Organization Established Date 15 Jul 2022; License 1081218 (United Arab Emirates); Economic Register Number (CBLS) 11907262 (United Arab Emirates) [SDGT] [IFSR] (Linked To: SAHARA THUNDER).

   Designated pursuant to section 1(a)(iii)(C) of E.O. 13224, as amended, for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, SAHARA THUNDER, a person whose property and interests in property are blocked pursuant to E.O. 13224, as amended.

10. TRANS GULF AGENCY LLC (Arabic: ترانس جولف ايجانسي) (a.k.a. TRANS GULF AGENCY), P.O Box 7742, Office No 202, Fitco Building 3, Inside Fujairah Seaport, United Arab Emirates; Dubai, United Arab Emirates; Sharjah, United Arab Emirates; Khorfakkan, United Arab Emirates; Website www.transgulfagency.ae; Secondary sanctions risk: section 1(b) of Executive Order 13224, as amended by Executive Order 13886; Organization Established Date 19 Jun 2014; alt. Organization Established Date 08 Nov 2015; License 1013348 (United Arab Emirates); alt. License 745668 (United Arab Emirates); Economic Register Number (CBLS) 10382731 (United Arab Emirates); alt. Economic Register Number (CBLS) 10932144 (United Arab Emirates) [SDGT] (Linked To: SEA ART SHIP MANAGEMENT OPC PRIVATE LIMITED).

    Designated pursuant to section 1(a)(iii)(C) of E.O. 13224, as amended, for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, SEA ART SHIP MANAGEMENT (OPC) PRIVATE LIMITED, a person whose property and interests in property are blocked pursuant to E.O. 13224, as amended.

Vessels

1. LA PEARL (a.k.a. ELITE) (5IM808) Crude Oil Tanker Tanzania flag; Secondary sanctions risk: section 1(b) of Executive Order 13224, as amended by Executive Order 13886; Vessel Registration Identification IMO 9174660; MMSI 677070800 (vessel) [SDGT] (Linked To: SAONE SHIPPING CORPORATION).

Identified as property in which SAONE SHIPPING CORPORATION, a person whose property and interests in property are blocked pursuant to E.O. 13224, as amended, has an interest.

2. CHEM (E5U4368) Chemical/Products Tanker Cook Islands flag; Secondary sanctions risk: section 1(b) of Executive Order 13224, as amended by Executive Order 13886; Vessel Registration Identification IMO 9240914; MMSI 518998388 (vessel) [SDGT] (Linked To: SAFE SEAS SHIP MANAGEMENT FZE).

   Identified as property in which SAFE SEAS SHIP MANAGEMENT FZE, a person whose property and interests in property are blocked pursuant to E.O. 13224, as amended, has an interest.

3. CONRAD (E5U4542) Oil Products Tanker Cook Islands flag; Secondary sanctions risk: section 1(b) of Executive Order 13224, as amended by Executive Order 13886; Vessel Registration Identification IMO 9546722; MMSI 518998562 (vessel) [SDGT] (Linked To: SAFE SEAS SHIP MANAGEMENT FZE).

   Identified as property in which SAFE SEAS SHIP MANAGEMENT FZE, a person whose property and interests in property are blocked pursuant to E.O. 13224, as amended, has an interest.

4. DANCY DYNAMIC (T8A3476) Oil Products Tanker Palau flag; Secondary sanctions risk: section 1(b) of Executive Order 13224, as amended by Executive Order 13886; Vessel Registration Identification IMO 9158161; MMSI 511100350 (vessel) [SDGT] (Linked To: SAFE SEAS SHIP MANAGEMENT FZE).

   Identified as property in which SAFE SEAS SHIP MANAGEMENT FZE, a person whose property and interests in property are blocked pursuant to E.O. 13224, as amended, has an interest.

5. K M A (E5U4542) Chemical/Products Tanker Cook Islands flag; Secondary sanctions risk: section 1(b) of Executive Order 13224, as amended by Executive Order 13886; Vessel Registration Identification IMO 9234616; MMSI 518998425 (vessel) [SDGT] (Linked To: SAFE SEAS SHIP MANAGEMENT FZE).

   Identified as property in which SAFE SEAS SHIP MANAGEMENT FZE, a person whose property and interests in property are blocked pursuant to E.O. 13224, as amended, has an interest.

Dated: April 25, 2024.

Bradley T. Smith,

Director, Office of Foreign Assets Control, U.S. Department of the Treasury.

[FR Doc. 2024–09252 Filed 4–29–24; 8:45 am]

BILLING CODE 4810–AL–C

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Notice of OFAC Sanctions Actions

AGENCY: Office of Foreign Assets Control, Treasury.

ACTION: Notice.

SUMMARY: The U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) is publishing the names of one or more persons and aircraft that have been placed on OFAC's Specially Designated Nationals and Blocked Persons List (SDN List) based on OFAC's determination that one or more applicable legal criteria were satisfied. All property and interests in property subject to U.S. jurisdiction of these persons and this aircraft are blocked, and U.S. persons are generally prohibited from engaging in transactions with them.

DATES: See **SUPPLEMENTARY INFORMATION** section for applicable date(s).

FOR FURTHER INFORMATION CONTACT: OFAC: Bradley T. Smith, Director, tel.: 202–622–2490; Associate Director for Global Targeting, tel.: 202–622–2420; Assistant Director for Licensing, tel.: 202–622–2480; Assistant Director for Regulatory Affairs, tel.: 202–622–4855; or Assistant Director for Enforcement, Compliance and Analysis, tel.: 202–622–2490.

SUPPLEMENTARY INFORMATION:

Electronic Availability

The SDN List and additional information concerning OFAC sanctions programs are available on OFAC's website (*https://www.treasury.gov/ofac*).

Notice of OFAC Actions

On April 25, 2024, OFAC determined that the property and interests in property subject to U.S. jurisdiction of the following persons and aircraft are blocked under the relevant sanctions authorities listed below.

BILLING CODE 4810–AL–P

Individuals

1. ABDI ASJERD, Abbas (Arabic: عباس عبدی اسجرد) (a.k.a. ABDI ASJARD, Abbas; a.k.a. ABDI ESJERD, Abbas; a.k.a. ABDIASJERD, Abbas), Tehran, Iran; DOB 09 Sep 1960; nationality Iran; Additional Sanctions Information - Subject to Secondary Sanctions; Gender Male; Passport R35593485 (Iran); National ID No. 0045607362 (Iran) (individual) [NPWMD] [IRGC] [IFSR] (Linked To: BONYAN DANESH SHARGH PRIVATE COMPANY).

   Designated pursuant to section 1(a)(iv) of Executive Order 13382 of June 28, 2005, "Blocking Property of Weapons of Mass Destruction Proliferators and Their Supporters," 70 FR 38567, 3 CFR, 2005 Comp., p. 170 (E.O. 13382), for acting or purporting to act for or on behalf of, directly or indirectly, BONYAN DANESH SHARGH PRIVATE COMPANY, a person whose property and interests in property are blocked pursuant to E.O. 13382.

2. VAHABZADEH MOGHADAM, Seyed Mohsen (Arabic: سید محسن وهاب زاده مقدم) (a.k.a. VAHABZADEH MOGHADDAM, Seyed Mohsen), Tehran, Iran; DOB 22 Nov 1958; nationality Iran; Additional Sanctions Information - Subject to Secondary Sanctions; Gender Male; National ID No. 0042587662 (Iran) (individual) [NPWMD] [IRGC] [IFSR] (Linked To: BONYAN DANESH SHARGH PRIVATE COMPANY).

   Designated pursuant to section 1(a)(iv) of E.O. 13382 for acting or purporting to act for or on behalf of, directly or indirectly, BONYAN DANESH SHARGH PRIVATE COMPANY, a person whose property and interests in property are blocked pursuant to E.O. 13382.

3. ABDI ASJERD, Zahra (Arabic: زهرا عبدی اسجرد), Tehran, Iran; DOB 22 Oct 1995; nationality Iran; Additional Sanctions Information - Subject to Secondary Sanctions; Gender Female; Passport F44356873 (Iran) expires 03 Jan 2023; National ID No. 0018946798 (Iran) (individual) [NPWMD] [IRGC] [IFSR] (Linked To: BONYAN DANESH SHARGH PRIVATE COMPANY).

   Designated pursuant to section 1(a)(iv) of E.O. 13382 for acting or purporting to act for or on behalf of, directly or indirectly, BONYAN DANESH SHARGH PRIVATE COMPANY, a person whose property and interests in property are blocked pursuant to E.O. 13382.

4. EIDI ASHJERDI, Hamid (Arabic: حمید عیدی آشجردی) (a.k.a. EYDI ASHJERDI, Hamid), Tehran, Iran; DOB 01 Dec 1963; nationality Iran; Additional Sanctions Information - Subject to Secondary Sanctions; Gender Male; Passport V54707341 (Iran) expires 01 Oct 2026; National ID No. 0053643232 (Iran) (individual) [NPWMD] [IFSR] (Linked To: BONYAN DANESH SHARGH PRIVATE COMPANY).

   Designated pursuant to section 1(a)(iii) of E.O. 13382 for having provided, or attempted to provide, financial, material, technological or other support for, or goods or services in support of, BONYAN DANESH SHARGH PRIVATE COMPANY, a person whose property and interests in property are blocked pursuant to E.O. 13382.

5. MORADIPOUR, Mohammad Ali (Arabic: محمد علی مرادی پور) (a.k.a. ALI MORADIPUR, Mohammad), Tehran, Iran; DOB 30 Apr 1959; nationality Iran; Additional Sanctions Information - Subject to Secondary Sanctions; Gender Male; National ID No. 1218719699 (Iran) (individual) [NPWMD] [IFSR] (Linked To: SANAYE MOTORSAZI ALVAND PRIVATE COMPANY).

   Designated pursuant to section 1(a)(iii) of E.O. 13382 for having provided, or attempted to provide, financial, material, technological or other support for, or goods or services in support of, SANAYE MOTORSAZI ALVAND PRIVATE COMPANY, a person whose property and interests in property are blocked pursuant to E.O. 13382.

6. ABDULAHI FARD, Hojat (Arabic: حجت عبداللهی فرد) (a.k.a. ABDOLLAHI FARD, Hojjat; a.k.a. ABDOLLAHIFARD, Hojat), Tehran, Iran; DOB 22 Dec 1964; nationality Iran; Gender Male; Secondary sanctions risk: section 1(b) of Executive Order 13224, as amended by Executive Order 13886; National ID No. 4072184535 (Iran) (individual) [SDGT] [IFSR] [RUSSIA-EO14024] (Linked To: SAHARA THUNDER).

   Designated pursuant to section 1(a)(iii)(E) of Executive Order 13224 of September 23, 2001, "Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten to Commit, or Support Terrorism" (E.O. 13224), 3 CFR, 2019 Comp., p. 356., as amended by Executive Order 13886 of September 9, 2019, "Modernizing Sanctions To Combat Terrorism," 84 FR 48041 (E.O. 13224, as amended), for being a leader or official SAHARA THUNDER, a person whose property and interests in property are blocked pursuant to E.O. 13224, as amended.

   Designated pursuant to section 1(a)(iii)(C) of Executive Order 14024 of April 15, 2021, "Blocking Property With Respect To Specified Harmful Foreign Activities of the Government of the Russian Federation," 86 FR 20249, 3 CFR, 2021 Comp., p. 542 (Apr. 15, 2021) (E.O. 14024), as amended by Executive Order 14114 of December 22, 2023, "Taking Additional Steps With Respect to the Russian Federation's Harmful Activities," 88 FR 89271 (Dec. 22, 2023) (E.O. 14114), for being or having been a leader, official, senior executive officer, or member of the board of directors of SAHARA THUNDER, a person whose property and interests in property are blocked pursuant to E.O. 14024.

7. BAKHSHAYESH, Hossein (Arabic: حسین بخشایش) (a.k.a. BAKHSHAISH, Hussein), Tehran, Iran; DOB 22 May 1964; nationality Iran; Gender Male; Secondary sanctions risk: section 1(b) of Executive Order 13224, as amended by Executive Order 13886; National ID No. 1189810190 (Iran) (individual) [SDGT] [IFSR] [RUSSIA-EO14024] (Linked To: SAHARA THUNDER).

Designated pursuant to section 1(a)(iii)(A) of E.O. 13224, as amended, for having acted or purported to act for or on behalf of, directly or indirectly, SAHARA THUNDER, a person whose property and interests in property are blocked pursuant to E.O. 13224, as amended.

Designated pursuant to section 1(a)(iii)(C) of E.O. 14024 for being or having been a leader, official, senior executive officer, or member of the board of directors of SAHARA THUNDER, a person whose property and interests in property are blocked pursuant to E.O. 14024.

8. MIRZAI KONDORI, Kazem (Arabic: كاظم ميرزايى كندرى) (a.k.a. MIRZAEI KONDORI, Kazem; a.k.a. MIRZAI KANDARI, Kazem), Tehran, Iran; DOB 11 Jul 1958; nationality Iran; Gender Male; Secondary sanctions risk: section 1(b) of Executive Order 13224, as amended by Executive Order 13886; Passport V52950311 (Iran) expires 29 Jul 2025; National ID No. 0046310622 (Iran) (individual) [SDGT] [IFSR] [RUSSIA-EO14024] (Linked To: SAHARA THUNDER).

   Designated pursuant to section 1(a)(iii)(A) of E.O. 13224, as amended, for having acted or purported to act for or on behalf of, directly or indirectly, SAHARA THUNDER, a person whose property and interests in property are blocked pursuant to E.O. 13224, as amended.

   Designated pursuant to section 1(a)(iii)(C) of E.O. 14024 for being or having been a leader, official, senior executive officer, or member of the board of directors of SAHARA THUNDER, a person whose property and interests in property are blocked pursuant to E.O. 14024.

Entities

1. POUYA AIR (Arabic: شركت هواپيمايى پويا ايز) (a.k.a. PARS AVIATION SERVICES COMPANY; a.k.a. POUYA AIRLINES; a.k.a. YAS AIR; a.k.a. YAS AIR KISH; a.k.a. YASAIR CARGO AIRLINE), Mehrabad International Airport, Next to Terminal No. 6, Tehran, Iran; Number 37, Ahour Alley, Shariati St., Tehran, Iran; Mehrabad International Airport, between Terminals No. 4 and 6, Tehran, Iran; Website www.pouyaair.com; Email Address info@pouyaair.com; Additional Sanctions Information - Subject to Secondary Sanctions; Organization Type: Passenger air transport; National ID No. 10102315647 (Iran); Registration Number 189556 (Iran) [SDGT] [NPWMD] [IRGC] [IFSR] (Linked To: ISLAMIC REVOLUTIONARY GUARD CORPS AIR FORCE).

   Designated pursuant to section 1(a)(iii) of E.O. 13382 for having provided, or attempted to provide, financial, material, technological or other support for, or goods or services in support of, ISLAMIC REVOLUTIONARY GUARD CORPS AIR FORCE, a person whose property and interests in property are blocked pursuant to E.O. 13382.

2. ETEMAD TEJARAT MISAGH (Arabic: اعتماد تجارت ميثاق) (a.k.a. MISAGH TRADE TRUST COMPANY), Iran; Additional Sanctions Information - Subject to Secondary Sanctions; National ID No. 10101409423 (Iran); Registration Number 96892 (Iran) [RUSSIA-EO14024] (Linked To: MINISTRY OF DEFENSE AND ARMED FORCES LOGISTICS).

Designated pursuant to section 1(a)(vii) of E.O. 14024 for being owned or controlled by, or having acted or purported to act for or on behalf of, directly or indirectly, MINISTRY OF DEFENSE AND ARMED FORCES LOGISTICS, a person whose property and interests in property are blocked pursuant to E.O. 14024.

3. BARAN SAZAN CASPIAN ANZALI FREE ZONE COMPANY (Arabic: □شرکت بارا □سازا کاسپین منطقه آزاد انز□ی), Kiashahr Section, Koye Shahid Rajai Neighborhood, Shahid Seyyed Isa Jalili Alley, Shahid Ahmedpour Alley, 17 Shaghayegh, No. 0, Ground Floor, Astaneh Ashrafiyeh, Kiashahr, Gilan Province 4447114702, Iran; Anzali Commercial-Industrial Free Zone, Chappard Zaman, Laleh Alley Street 2, No. 178, 4349137899, Iran; North Kargar St., Above Jalal Al-Ahmad, 11th Alley, Shahid Khojaste, No. 2, Third Floor, Tehran 1439715333, Iran; Additional Sanctions Information - Subject to Secondary Sanctions; Organization Established Date 14 Aug 2019; National ID No. 14008086051 (Iran); Registration Number 3644 (Iran) [NPWMD] [IFSR] (Linked To: ABDI ASJERD, Abbas).

   Designated pursuant to section 1(a)(iv) of E.O. 13382 for being owned or controlled by, or acting or purporting to act for or on behalf of, directly or indirectly, ABDI ASJERD, Abbas, a person whose property and interests in property are blocked pursuant to E.O. 13382.

4. BONYAN DANESH SHARGH PRIVATE COMPANY (Arabic: □شرکت بنیا دانش شرق) (a.k.a. BONYAN DANESH SHARGH COMPANY), District 15, Bagh Saba-Sohrevardi Street, Ghabousnameh, Shahid Mohammad Bakhshi Movaghar Alley, 2nd Floor, No. 27, Tehran, Tehran Province 1588856643, Iran; Additional Sanctions Information - Subject to Secondary Sanctions; Organization Established Date 16 Mar 1994; National ID No. 10101477155 (Iran); Registration Number 103805 (Iran) [NPWMD] [IRGC] [IFSR] (Linked To: ISLAMIC REVOLUTIONARY GUARD CORPS AEROSPACE FORCE SELF SUFFICIENCY JIHAD ORGANIZATION).

   Designated pursuant to section 1(a)(iii) of E.O. 13382 for having provided, or attempted to provide, financial, material, technological or other support for, or goods or services in support of, ISLAMIC REVOLUTIONARY GUARD CORPS AEROSPACE FORCE SELF SUFFICIENCY JIHAD ORGANIZATION, a person whose property and interests in property are blocked pursuant to E.O. 13382.

5. PISHRO SANAT ASEMAN SHARIF PRIVATE COMPANY (Arabic: □شرکت پیشرو صنعت آسما شریف), Central Sector, North Persian Gulf Neighborhood, Shahid Shokralah Mohseni Alley, Second Alley, No. 24, Milad Building Block A1, 1st Floor, Unit 1, Tehran, Tehran Province 1379616818, Iran; Central Sector, Shahrak Rah Ahan, Kamyab Street, Kavoosh Alley, No. 0, Pezeshkan Trita Building, Floor 4, No 59, Islamshahr, Tehran Province 1498711318, Iran; Additional Sanctions Information - Subject to Secondary Sanctions; Organization Established Date 30 Jul 2022; National ID No. 14011378933 (Iran); Registration Number 599557 (Iran) [NPWMD] [IFSR] (Linked To: ABDI ASJERD, Abbas).

   Designated pursuant to section 1(a)(iv) of E.O. 13382 for being owned or controlled by, or acting or purporting to act for or on behalf of, directly or indirectly, ABDI ASJERD, Abbas, a person whose property and interests in property are blocked pursuant to E.O. 13382.

6. SANAYE MOTORSAZI ALVAND PRIVATE COMPANY (Arabic: شركت صنايع موتورسازی الوند) (a.k.a. ALVAND MOTORBUILDING INDUSTRIES PRIVATE COMPANY), Central Sector, Bagh Saba-Sohrevardi Street, Ghabousnameh Street, Shahid Mohammad Bakhshi Movaghar Alley, No. 27, First Floor, Tehran, Tehran Province 1588856641, Iran; Additional Sanctions Information - Subject to Secondary Sanctions; Organization Established Date 01 Jan 2023; National ID No. 14011819996 (Iran); Registration Number 606989 (Iran) [NPWMD] [IFSR] (Linked To: ABDI ASJERD, Abbas).

   Designated pursuant to section 1(a)(iv) of E.O. 13382 for being owned or controlled by, or acting or purporting to act for or on behalf of, directly or indirectly, ABDI ASJERD, Abbas, a person whose property and interests in property are blocked pursuant to E.O. 13382.

7. SAHARA THUNDER (Arabic: شركت تندر صحرا) (a.k.a. DESERT THUNDER COMPANY; a.k.a. TONDAR SAHARA CO.; a.k.a. TONDAR SAHRA PRIVATE LIMITED COMPANY), No. 2, Moghadas Alley (4), Ghasir St., Beheshti St., Tehran, Iran; Fifth Floor, No 2, Shahid Hassan Moghadam Alley, Shahid Ahmad Ghasir St, Argentine, Saei St, Tehran, Iran; Website www.saharathunder.com; Secondary sanctions risk: section 1(b) of Executive Order 13224, as amended by Executive Order 13886; Organization Established Date 07 Dec 1992; National ID No. 10101382714 (Iran); Chamber of Commerce Number 131454 (Iran); Business Registration Number 94186 (Iran) [SDGT] [IFSR] [RUSSIA-EO14024] (Linked To: MINISTRY OF DEFENSE AND ARMED FORCES LOGISTICS).

   Designated pursuant to section 1(a)(iii)(C) of E.O. 13224, as amended, for having materially assisted, sponsored, or provided financial, material, or technological support for, or goods or services to or in support of, the MINISTRY OF DEFENSE AND ARMED FORCES LOGISTICS, a person whose property and interests in property are blocked pursuant to E.O. 13224.

   Designated pursuant to section 1(a)(i) of E.O. 14024 for operating or having operated in the defense and related materiel sector of the Russian Federation economy.

Aircraft

1. EP-PUS; Aircraft Manufacture Date 1992; Aircraft Mode S Transponder Code 7342B3; Aircraft Model Ilyushin IL-76TD; Aircraft Manufacturer's Serial Number (MSN) 1023409321; Additional Sanctions Information - Subject to Secondary Sanctions (aircraft) [SDGT] [NPWMD] [IRGC] [IFSR] (Linked To: POUYA AIR).

   Identified as property in which POUYA AIR, a person whose property and interests in property are blocked pursuant to E.O. 13224 and E.O. 13382, has an interest.

Dated: April 25, 2024.

Bradley T. Smith,

Director, Office of Foreign Assets Control, U.S. Department of the Treasury.

[FR Doc. 2024–09255 Filed 4–29–24; 8:45 am]

BILLING CODE 4810–AL–C

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Publication of Nonconventional Source Production Credit Reference Price for Calendar Year 2023

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice.

SUMMARY: Publication of the reference price for the nonconventional source production credit for calendar year 2023.

FOR FURTHER INFORMATION CONTACT: Alan Tilley, CC:PSI:6, Internal Revenue Service, 1111 Constitution Avenue NW, Washington, DC 20224, Telephone Number (202) 317–6853 (not a toll-free number).

SUPPLEMENTARY INFORMATION: The credit period for the nonconventional source production credit ended on December 31, 2013 for facilities producing coke or coke gas (other than from petroleum based products). However, the reference price continues to apply in determining the amount of the enhanced oil recovery credit under section 43 of title 26 of the U.S.C., the marginal well production credit under section 45I of title 26 of the U.S.C., and the applicable percentage under section 613A of title 26 of the U.S.C. to be used in determining percentage depletion in the case of oil and natural gas produced from marginal properties.

The reference price under section 45K(d)(2)(C) of title 26 of the U.S.C. for calendar year 2023 applies for purposes of sections 43, 45I, and 613A for taxable year 2024.

Reference Price: The reference price under section 45K(d)(2)(C) for calendar year 2023 is $76.10.

Christopher T. Kelley,

Special Counsel (Passthroughs and Special Industries).

[FR Doc. 2024–09224 Filed 4–29–24; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Quarterly Publication of Individuals, Who Have Chosen To Expatriate

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice.

This notice is provided in accordance with IRC section 6039G of the Health Insurance Portability and Accountability Act (HIPAA) of 1996, as amended. This listing contains the name of each individual losing United States citizenship (within the meaning of section 877(a) or 877A) with respect to whom the Secretary received information during the quarter ending March 31, 2024. For purposes of this listing, long-term residents, as defined in section 877(e)(2), are treated as if they were citizens of the United States who lost citizenship.

Last name	First name	Middle name/initials
ACKLAND	MICHAEL	JESSE DAIN
ACOSTA	ALBERTO	
ADEGBITE	AYEBAWADUATE	BAMIDELE
AL KABBANI	ZAID	KHAIRY
ALEXANDER	GEORGE	
AL-GHANNAM	MOHAMMED	
ALVAREZ	ALEJANDRO	
AMMANN-WALLACE	CHRISTINA	MARIE
ANASTAS	FIONA	CLARE
ANDERSON	KYLE	LAURENCE
AVERILL	FIONA	VICTORIA
AVERY	SIOBHAN	MAY
BABER	JANE	LYN
BAKONYI	ANDREW	ALEXANDER
BARNETT	JOANNA	JANE
BARROWS	ROSS	CHRISTOPHER
BAUER	ARIANE	CAROLE
BAYES	MARY	ANN
BAYES	MARLIN	DAYLE
BAYES	LORI	ANNE
BEGIN	DANIEL	NORMAN
BEHAR	JULIE	B
BELANGER	DANIEL	DOLLARD
BELLHOUSE	ALISON	GRACE
BENTAIEB	MALIK	RYAD
BERGER	PHILIPP	ROMAIN
BERRIDGE	COLTER	ANDERS
BERRIDGE	ANNIKKA	CORDELIA WOODWARD
BEYLEVELD	MARIAN	EDITH
BLIZZARD	ROBERT	MORGAN
BONELLI	ANN	PAULINE
BOOCHER	MICHAEL	JAME
BOOTHE	KAREN	PENELOPE
BOUCHER	HUGH	ALEXANDER COMYN
BRIEGER	JULIA	
BRUCKER	CAROLINE	
BUCKLEY	SCOTT	VERNON
BULLA	PAMELA	A
BUSCHER	AMANDA	JANE

Last name	First name	Middle name/initials
CAMP	DIANA	LAINE
CAPELLE	NICOLAS	GILLES
CAPLAN	RISA	ALISON
CAREY	ROBERTA	MARIE
CHAIKEN	AUDREY	
CHAO	SHAO-HUA	
CHEN	STEVEN	JEH-WEN
CHEN	JAMES	TZE MAY
CHOTEM	MARILYN	GAY
CHRINKO	PHILIP	JOSEPH
CHUI	RONALD	WEN-HAN
CIPES	ARI	BARUCH
CLARKE	CHARLES	LAWRENCE SOMERSET
CLINESMITH	JENNIFER	LYNN
COLE	STEPHEN	WILLIAM TYRIE
COLLINS	MATTHEW	JOHN
COLTON	JAMES	WALTER
COMPTON	CHARLES	LEONARD
CORTHOUT	JEROEN	DIRK
COTTI	SARA	ALYSSA
COWAN	LUKE	MAXWELL
CRANFIELD	EMILY	LEYA
CRIBARI	MARIO	ENRICO
CUMBERLAND	MILDRED	KATHLEEN
CUMMINS	NORA	RUTH
CUNNINGHAM	STEPHANIE	LOUISE
DAJANI-BADR	DAHLIA	
DAMBACH	HELEN	ELISABETH
DAMIS	ANDREW	WILLIAM
DANTZER	WILLIAM	RAYMOND
DAVIS	SARA	LOUISE
DAY	CHERIE	NICOLE
DE KALBERMATTEN	MAXIME	BRUNO MARIE
DELACOUR	REBECCA	ESTHER
DI PAOLA	GENEVIEVE	
DOBRENAN	DEBORAH	ANN
DOCHY	NICHOLAS	ALEXANDER
DONNELLY	PETER	JAMES
DOWLING	HEATHER	BROOKS
DOWSE	DALE	SARA
DOYLE	JOHN	ANTHONY
DRIEDGER	ROSEANNE	IRENE
DROPE	HARRIET	KAREN
DUGGAN	CLEONA	MARY
ECKFELDT	CHARLES	TAYLOR
ECSY	CAROLIN	
EICHHORN	ROBERT	
EL TORGOMAN	TAREK	AMR
ELDERENBOSCH	ROBBERT	LEROY
ELSWORTH	FRANK	DURRELL
ENGH	CARL	MARTIN
ERSKINE	DOUGLAS	GRAHAM
ERVIN	LIAM	JOSEPH ALEXANDER
FACON	ERIC	RENE
FAGERER	STEPHAN	RUPERT
FARES	ZIAD	FARES
FARMER	LAURA	ELLEN
FIGUEROA	PHILLIPE	IGNACIO
FINGERHUTH	ALLISON	
FISSER	GUIDO	MICHAEL
FITZPATRICK	EILIS	MAIRE
FOLEY	AARON	STEPHEN
FONG	ERIN	WHITNEY
FRANKLIN	HENRY	RUPERT
FROEMMEL	ALETA	MARIA
GAINES	THOMAS	JOHN
GAISANO JR	JOSEPH	DAVIDSON CHAN
GARDNER	STEPHANIE	CLARA EDITHA
GARRETT	WILLIAM	TOBIAS
GAUTHIER	DOMINIQUE	MARIE
GIAVI	RAIMONDO	
GIDDINGS	THOMAS	BERGER
GILLAM-O'CONNOR	KERRY	VICTORIA
GIRGIS	JOHN	MAGDY

Last name	First name	Middle name/initials
GLYNN	MICHAEL	BAKER
GORAIEB	DELOIS	JANE
GORBITZ	CARLOS	
GORMAN	JAMES	DANIEL
GRANATA	GIORGIA	MARIA
GRUNER	GREGORY	EDWARD
GRYGIEL	CHRISTINA	JOANNE
GUILLERMO	BERNARDO	FEDERICO TOMAS
HAEFELE	MARC	PHILIPP
HAEFELE	LAURA	STEPHANIE
HAFIZOVIC	VELIDA	
HAND	VICTORIA	ANN
HANNER	ROBERT	HARLAND
HARDISTY	PAUL	RUSSELL
HARRISON	CASSEY	LEE
HAY	STUART	DOUGLAS SCOTT
HAYNES	THOMAS	SCOTT
HAYWARD	MARCUS	DANIEL
HAYWARD	CHRISTOPHER	SCOTT
HELMICK	CARL	ALBERT
HENSON	MARTHA	SADIE
HERBERT	HARRY	MALCOLM
HERMON-TAYLOR	AMY	CAROLINE
HILTON	MICHAEL	JAMES
HINDRICHS	STEFAN	CHRISTOPHER
HOLCOMB	CHADWICK	WARD
HOLMAN	AMBER	LAURIE
HOLTMAN	TIFFANY	DIONE
HOPKINSON	NICHOLAS	JAMES
HOWAT	DAPHNE	CLOTILDE
HURST	CLARISSA	HELEN
HWARNG	GWEN	YUNG-HSIN
IRANI	MANIZEH	
JAIN	ANITA	PRERNA
JENNINGS	DONNA	MARIE
JOHN	JOANNA	SYLVINA
JONES	NATHALIE	ANNE
KADISH	LEE	MICHAEL
KARLESKIND	DANIELE	MARIE ANTOINETTE
KATES	DAVID	MARTIN
KENT	REBECCA	JEAN
KENT	ELISA	ANN
KENYON	STEPHANIE	ROSE
KISSMANN	MICHAEL	PELLE
KNUTSSON	HANNES	ROBERT
KOHLER	ANDREAS	BRYAN
KRAPF	SARAH	JEANNE
KRAPF	JOAN	ELLEN
KRIGSTIN	DAVID	JONATHAN
KUO	SHAINA	LI
KYSHAKEVYCH-KATCHALUBA	CRISTINA	IRENE
LACROIX	ALESSANDRA	RENEE
LACROIX	SARAH	TEAGAN
LAKIN-THOMAS	PATRICIA	LOUISE
LAKIN-THOMAS	DUANE	SCOTT
LAMBDEN	ANDREW	DAVID
LANDERER	LESLIE	WILLIAM
LAPAGE	TANA	RAIN
LASS	JOSEPH	HANSEN
LAURIE	AVRUM	
LEACH	JOHN	STUART LLEWELYN
LEE	BRIAN	SUN
LEGENNE	SYLVIE	
LEIBINGER	PHOEBE	HANNAH DOROTHEE
LENDERS	NICOLAS	KIM
LEVITT	LYNDELL	
LIGHTOLLER	THOMAS	CHARLES
LINLEY	THOMAS	ARTHUR
LOISELLE	HELEN	MARIE
LONGLEY	CLARE	HANNAH
LOVRIC	NEDA	
LOWEN	DANIEL	GARETH
LOWEN	JEREMY	DAVID
LOWES	STEPHANIE	ANNE

Last name	First name	Middle name/initials
LU	FIONA	
LUI	NATHAN	COLLIN
MACDONALD	EMMA	IONA CLAIRE
MACKENZIE	CALUM	KENNETH
MACOR	JUDSON	TRIMBLE
MAHAUD	JEAN GUY	ANDRE
MAHOOD	ANNA	ELISABETH
MAILATH-NURMELA	JULIA	KOKORO
MALTZOFF	MICHAEL	
MANDICH	MARIE-ALICE	SOPHIE
MARCUS	JONATHAN	MAYER
MARTEL-CANTELON	MARY	ELEANOR
MARZELLA	MARY	ELLEN
MCKAIGE	DAVID	ALEXANDER
MCMASTER	CAMERON	DONALD MARK
MCMULLEN	DEBORAH	CRISTMAN
MEALINGS TARR	VERONIKA	
MEHAFFEY	MICHAEL	RICHARD
MEI	MING	ZHI
MERKEL	THOMAS	KURT
MESCHKO	TANYA	MIN
MICHALSKI	JAN	ANDREW
MOGENSEN	BARBARA	BURKARD
MOHAMEDALLY	ADAM	HAMEED
MONSON	SARAH	CAROLINE
MORACE	MICHAEL	ANTHONY
MORRIS	DANIEL	ALEXANDER
MORRIS	JACQUELINE	C
MORRISON	MICHAEL	PATRICK
MUELLER	ASHLEY	JENNIFER
MULHOLLAND	STEPHEN	EDWARD
MUMME	BEN	WILLIAM
MURRAY	ANA	MARIA
MUSIOL	LARS	JENS BRIAN
NELSON	JULIE	SUZANNE
NETZBAND	PAUL	EDWARD
NEWBANKS	MARK	ASHLEY
NEWCOMER	CANDICE	EVANGELINE
NICKERSON	DAWN	ANNE
NIEBUHR	PHILIPPE	HEINER
NORMAN	ALIA	WETHEROW
NORTON	OLIVIA	SARAH
OATES	RUTH	
O'DWYER	DANIEL	FRANCIS
OLIVERA	SOLEDAD	
PALMER	ROBERT	ANDREW
PANGBORN	ANTHONY	
PARK	PAUL	JUNHYUK
PATEL	MINESH	DINESHDHAI
PATEL	PRIYESH	DINESH
PAVLOV	SAVVA	OLEGOVICH
PAYNE	CATHARINE	ANNE
PEACOCK	PATRICIA	LURMANN
PEARCE	HANNAH	MARGARET
PENNER	RITA	LARAE
PFIFFNER	JEAN-MICHEL	
PHILLIPS	JAMES	MATTHEW MCDONALD
PHILLIPS	ALEXANDER	ROBERT
PHILLIPS	MICHELLE	ANNA
PLAYER	ZEN	
POND	ELLEN	KATHERINE
PONTUSSON	JONAS	GUNNAR
PRIETO	BECKY	MONSON
PRINGLE	MARY	MARGARET
RANDISI	JOSEPH	MICHAEL
RATHBUN	COLIN	RENE WALTER
RAY	PEGGY	RUTH
REDSTONE	BETH	ANN
REECE (SHEPHERD)	PAGE	ROYALL
REED	TEDDY	HANS
REGAN JR	RICHARD	CHARLES
REID	ALLAN	MCLEAN
REIMER	ADRIAN	NICHOLAS FRIESEN
RIEGEL	DORIS	ANN

Last name	First name	Middle name/initials
RIEGEL	MARTIN	ANDREW
RIETSCHLIN	JOHN	CHARLES
RIFFERT	PIA-ANNA	ELISABETH
RIVERA	GISELA	
ROBBINS	MAX	DAVID
ROBINDORE	BRIGITTE	LUCIENNE
ROBINDORE	ANNABELLE	PROMIS
ROBINSON	DIANA	MAUD
ROBINSON	LAURA	MARIE
ROMASCHIN	VERONICA	ALEXANDRA
ROTH	PAUL	CURTIS
RUEBELMANN	MATTHEW	ERICH
RUNYON DUERRENBERGER	LISA	ANNE
RUTHERFORD	BRENT	MCLEAN
SABO	JORDAN	JOHN
SAUNDERS	MARGO	HILARY
SCHILDHAUER	VIRGINIA	ANN
SCHUETT	TOBIAS	DAE-WOO
SCHUHFRIED	ERNA	
SCHWERDTFEGER	ULRIKE	AMY
SEEGER	PEGGY	
SHANG	PEI	CHUN
SHAPIRO	SHARON	LYNN
SHIRLEY	MARGARET	ANNE
SHOEMAKER	EMMA	PATRICIA
SHOEMARK	SUSAN	
SHORTO	JENNIFER	OLIVE
SIMONS	JONATHAN	ROBERT
SINGHANIA	RASAALLKA	MADHUPATI
SKERKER	RACHEL	SIIRI
SLABODKIN	DAVID	BARRY
SMITH	SALLY	LOIS
SPEAS	BENJAMIN	ROBERT
STACK	MARC	MICHEL
STANNERS	JAMES	PETER
STAPLES	IAN	ANTHONY
STARKEBAUM	MARK	ALAN
STAUDTE	DONALD	STEPHEN
STEFANI	KRISTIAN	ANDREAS MARTIN
STEG	DIANE	ANTOINETTE
STEPHENSON	BRITT	NICOLE
STILL	RHIANNA	CLARE
STOHN	JOHN	STEPHEN
STRAND	KIRSTEN	BJERKREIM
STRAUSS	LORALEE	MARIE
SUTCH	BENJAMIN	MARCUS
SUTTON	CLIFFORD	GREGORY
SWANSON	DAVID	ARNOLD
SYTSMA	MICHAEL	JON
TANZER	JANET	
TAYLOR	DANIELLE	ALEXA HORTON
TAYLOR	DWAYNE	MCCAUGHEY
TAYLOR	JULIA	CAREN
TE VELDE	KAREN	HELEEN
TEO	TESS	LIN
TOMFORDE	BETTINA	
TREADWELL	ANDREW	WILLIAM
TULIP	ARDEN	ANDREWS
VACHICOURAS	KATERINA	
VIGARIO	BELMIRO	
VIRGIN	GARTH	LARRY
VIROS	DAVID	JEAN-MICHAEL HAROLD
VOGEL	STEPHANIE	MICHELLE
VON KLENCKE	HENRY	JUSCAR ECKHART
VYAS	SATYEN	ARVINDKUMAR
WADDINGTON	SAMUEL	JOSH
WAHL	JEFFREY	THOMAS
WALLRAF	FREDERICA	RUTH MARIA
WARBRICK	JENNIFER	ALISON
WARREN	JEFFERY	THOMAS
WATKINS	RICHARD	ROBERT
WELL	PRISCILA	HAYDON
WILLIAMS	KEITH	SMITH
WINKER	FREDERICK	MICHAEL

Last name	First name	Middle name/initials
WOLFE	ANTHONY	ERIC
WOODROW	CHRISTOPHER	DALE
WRIGHT	CLAUDIA	SOPHIE
WU	KATHARINE	HSING-I
YIN	LI	WEI
YU	BORIS	KENNETH
YU	JIM	
ZETLIN	ELIZABETH	LOUISE
ZOBAC	MICHAEL	ANGELO

Dated: April 24, 2024.

Steven B. Levine,

Manager Team 1940, CSDC—Compliance Support, Development & Communications, LB&I:WEIIC:IIC:T4.

[FR Doc. 2024–09243 Filed 4–29–24; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF VETERANS AFFAIRS

Department of Veterans Affairs Voluntary Service National Advisory Committee, Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under the Federal Advisory Committee Act, 5 U.S.C. ch. 10, that the VA Voluntary Service National Advisory Committee (Committee) will meet May 14–16, 2024 at the Hyatt Regency St. Louis At The Arch located at 315 Chestnut Street, St. Louis, Missouri 63102. The meeting sessions will begin and end as follows:

Meeting date(s)	Meeting time(s)
Tuesday, May 14, 2024 ..	8:30 a.m. to 7:30 p.m. Central Time (CT).
Wednesday, May 15, 2024.	8:30 a.m. to 5:00 p.m. CT.
Thursday, May 16, 2024	8:30 a.m. to 5:00 p.m. CT.

The meeting sessions are open to the public.

The Committee, comprised of 56 major Veteran, civic, and service organizations, advises the Secretary, through the Under Secretary for Health, on the coordination and promotion of volunteer activities and strategic partnerships within VA health care facilities, in the community, and on matters related to volunteerism and charitable giving.

Agenda topics will include the Committee goals and objectives; review of minutes from the April 26–28, 2023 meeting; an update on VA Center for Development and Civic Engagement (CDCE) activities; Veterans Health Administration (VHA) update; Federal Advisory Committee Act training provided by the VA Advisory Committee Management Office; subcommittee reports; review of standard operating procedures; assessment of member organization data; embracing whole health; patient advocacy; innovation for optimal patient outcomes; partnering with Veterans Canteen Service; cross committee collaboration among Federal advisory committees; extending programming into communities; equity focused implementation mapping; VHA's journey to high reliability; recognition of outstanding programs and individuals; and any new business.

The public may engage the Committee in writing or through oral presentation. To participate orally, please contact Sabrina C. Clark, Ph.D., Designated Federal Officer, VA Center for Development and Civic Engagement (15CDCE), Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420, or email at *Sabrina.Clark@va.gov.* Any member of the public wishing to attend the meeting or seeking additional information should contact Dr. Clark at 202–536–8603.

Dated: April 25, 2024.

Jelessa M. Burney,

Federal Advisory Committee Management Officer.

[FR Doc. 2024–09310 Filed 4–29–24; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

Advisory Committee on Structural Safety of Department of Veterans Affairs Facilities, Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under Federal Advisory Committee Act, 5 U.S.C. Ch. 10, that a meeting of the Advisory Committee on Structural Safety of Department of Veterans Affairs Facilities will be held on May 21–22, 2024. The meeting sessions will take place at Room 4E.400, 425 I Street NW, Washington, DC 20001. The meeting sessions will begin and end as follows:

Dates	Times	Open session
May 21, 2024	9:00 a.m. to 5:00 p.m. EST	Yes.
May 22, 2024	9:00 a.m. to 12:00 p.m. EST	Yes.

The meeting sessions are open to the public.

The purpose of the Committee is to advise the Secretary of Veterans Affairs on matters of structural safety in the construction and remodeling of VA facilities and to recommend standards for use by VA in the construction and alteration of its facilities.

The meeting will be hybrid, held in-person and virtual, and the Committee will receive appropriate briefings and presentations on current seismic, natural hazards, and fire safety issues that are particularly relevant to facilities owned and leased by the Department. The Committee will also discuss appropriate structural and fire safety recommendations for inclusion in VA's construction standards.

The public may engage the Committee in writing or through oral presentation. To participate orally, please contact Donald Myers, Director, Facilities Standards Service, Office of Construction & Facilities Management (003C2B), Department of Veterans Affairs, at *donald.myers@va.gov* or at 202–632–5388. In the communication, writers must identify themselves and state the organization, association, or person(s) they represent. For any members of the public that wish to attend virtually, they may use the Webex link or call in with the phone number and access code below:

May 21: https://veteransaffairs.webex.com/veteransaffairs/j.php?MTID=mf0ecb43ce5beda7d12db46f564cf9e88, Meeting number (access code): 2820 061 6231, Meeting password: cM2iGiec@43, or to join by phone (audio only): +14043971596,,28200616231## or +12122313802,,28200616231##.

May 22: https://veteransaffairs.webex.com/veteransaffairs/j.php?MTID=m1e8ddc6e6119fbaed6ce9fc75ac2d934, Meeting number (access code): 2824 298 3443, Meeting password: MNg5A8EEZ$2, or to join by phone (audio only): +14043971596,,28242983443## or +12122313802,,28242983443##.

Because the meeting is being held in a government building, a photo I.D. must be presented at the Guard's Desk as a part of the screening process. Due to an increase in security protocols, you should allow an additional 30 minutes before the meeting begins. Those seeking additional information or wishing to attend should contact Mr. Myers at the email address noted above or via phone at 202–632–5388.

Dated: April 25, 2024.

Jelessa M. Burney,

Federal Advisory Committee Management Officer.

[FR Doc. 2024–09311 Filed 4–29–24; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0079]

Agency Information Collection Activity: Employment Questionnaire

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: Veterans Benefits Administration, Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed revision of a currently approved collection, and allow 60 days for public comment in response to the notice.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before July 1, 2024.

ADDRESSES: Submit written comments on the collection of information through Federal Docket Management System (FDMS) at *www.Regulations.gov* or to Nancy J. Kessinger, Veterans Benefits Administration (20M33), Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420 or email to *nancy.kessinger@va.gov.* Please refer to ''OMB Control No. 2900–0079'' in any correspondence. During the comment period, comments may be viewed online through FDMS.

FOR FURTHER INFORMATION CONTACT: Maribel Aponte, Office of Enterprise and Integration, Data Governance Analytics (008), 810 Vermont Ave. NW, Washington, DC 20006, (202) 266–4688 or email *maribel.aponte@va.gov.* Please refer to ''OMB Control No. 2900–0079'' in any correspondence.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995, Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Authority: 38 U.S.C. 501, 38 U.S.C. 5317, 38 CFR 3.362 and 3.343, 38 CFR 4.16.

Title: Employment Questionnaire (VA Form 21–4140).

OMB Control Number: 2900–0079.

Type of Review: Revision of a currently approved collection.

Abstract: VA Forms 21–4140 is used to gather the necessary information to determine continued entitlement to individual unemployability. 38 CFR 3.652 provides that recipients are required to certify, when requested, that the eligibility factors which established entitlement to the benefit being paid continue to exist. Individual unemployability is awarded based on a veteran's inability to be gainfully employed due to service-connected disabilities, and entitlement may be terminated if a veteran begins working. Without information about recipients' employment, VA would not be able to determine continued entitlement to individual unemployability, and overpayments would result. No changes have been made to this form. The respondent burden has increased due to the estimated number of receivables averaged over the past year.

Affected Public: Individual or households.

Estimated Annual Burden: 285 hours.

Estimated Average Burden per Respondent: 5 minutes.

Frequency of Response: One time.

Estimated Number of Respondents: 3,422 per year.

By direction of the Secretary.

Maribel Aponte,

VA PRA Clearance Officer, Office of Enterprise and Integration/Data Governance Analytics, Department of Veterans Affairs.

[FR Doc. 2024–09305 Filed 4–29–24; 8:45 am]

BILLING CODE 8320–01–P

FEDERAL REGISTER

Vol. 89 Tuesday,

No. 84 April 30, 2024

Part II

Department of Agriculture

Food and Nutrition Service

7 CFR Part 271 and 273

Supplemental Nutrition Assistance Program: Program Purpose and Work Requirement Provisions of the Fiscal Responsibility Act of 2023; Proposed Rule

DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

7 CFR Part 271 and 273

[FNS 2023–0058]

RIN 0584–AF01

Supplemental Nutrition Assistance Program: Program Purpose and Work Requirement Provisions of the Fiscal Responsibility Act of 2023

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

ACTION: Proposed rule.

SUMMARY: This proposed rule would amend the Supplemental Nutrition Assistance Program (SNAP) regulations to incorporate three provisions of the Fiscal Responsibility Act of 2023 by adding to the program purpose language assisting low-income adults in obtaining employment and increasing their earnings; updating and defining the exceptions from the able-bodied adults without dependents (ABAWD) time limit; and adjusting the number of discretionary exemptions available to State agencies each year. This proposed rule would also amend the regulations to clarify procedures for how and when State agencies must screen for exceptions to the time limit and clarify the verification requirements.

DATES: Written comments must be received on or before May 30, 2024 to be assured of consideration.

Docket: Go to the Federal eRulemaking Portal at *https://www.regulations.gov* for access to the rulemaking docket, including any background documents and the plain-language summary of the proposed rule of not more than 100 words in length required by the Providing Accountability Through Transparency Act of 2023.

ADDRESSES: The Food and Nutrition Service, USDA, invites interested persons to submit written comments on this proposed rule. Comments may be submitted in writing by one of the following methods:

- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *Mail:* Send comments to Food and Nutrition Service, P.O. Box 9233, Reston, Virginia 20195. Email: *SNAPCPBRules@usda.gov.* Phone: (703) 305–2022.
- *Website:* Go to *http://www.regulations.gov.* Follow the online instructions for submitting comments.
- *E-Mail:* Send comments to *SNAPCPBRules@usda.gov.* Include Docket ID Number [FNS–2023–0058], ''Supplemental Nutrition Assistance Program: Program Purpose and Work Requirement Provisions of the Fiscal Responsibility Act of 2023'' in the subject line of the message.
- All written comments submitted in response to this proposed rule and regulatory impact analysis will be included in the record and will be made available to the public. Please be advised that the substance of the comments and the identity of the individuals or entities submitting the comments will be subject to public disclosure. FNS will make the written comments publicly available on the internet via *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Catrina Kamau, Chief, Certification Policy Branch, Program Development Division, Food and Nutrition Service, 1320 Braddock Place, Alexandria, Virginia 22314. Email: *SNAPCPBRules@usda.gov.* Phone: (703) 305–2022.

SUPPLEMENTARY INFORMATION:

Acronyms or Abbreviations

Able-bodied adults without dependents, ABAWDs or time-limited participants
Code of Federal Regulations, CFR
Fiscal Responsibility Act of 2023, FRA
Fiscal Year, FY
Food and Nutrition Act of 2008, the Act
Food and Nutrition Service, FNS
State SNAP Agencies, State agencies or States
Supplemental Nutrition Assistance Program, SNAP
U.S. Department of Agriculture, the Department or USDA

I. Background

The Food and Nutrition Act of 2008 (the Act), as amended, establishes national eligibility standards for the Supplemental Nutrition Assistance Program (SNAP), including work requirements for certain individuals. The first of these requirements, referred to as the general work requirements, requires individuals to register for work; accept an offer of suitable employment; not voluntarily quit or reduce hours of employment below 30 hours per week, without good cause; and participate in workfare or SNAP Employment and Training (SNAP E&T) if required by the State agency. Most SNAP participants are exempt from the general work requirements because they are older adults, have disabilities, or are children, or meet another exemption from the general work requirements listed in the Act.

Individuals who are not exempt from the general work requirements may also be subject to an additional time-limit work requirement. The Act limits these individuals, referred to as able-bodied adults without dependents (ABAWDs) or time-limited participants, to receiving SNAP benefits for three months in a 36-month period unless they are meeting the work requirement, live in an area where the time limit is waived due to a lack of sufficient jobs or a high rate of unemployment, or are otherwise exempt. This is sometimes referred to as the ABAWD time limit. Individuals can continue receiving SNAP beyond the three-month time limit by working, participating in a qualifying work program, or any combination of the two, for at least 20 hours a week (averaged monthly to 80 hours a month). Individuals can also meet the time limit by participating in and complying with workfare for the number of hours assigned (equal to the result obtained by dividing a household's SNAP allotment by the higher of the applicable Federal or State minimum wage). For the purposes of the time limit, working includes unpaid or volunteer work that is verified by the State agency. These requirements are sometimes referred to as the ABAWD work requirement. For the purposes of the proposed rule, the Department will use the term ''time limit'' to refer to both the ABAWD work requirement and time limit, as this phrasing more accurately describes the requirements applied to time-limited participants.

The Act provides exceptions from the time limit based on certain individual circumstances, such as age, pregnancy, or meeting an exemption from the general work requirements. Individuals who meet an exception are not subject to the time limit. The Act also allows for waivers of the time limit in areas with an unemployment rate over 10 percent or an insufficient number of jobs to provide employment for individuals. Individuals residing in waived areas are not required to meet the time limit. Lastly, the Act also establishes an annual allotment of discretionary exemptions that State agencies may use to extend eligibility for a time-limited participant who is not meeting the requirement. Each discretionary exemption can extend eligibility for one participant for one month and there is no limit on the number of discretionary exemptions a single participant can receive.

Sec. 311 through 313 of the Fiscal Responsibility Act (FRA) of 2023 (Pub. L. 118–5) amended the Act, revising exceptions from the time limit and the allotment of discretionary exemptions, as well as the program purpose. Based on these changes, the Department is proposing to amend the regulations to reflect the requirements of the FRA.

Sec. 314 of the FRA also required the Department to publicize all available

State requests for waivers authorized by Sec. 6(o)(4)(A) of the Act, including supporting data, and all Department approvals of waivers within 30 days of enactment. The Department complied with this requirement by the statutory deadline and is not proposing rulemaking relating to this provision.[1]

The Department issued multiple memoranda for implementing the FRA changes. On June 30, 2023, the Department issued the initial implementation memorandum, ''Implementing SNAP Provisions in the Fiscal Responsibility Act of 2023'' which provided definitions for the new exceptions, detailed when and how State agencies must apply the changes to the exception criteria, and clarified the changes to discretionary exemptions. On July 27, 2023, the Department issued a Question-and-Answer memorandum, ''SNAP Provisions of the Fiscal Responsibility Act of 2023—Questions & Answers #1,'' which answered questions from State agencies and advocates to further clarify how State agencies should implement the FRA provisions. On August 25, 2023, the Department issued a second Question-and-Answer memorandum, ''SNAP Provisions of the Fiscal Responsibility Act of 2023—Questions & Answers #2,'' which further answered questions from State agencies and advocates on how to implement the FRA provisions.

II. Discussion of Rule's Provisions

7 CFR 271.1: Program Purpose

The Act provides that the purpose of SNAP is to safeguard the health and well-being of the Nation's population by raising levels of nutrition among low-income households to promote the general welfare. Sec. 313 of the FRA amends Sec. 2 of the Act and adds language to the purpose stating the program also assists low-income adults in obtaining employment and increasing their earnings. Specifically, the new language is: ''That program includes as a purpose to assist low-income adults in obtaining employment and increasing their earnings. Such employment and earnings, along with program benefits, will permit low-income households to obtain a more nutritious diet through normal channels of trade by increasing food purchasing power for all eligible households who apply for participation.'' This language recognizes that the program has long had an employment and training program component and reflects the work by the Department spanning the last few decades to invest in effective and evidence-based job training aligned with State workforce programs designed to increase opportunity and earnings through skills-based training. Program rules at 7 CFR 271.1(a) incorporate this purpose statement, excerpting the language included at Sec. 2 of the Act. The Department proposes to revise 7 CFR 271.1(a) to reflect the purpose language added by the FRA.

7 CFR 273.24(c): Exceptions From the Time Limit

Sec. 6(o)(3) of the Act provides exceptions from the time limit for certain individuals, including, but not limited to, individuals under 18 years of age, individuals who are pregnant, or individuals who are exempt from the general work requirements. If an individual meets one of the exceptions, they are not subject to the time limit and are eligible to receive SNAP benefits for more than three months subject to other program rules. Throughout this proposed rule, ''exceptions from the time limit'' refers to the list of exception criteria listed in Sec. 6(o)(3) of the Act and program rules at 7 CFR 273.24(c) that determine which individuals are not subject to the time limit, whereas ''exemptions from the general work requirements'' refers to the list of criteria in Sec. 6(d)(2) of the Act and 7 CFR 273.7(b) that exempts individuals from needing to fulfil the general work requirements.

Age-Based Exceptions

Sec. 311 of the FRA amends Sec. 6(o)(3)(A) of the Act to adjust the age-based exception from the time limit. This change gradually increases the upper age limit of this exception as follows: by September 1, 2023, increases from 50 to 51 years of age or older; starting October 1, 2023, increases from 51 to 53 years of age or older; and starting October 1, 2024, increases from 53 to 55 years of age or older. The FRA also prescribed that these changes to the age-based exception sunset on October 1, 2030, when the upper age limit will return to 50 years of age or older. The Department proposes to capture this sunset at 7 CFR 273.24(c)(10).

Prior to the FRA, the Act excepted individuals from the time limit if they are under 18 years of age or 50 years of age or older. This exception is captured at 7 CFR 273.24(c)(1). The Department proposes to amend this paragraph to increase the upper age limit to 55 years of age or older. Since State agencies will have implemented the last age increase by the anticipated publication of the final rule, the Department proposes to only amend the regulations to reflect the final age increase to 55 or older in this rulemaking.

New Exceptions

Sec. 311 of the FRA amends Sec. 6(o)(3) of the Act to add three new exceptions from the time limit. This change excepts individuals experiencing homelessness, veterans, and individuals who are 24 years of age or younger and in foster care on their 18th birthday (or higher age if the State offers extended foster care to a higher age). The FRA required State agencies to implement and apply these new exceptions by September 1, 2023. As with the changes to age-based exceptions, these new exceptions cease to have effect on October 1, 2030. The Department proposes to capture this sunset at 7 CFR 273.24(c)(10).

Prior to the FRA, the Act included existing exceptions from the time limit for individuals who are unable to work due a physical or mental limitation, are pregnant, are responsible for a dependent child, or are not subject to the general work requirements. These existing exceptions are unchanged by the FRA and captured at 7 CFR 273.24(c)(1) through (6). The Department proposes to add to the existing list the new exceptions created by the FRA for individuals experiencing homelessness, veterans, and individuals who are 24 years of age or younger and in foster care on their 18th birthday (or higher age if the State offers extended foster care to a higher age). These new exceptions are further defined in the following sections.

Individuals Experiencing Homelessness

Sec. 311 of the FRA creates an exception for a ''homeless individual''—individuals experiencing homelessness—from the time limit. To aid in implementation, the Department provided guidance to State agencies which referred State agencies to the program's longstanding definition of ''homeless individual'' at Sec. 3(l) of the Act: an individual who lacks a fixed and regular nighttime residence; or who has a primary nighttime residence that is a supervised publicly or privately operated shelter designed to provide temporary living accommodations (including a welfare hotel or congregate shelter), an institution that provides a temporary residence for individuals intended to be institutionalized, a temporary accommodation for not more than 90 days in the residence of another individual, or a public or private place not designed for, or ordinarily used as, a regular sleeping accommodation for human beings.

[1] These waiver requests and responses are available at: *https://www.fns.usda.gov/snap/ABAWD/waivers.*

The Department proposes to include a reference to the definition for homeless individual at 7 CFR 271.2 at new paragraph 7 CFR 273.24(c)(7) for the purpose of this new exception.

The Department also proposes to update the definition of ''homeless individual'' provided at 7 CFR 271.2 to include individuals who will imminently lose their nighttime residence and will issue further sub-regulatory guidance on circumstances that may render an individual ''imminently homeless.'' This update reflects the Department's consideration that those who will imminently lose their primary nighttime residence are included in the Act's definition of a homeless individual, as a nighttime residence that will be imminently lost cannot reasonably be described as ''fixed and regular.'' It also presents an undue hardship on an individual to be subject to the time limit if that individual knows they will lose a fixed and regular nighttime residence in the near future. Individuals experiencing homelessness face greater difficulties in obtaining work due to unstable housing, transportation barriers, inconsistent access to hygiene materials or professional clothing, and other hardships related to homelessness.[2] [3] [4] Given these challenges, this proposed change is meant to encompass the diverse set of circumstances that can constitute homelessness.

Individuals do not need to meet the criteria in both paragraph (1) and (2) of 7 CFR 271.2 ''Homeless individual'' to be considered as experiencing homelessness for SNAP purposes. An individual may lack a fixed or regular nighttime residence and be considered homeless under paragraph (1), or the individual may have a nighttime residence that meets the criteria in paragraph (2), such as a supervised shelter, and be considered homeless under paragraph (2). Therefore, an individual who is considered homeless under paragraph (1) is not subject to the criteria in paragraph (2), including the time limitation for temporary housing. The Department believes these changes reflect the understanding of subject matter experts and housing and homeless organizations that work on homelessness issues and ensure that State agencies can recognize a wide range of unstably housed individuals as homeless.[5]

This proposal will amend the definition for all of SNAP, not only for purposes of the time limit. This will provide consistency throughout SNAP of the Department's updated understanding of ''homeless individual.'' The Department proposes clarifying this matter by amending the definition of ''homeless individual'' at 7 CFR 271.2.

Veterans

The FRA also updates the list of exceptions from the time limit to include veterans but does not provide a definition for or specify limits on who is considered a veteran. In FRA guidance, the Department used a definition of ''veteran'' established by Congress in Sec. 5126(f)(13)(F) of the James M. Inhofe National Defense Authorization Act for Fiscal Year 2023 (Public Law 117–263) for the purposes of a pilot program to combat food insecurity among veterans and their families. Under this statutory provision, a veteran is an individual who served in the United States Armed Forces (such as the Army, Marine Corps, Navy, Air Force, Space Force, Coast Guard, and National Guard), including an individual who served in a reserve component of the Armed Forces, and who was discharged or released therefrom, regardless of the conditions of such discharge or release.

Since the issuance of the guidance, the Department has determined that it is appropriate to include another group of individuals, defined under 38 CFR 3.7, who are considered veterans for purposes of receiving veterans' benefits: individuals who were commissioned officers of the Public Health Service, Environmental Scientific Services Administration, or the National Oceanic and Atmospheric Administration. These individuals are eligible for veterans' benefits, such as disability compensation, veterans' pensions, and educational benefits, because they are considered to have served in ''active military service'' under 38 CFR 3.7. However, this group of veterans was not included in the definition used in the implementation guidance. Including such commissioned officers in SNAP's definition ensures individuals who the VA considers veterans for VA benefits programs are eligible for the exception from the time limit.

Research shows that veterans, particularly older veterans who served between 1975 and 2001, have a 7.4 percent greater risk for food insecurity than non-veterans, adjusted for observable differences, and veterans were consistently less likely to be enrolled in SNAP.[6] [7] Food insecurity prevalence rates were also higher among disabled, unemployed, and women working-age veterans when compared to the national average for all working-age veterans.[8] Given the persistent and rising concern over food insecurity for veterans, it is critical to ensure the exception covers a broad range of veterans, including individuals with former military service who may not identify with the term ''veteran.'' The Department believes using this definition informed by the NDAA pilot and other veterans' benefits programs achieves that goal.

Therefore, the Department proposes to define veteran at 7 CFR 273.34(c)(8) as an individual who, regardless of the conditions of their discharge or release from, served in the United States Armed Forces (such as the Army, Marine Corps, Navy, Air Force, Space Force, Coast Guard, and National Guard), including an individual who served in a reserve component of the Armed Forces, or served as a commissioned officer of the Public Health Service, Environmental Scientific Services Administration, or the National Oceanic and Atmospheric Administration.

Individuals Who Were in Foster Care

Sec. 311 of the FRA also created an exception from the time limit for certain individuals previously in foster care, recognizing the particular challenges that individuals aging out of foster care face in obtaining stable employment. This exception applies to an individual

[2] Sarver, Maureen. ''Why Is It So Hard for People Experiencing Homelessness to 'Just Go Get a Job?' '' Urban Institute. Last modified November 3, 2023. *https://www.urban.org/urban-wire/why-it-so-hard-people-experiencing-homelessness-just-go-get-job.*

[3] National Alliance to End Homelessness. ''Overcoming Employment Barriers.'' Last modified August 13, 2023. *https://endhomelessness.org/resource/overcoming-employment-barriers/.*

[4] Bharat, Nisha, Jenna Cicatello, Emily Guo, and Vennela Vallabhaneniand. ''Homelessness and Job Security: Challenges and Interventions.'' University of Michigan School of Public Health. Last modified May 11, 2020. *https://sph.umich.edu/pursuit/2020posts/homelessness-and-job-security-challenges-and-interventions.html.*

[5] National Alliance to End Homelessness. ''State of Homelessness: 2023 Edition.'' Accessed December 4, 2023. *https://endhomelessness.org/homelessness-in-america/homelessness-statistics/state-of-homelessness/.*

[6] U.S. Department of Agriculture. Economic Research Service. *Food Insecurity Among Working-Age Veterans* by Matthew P. Rabbitt and Michael D. Smith. ERR–829. Washington, DC, 2021. *https://www.ers.usda.gov/publications/pub-details/?pubid=101268.*

[7] Dubowitz, Tamara, Andrea Richardson, Teague Ruder, and Catria Gadwah-Meaden. *Food Insecurity Among Veterans: Examining the Discrepancy Between Veteran Food Insecurity and Use of the Supplemental Nutrition Assistance Program (SNAP).* Santa Monica, CA: RAND Corporation, 2023. *https://www.rand.org/pubs/research_reports/RRA1363-2.html.*

[8] U.S. Government Accountability Office. *Nutrition Assistance Programs: Federal Agencies Should Improve Oversight and Better Collaborate on Efforts to Support Veterans with Food Insecurity.* GAO–22–104740. Washington, DC, 2022. Accessed December 4, 2023. *https://www.gao.gov/assets/gao-22-104740.pdf.*

who is 24 years of age or younger and who was in foster care under the responsibility of a State on their 18th birthday or such higher age as the State has elected under Sec. 475(8)(B)(iii) of the Social Security Act. The Department notes that this definition does not require that an individual was in foster care in the State in which they are applying for or receiving SNAP benefits. The definition provided in the FRA is similar to that of the ''former foster care children'' eligibility group for Medicaid, as revised by the Substance Use-Disorder Prevention that Promotes Opioid Recovery and Treatment for Patients and Communities Act for individuals who turn 18 on or after January 1, 2023. Per section 1902(a)(10)(A)(i)(IX)(cc) of the Social Security Act and programs rules at 42 CFR 435.150, these individuals are eligible for Medicaid in this eligibility group if they are under age 26 and were in foster care under the responsibility of a State or Tribe upon attaining age 18 or such higher age as the State or such Tribe has elected for foster care assistance to end under section 475(8)(B)(iii) of the Social Security Act.

In implementing guidance, the Department clarified who may qualify for this exception, described below. The Department proposes to adopt these clarifications into the definition provided in regulations. In this guidance, the Department clarified that ''foster care under the responsibility of a State'' includes foster care programs run by Districts, Territories, or Indian Tribal Organizations.[9] The Department also clarified that the exception applies to individuals who are in foster care when they reach 18 years of age even if they elect to stay in foster care up to the State's maximum age, as well as individuals aged 18 to 24 who were in foster at the time they turned 18 years of age, even if the individual exits extended foster care before the maximum age. The Department also notes that individuals who are in foster care when they reach 18 years of age qualify for this exception regardless of their length of time in foster care or the reason for the individual's removal into foster care. Additionally, after consulting with the Department of Health and Human Services, the Department proposes to further clarify in the definition that ''foster care under the responsibility of a State'' also includes the Unaccompanied Refugee Minors Program.

These changes will help account for the variation in foster care and extended foster care operations across States. Further, the Department recognizes that individuals leaving foster care face particular barriers in obtaining suitable employment, including lower educational attainment, limited work history, and housing instability,[10] [11] and struggle with sustained employment and earnings more than their peers.[12] This definition will help to ensure these particularly vulnerable individuals are not subject to the time limit.

The Department proposes to amend the regulations at 7 CFR 273.24(c)(9) to include the revised exception definition provided in Sec. 311(a)(4) of the FRA and codify the foster care clarifications provided in the implementation guidance.

7 CFR 273.24(l): Verification of Exception Status

The FRA did not make any changes to how State agencies verify exceptions from the time limit. Program rules at 7 CFR 273.2(f) do not require State agencies to verify exception status unless the information is considered questionable. In FRA implementation guidance, the Department provided examples of verification State agencies could use if the State agency deems the information to be questionable based on the State agency's established criteria and requires further verification.[13] [14] [15] The Department reminds State agencies that program rules at 7 CFR 273.2(f)(2)(i) prohibit State agencies from setting guidelines for determining what is considered questionable information that would require verification based on race, religion, ethnic background, or national origin. The Department also reminds State agencies that the FRA provides populations exceptions in part because they are especially vulnerable and may be in unstable living situations. Placing additional and unnecessary burden on the applicants to provide verification may put these vulnerable individuals at risk. The Department encourages State agencies avoid setting guidelines for questionable information that would consider self-attestation questionable and require every individual who meets exception criteria to provide verification.

Program rules at 7 CFR 273.2(f)(5)(i) require State agencies to assist cooperating households in obtaining verification. Such assistance includes, but is not limited to, utilization of data sharing agreements with other State agencies and information received from other public assistance programs operated by the State agency. The Department proposes to clarify State agencies' responsibilities in obtaining verification of exception status, when questionable, by requiring State agencies to use all available information to verify exception status when questionable, before asking individuals to provide verification.

This proposal is based on several reasons. For example, State agencies' data sharing agreements provide additional resources to State agencies in the eligibility determination process, offering a less burdensome way to comply with the requirement to assist individuals in obtaining verification by reducing the amount of time and actions needed to verify information and minimizing the need to call contacts, send notices, and continuously re-touch a case. Further, these agreements can improve processes for screening for exceptions and proactively identify people who may be eligible for exceptions from the time limit. They also help streamline verification of exception status when the State agency determines the information is questionable by reducing the number of actions needed to verify information and decreasing time wait for the individual to provide sources of verification and for eligibility workers to verify the information. This may include agencies that support veterans

[9] U.S. Department of Agriculture. Food and Nutrition Service. Implementing SNAP Provisions in the Fiscal Responsibility Act of 2023. Washington, DC, 2023. Accessed December 11, 2023. *https://www.fns.usda.gov/snap/implementing-fra-provisions-2023.*

[10] Fung, Sara, Jessica Haspel, Susanna Kniffen, and Danielle Wondra. *Employment and Youth with Foster Care Experience: Understanding Barriers and Supporting Success.* Oakland, CA: Children Now, 2022.

[11] Pecora, Peter J., and et al. ''Educational and employment outcomes of adults formerly placed in foster care: Results from the Northwest Foster Care Alumni Study.'' *Children and youth services review* 28, no. 12 (December 2006): 1459–1481. *https://doi.org/10.1016/j.childyouth.2006.04.003.*

[12] Stewart, C. Joy, and et al. ''Former foster youth: Employment outcomes up to age 30.'' *Children and youth services review* 36 (January 2014): 220–229. *https://doi.org/10.1016/j.childyouth.2013.11.024.*

[13] U.S. Department of Agriculture. Food and Nutrition Service. Implementing SNAP Provisions in the Fiscal Responsibility Act of 2023. Washington, DC, 2023. Accessed December 11, 2023. *https://www.fns.usda.gov/snap/implementing-fra-provisions-2023.*

[14] U.S. Department of Agriculture. Food and Nutrition Service. Supplemental Nutrition Assistance Program (SNAP)—SNAP Provisions of the Fiscal Responsibility Act of 2023—Questions and Answers #1. Washington, DC, 2023. Accessed December 11, 2023. *https://www.fns.usda.gov/snap/provisions-fiscal-responsibility-act-2023-questions-and-answers-1.*

[15] U.S. Department of Agriculture. Food and Nutrition Service. Supplemental Nutrition Assistance Program (SNAP)—SNAP Provisions of the Fiscal Responsibility Act of 2023—Questions and Answers #2. Washington, DC, 2023. Accessed December 11, 2023. *https://www.fns.usda.gov/snap/provisions-fiscal-responsibility-act-2023-questions-answers-2.*

which may have information regarding an individual's prior service that can streamline verification of an individual's veteran status if the State agency finds it questionable. Similarly, State and Tribal IV–E agencies or State Medicaid agencies may have information on an individual's current or former placement in foster care that the SNAP State agency could use to verify an individual's status as a former foster youth. As a reminder, Section 475(5)(I) of the Social Security Act also requires child welfare agencies to provide any official documentation necessary to prove former foster care status to young people who have been in foster care for six or more months and exit foster care after attaining age 18. Likewise, State agencies' housing assistance programs or Continuums of Care may have information on an individual's housing status and eliminate the need for further verification to determine an individual's homelessness status and exception from the time limit. Through their participation in other programs, these vulnerable individuals have already demonstrated their status as homeless, disabled, pregnant, etc. to another program. The Department expects State agencies to avoid imposing a redundant burden on these individuals, which could impede their ability to claim an exception from the time limit, by using information available to the State agency.

Therefore, in the interest of improved efficiency and minimizing unnecessary burden on individuals, the Department proposes at 7 CFR 273.24(l) to require State agencies to assist individuals when requiring verification of exception status by using all information available to the State agency before requesting the individual provide sources of verification. The Department intends for State agencies to use existing information available in their eligibility system or through data sharing agreements. State agencies are not required to establish new data sharing agreements; however, the Department highly encourages State agencies to determine ways to collaborate with other State agencies, improving the coordination and information sharing across programs.

The Department recognizes that, when possible, State agencies likely use similar processes to support households in gathering other necessary verifications, however, it is proposing 7 CFR 273.24(l) in lieu of amending 7 CFR 273.2(f)(5)(i) for several reasons. Reducing barriers to identifying exceptions is especially important because of the impact that exception status and the time limit can have on an individual's SNAP eligibility. State agencies are more likely to already have access to information about household circumstances that except an individual from the time limit. As such, the Department is proposing this requirement at 7 CFR 273.24(l) and is not amending 7 CFR 273.2(f)(5)(i) to clarify that the requirement is specific to verification of exception status when questionable and is not intended to replace existing efforts State agencies employ to assist households in obtaining verification for other household circumstances.

7 CFR 271.2, 273.7(b)(3), and 273.24(k): Screening and Assigning Countable Months

Individuals subject to the time limit are a largely vulnerable population. An FNS study titled, ''The Impact of SNAP Able-Bodied Adults Without Dependents (ABAWD) Time Limit Reinstatement in Nine States,'' researched characteristics of individuals potentially subject to the time limit, meaning they are 18 to 49 and do not meet an exemption from the general work requirement, and do not live in a household with someone under the age of 18.[16] The study found that this population is less connected to the workforce and has higher rates of homelessness as well as mental and physical limitations, compared to other SNAP participants aged 18 to 49.

Sec. 6(o)(3) of the Act provides exceptions from the time limit to ensure certain individuals who face additional barriers to employment are not required to meet the more stringent time limits. Exceptions are provided for individuals based on certain circumstances, including those for individuals considered mentally or physically unfit for work, pregnant individuals, or those who are responsible for the care of a dependent child to name a few. As described earlier, following the passage of the FRA, individuals are also now excepted if they are experiencing homelessness, a veteran, or 24 years of age or younger who were in foster care on their 18th birthday (or higher age if the State offers extended foster care to a higher age).

In order to properly apply an exception to a case, State agencies must first evaluate individuals potentially subject to the time limit to determine if they are indeed subject to the time limit, or if they qualify for an exception. The Department refers to this process as ''screening.'' State agencies must perform a thorough screening to appropriately apply the time limit or an exception and to ensure only the appropriate individuals accrue countable months.[17] This proposed rule would address requirements for when this screening must occur and what steps State agencies must take prior to assigning countable months.

Screening at Initial and Recertification Application

The FRA required State agencies to apply the new exception criteria at initial application and recertification application. The Department issued guidance regarding requirements to screen for the new exceptions at initial and recertification application, consistent with the FRA and existing expectations for other exceptions from the time limit.[18] [19] [20]

The need to screen for ABAWD exceptions at initial application and recertification application is not new to State agencies—prior to the FRA, screening individuals at initial and recertification application for exceptions was necessary, as the Act provides that individuals must not be subject to the time limit if they meet one of the exceptions listed in Sec. 6(o)(3) of the Act. The Department has repeatedly emphasized the importance of screening for ABAWD exceptions at initial and recertification application through

[16] U.S. Department of Agriculture. Food and Nutrition Service. *The Impact of SNAP Able-Bodied Adults Without Dependents (ABAWD) Time Limit Reinstatement in Nine States* by Laura Wheaton and et al. Washington, DC, 2021. *https://www.fns.usda.gov/snap/impact-snap-able-bodied-adults-without-dependents-abawd-time-limit-reinstatement-nine.*

[17] A countable month is a month in which a person is receiving a full SNAP benefit allotment, is not meeting the time limit, and is not otherwise exempt (*i.e.,* the person is not meeting an exception from the time limit, is not living in an area covered by a waiver, is not receiving a discretionary exemption, does not have good cause for not meeting the work requirement, or is not in the month of notification from the State agency of a ''provider determination'' (from a SNAP E&T provider)).

[18] U.S. Department of Agriculture. Food and Nutrition Service. Implementing SNAP Provisions in the Fiscal Responsibility Act of 2023. Washington, DC, 2023. Accessed December 11, 2023. *https://www.fns.usda.gov/snap/implementing-fra-provisions-2023.*

[19] U.S. Department of Agriculture. Food and Nutrition Service. Supplemental Nutrition Assistance Program (SNAP)—SNAP Provisions of the Fiscal Responsibility Act of 2023—Questions and Answers #1. Washington, DC, 2023. Accessed December 11, 2023. *https://www.fns.usda.gov/snap/provisions-fiscal-responsibility-act-2023-questions-and-answers-1.*

[20] U.S. Department of Agriculture. Food and Nutrition Service. Supplemental Nutrition Assistance Program (SNAP)—SNAP Provisions of the Fiscal Responsibility Act of 2023—Questions and Answers #2. Washington, DC, 2023. Accessed December 11, 2023. *https://www.fns.usda.gov/snap/provisions-fiscal-responsibility-act-2023-questions-answers-2.*

guidance, including in the SNAP Able-Bodied Adults Without Dependents (ABAWD) Policy Guide.[21] While a screening requirement is not explicitly included in current regulations, State agencies must already have this screening process in place in order to effectuate the ABAWD provisions.

The Department is taking this opportunity to include clear language in the regulations that State agencies must screen for all exceptions from the time limit at initial and recertification application at new section 7 CFR 273.24(k). This will codify existing practices and clarify screening requirements and ensure compliance with the statutory exceptions. By adding this section to the regulations, the Department seeks to improve consistency in program operations and provide quality customer service in line with the December 13, 2021, Executive Order on *Transforming Federal Customer Experience and Service Delivery to Rebuild Trust in Government.*

Given the necessity of screening to properly administer exceptions, the Department is also proposing to include explicit language regarding the requirement for State agencies to screen for the exemptions from the general work requirements at certification and recertification at 7 CFR 273.7(b)(3), as State agencies must screen for both exemptions from the general work requirements and exceptions from the time limit to adequately determine if an individual should be subject to the time limit.[22] Individuals are not subject to the time limit if they meet an exemption from the general work requirements, as provided at Sec. 6(o)(3)(D) of the Act. This is an important first step in evaluating which, if any, work requirements apply to an individual. The proposed change would simply codify the need to determine if an individual is exempt from the general work requirements before registering the individual for work,[23] and promote further consistency in how exceptions are identified and work requirements policy is applied.

The Department also proposes to amend the definition of screening to reflect these changes. The provision currently only refers to determining if an individual should or should not be referred to E&T. Determining whether an individual should be referred to E&T is closely intertwined with determining whether the individual is subject to the general work requirement and ABAWD time limit. For example, a decision to refer an individual to E&T can only follow a determination that the individual is subject to the general work requirement. Similarly, whether an individual is subject to the time limit may affect the E&T referral decision. Therefore, the Department also proposes amending the definition of ''screening'' at 7 CFR 271.2 to include determining if an individual meets an exemption from the general work requirements listed in Sec. 6(d)(2) of the Act or an exception from the time limit listed in Sec. 6(o)(3) of the Act.

Screening and Applying Exceptions During the Certification Period

The FRA requires the new exceptions to be applied at initial application and recertification, however, questions arose during implementation about requirements for identifying exceptions during an individual's certification period. These questions reflected confusion among State agencies on how to comply with the FRA, the Act, and program rules. Some of the uncertainties raised include how States agencies account for individuals who appear to be newly subject to the time limit due to the changes in age-based exceptions, but the State agency has not screened those individuals to determine if they meet any exception. Since these individuals were not subject to the time limit at the time of their last certification, the State agency would likely not have any information on whether the individual meets another exception. Similarly, an individual subject to the time limit before the FRA could now be excepted as a veteran, however, the State agency may not know the individual is a veteran because the information is not collected in the SNAP application. In both scenarios for ongoing households, the State agency could not properly determine if the individual should be subject to the time limit.

The Department issued implementation guidance to address questions around the requirements for screening during the certification period.[24] [25] [26] This guidance detailed expectations of State agencies to apply the exceptions for ongoing households when the State agencies were able to identify such excepted households. However, there was no requirement for State agencies to evaluate households during their certification period for the purposes of identifying or applying an exception.

Program rules also do not establish a process during the certification period that would provide the information needed for the State agency to identify if an individual is subject to the time limit, or if they meet another exception from the time limit. Beyond new challenges in FRA implementation, State agencies face ongoing challenges in properly applying exceptions or subjecting individuals to the time limit when changes occur during the certification period. Further, the Department also recognizes it may be burdensome on both the individual and the State agency to require screening during the certification period when a change in exception status occurs. As such, the proposed rule would not require State agencies to screen during the certification period.

While the Department does not propose to require screening during the certification period, if a State agency learns about a change in exception status for an individual during the certification period, the State agency must act accordingly. A State agency could learn about the change from various sources such as household reports, data sharing or shared eligibility system arrangements with other programs, or voluntary screening undertaken by a State agency during a certification period.

[21] U.S. Department of Agriculture. Food and Nutrition Service. Supplemental Nutrition Assistance Program (SNAP) Able-Bodied Adults Without Dependents (ABAWD) Policy Guide. Washington, DC, 2023. Accessed January 2, 2024. *https://www.fns.usda.gov/snap/guide-serving-abawds-time-limit-participation. See also* U.S. Department of Agriculture. Food and Nutrition Service. ABAWD Time Limit Policy and Program Access Memo. Washington, DC, 2015. Accessed January 2, 2024. *https://www.fns.usda.gov/snap/ABAWD/time-limit-policy-program-access-memo.*

[22] U.S. Department of Agriculture. Food and Nutrition Service. SNAP Work Rules Screening Checklists and Flow Chart. Washington, DC, 2023. Accessed January 2, 2024. *https://www.fns.usda.gov/snap/work-rules-screening.*

[23] U.S. Department of Agriculture. Food and Nutrition Service. SNAP Employment and Training Screening and Referral Guidance. Washington, DC, 2023. Accessed January 2, 2024. *https://www.fns.usda.gov/snap/et-screening-and-referral-guidance.*

[24] U.S. Department of Agriculture. Food and Nutrition Service. Implementing SNAP Provisions in the Fiscal Responsibility Act of 2023. Washington, DC, 2023. Accessed December 11, 2023. *https://www.fns.usda.gov/snap/implementing-fra-provisions-2023.*

[25] U.S. Department of Agriculture. Food and Nutrition Service. Supplemental Nutrition Assistance Program (SNAP)—SNAP Provisions of the Fiscal Responsibility Act of 2023—Questions and Answers #1. Washington, DC, 2023. Accessed December 11, 2023. *https://www.fns.usda.gov/snap/provisions-fiscal-responsibility-act-2023-questions-and-answers-1.*

[26] U.S. Department of Agriculture. Food and Nutrition Service. Supplemental Nutrition Assistance Program (SNAP)—SNAP Provisions of the Fiscal Responsibility Act of 2023—Questions and Answers #2. Washington, DC, 2023. Accessed December 11, 2023. *https://www.fns.usda.gov/snap/provisions-fiscal-responsibility-act-2023-questions-answers-2.*

If a State agency determines an individual newly meets an exception, the State agency must apply the exception at that time and not subject the individual to the time limit. If a State agency learns an individual has lost an exception, the State agency must screen to see if the individual qualifies for a different exception. If the individual qualifies for a different exception, the individual is not subject to the time limit. The Department is proposing this requirement to apply to new exceptions at 7 CFR 273.24(k)(1)(ii) to ensure State agencies are clear on their responsibilities as it relates to applying the time limit and assigning countable months and complying with Sec. 6(o)(3) of the Act and program rules at 7 CFR 273.24(b)(1).

Due to the complexities of screening during the certification period and the importance of not improperly subjecting individuals to the time limit, the Department is also clarifying that if the State agency has information that an individual's excepted status has changed, then the State agency cannot assign countable months until it has screened an individual for other exceptions and determined they are subject to the time limit. If the individual does not meet another exception, the State agency must begin applying countable months in accordance with program rules at 7 CFR 273.24(b)(1) and ensure individuals are properly notified of what work requirements they are required to meet in accordance with 7 CFR 273.7(c)(1)(ii) and (iii). The Department is outlining this requirement at 7 CFR 273.24(k)(1)(i) for changes during the certification period, prohibiting State agencies from assigning countable months until it has screened and determined an individual does not meet an exception from the time limit. This prohibition on assigning countable months also applies at initial and recertification application and is outlined at 7 CFR 273.24(k).

When an individual loses an exception during the certification period, this only informs the State agency that the individual no longer meets that particular exception. It does not provide sufficient information to determine if the individual should now be subject to the time limit, as the individual may meet another exception. This is especially true given the fluid nature of some of the exceptions, such as homelessness or pregnancy, which individuals may meet only temporarily. As such, the State agency must screen to determine if the individual meets another exception in order to know if the individual should be subject to the time limit and to comply with Sec. 6(o)(3) of the Act, which requires State agencies to only subject individuals who do not meet an exception to the time limit.

For example, the State agency may be aware an individual has turned 18 during the certification period and is no longer excepted for being under the age of 18. However, this individual may qualify for another exception, such as the exception for homeless individuals or the exception for individuals 24 years of age or younger and in foster care on their 18th birthday. The State agency must not assign countable months to this individual before the State agency has screened for other exceptions and determined no other exceptions apply, either during the certification period or at the next recertification.

In the case that a State agency attempts to screen during the certification period, but is unable to do so, the State agency must not penalize individuals for not responding, require the household to come into the office per program rules at 7 CFR 273.2(e)(1), or send a request for contact (RFC). RFCs may only be sent to resolve unclear information that meets the criteria outlined at 7 CFR 273.12(c)(3). Otherwise, the State agency would wait until the next recertification to screen the individual, and then at that time, either apply another exception or begin applying the time limit.

It is also possible that individuals may meet more than one exception from the time limit. When this occurs, the Department encourages State agencies to apply the exception that will have the longest impact, minimizing the need to rescreen an individual if they lose an exception and reducing burden on both the State agency and individuals. For example, if a State agency screens an individual and determines they are a veteran who is also experiencing homelessness, the Department recommends that the State agency apply the exception for veteran, avoiding the need to rescreen the individual if they no longer qualify for the exception for individuals experiencing homelessness since the individual's veteran status will not change. While the Department highly encourages this as a best practice, the Department recognizes not all State agency eligibility systems have the same capabilities and therefore, is not proposing this as a requirement.

7 CFR 273.24(g) and (h): Discretionary Exemptions

The Act provides State agencies the ability to extend eligibility for time-limited participants who are not meeting the time limit and do not live in an area with an ABAWD waiver. This may be done through use of a discretionary exemption, and each discretionary exemption can be used to exempt up to one individual for one month. As defined by law, each State agency's allotment of discretionary exemptions is calculated annually by the Department, based on the total number of time limited participants that were ineligible in the State due to the time limit in the preceding fiscal year, known as ''covered'' individuals.

Prior to the FRA, the Act instructed the Department to calculate discretionary exemptions such that the average monthly number of exemptions do not exceed 12 percent of the number of covered individuals in the State. Sec. 312 of the FRA amends Sec. 6(o)(6) of the Act and reduces the allotment of exemptions to not exceed 8 percent of covered individuals. The Department proposes conforming edits to 7 CFR 273.24(g)(3) to reduce the allotment to not exceed 8 percent of covered individuals in the State.

Current regulations at 7 CFR 273.24(h)(2)(i) also allow State agencies to carryover all unused discretionary exemptions into the next fiscal year (FY). Sec. 312 of the FRA further amends Sec. 6(o)(6) of the Act, prohibiting State agencies from accumulating unused exemptions for more than the current fiscal year and subsequent fiscal year during FY 2024 and beyond. During FY 2024, State agencies received their allotment of discretionary exemptions, which included their historical balance of unused exemptions. The prohibition on accumulating unused exemptions allows for the carryover of this historical balance only into the subsequent fiscal year (FY 2025). Then starting in FY 2026, State agencies will only carryover unused discretionary exemptions earned for the previous fiscal year, not including historical balance. As such, the Department is proposing conforming edits to 7 CFR 273.24(h)(2)(i) to limit carryover to only unused discretionary exemptions earned for the previous fiscal year starting in FY 2026.

Procedural Matters

Executive Orders 12866, 13563, and 14094

Executive Orders 12866, 13563, and 14094 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563

emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This proposed 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 Summary

As required for all rules that have been designated as significant by the Office of Management and Budget, a Regulatory Impact Analysis (RIA) was developed for this proposed rule. It follows this rule as an Appendix. The following summarizes the conclusions of the regulatory impact analysis:

The Department estimates the total increase in federal transfers (SNAP benefit spending) associated with the provisions of this proposed rule to be approximately $2.8 billion over the nine years Fiscal Year (FY) 2023–FY 2031, averaging $306.5 million per year. Over the nine-year period FY 2023–FY 2031, federal costs (not including transfers) are estimated to total approximately $252.5 million, or an annual average of $28.1 million. Total State agency administrative expenses are also estimated to be approximately $252.5 million over the nine-year period, or an annual average of $28.1 million. Costs associated with administrative burden to individual SNAP participants are estimated to be approximately $322.0 million over the nine-year period, or an annual average of $35.8 million.

This proposed rule will primarily affect SNAP participants who are subject to the time limit, which the Department estimates to be, upon full implementation of the FRA's provisions in FY 2026, approximately 9.3 percent of SNAP participants, although far fewer will lose eligibility for SNAP. Hence, most SNAP participants will not be affected by this proposed rule. The estimated net impact of the proposed rule's change in the age-based exceptions and three new exceptions is a net increase in SNAP participation of about 54,000 individuals per year when fully implemented. In FY 2026, this includes 345,000 participants losing eligibility, 369,000 participants retaining eligibility, and about 30,000 new participants.

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. Pursuant to that review, it has been certified that this rule would not have a significant impact on a substantial number of small entities. This proposed rule would not have an impact on small entities because the changes required by the regulations are directed toward State agencies operating SNAP programs.

Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), the Office of Information and Regulatory Affairs designated this rule as major rule as defined by 5 U.S.C. 804(2).

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 $100 million or more 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 proposed rule does not contain Federal mandates (under the regulatory provisions of Title II of the UMRA) for State, local and tribal governments or the private sector of $100 million or more in any one year. Thus, the rule is not subject to the requirements of sections 202 and 205 of the UMRA.

Executive Order 12372

This Supplemental Nutrition Assistance Program is listed in the Catalog of Federal Domestic Assistance under Number 10.551 and is subject to Executive Order 12372, which requires intergovernmental consultation with State and local officials. (See 2 CFR chapter IV.) Since SNAP is State-administered, FNS has formal and informal discussions with State and local officials 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. For example, SNAP participated in three webinars covering FRA implementation and responded to State agency questions and concerns over implementation. SNAP also is providing ongoing technical assistance with State agencies covering implementation of the FRA and work requirements more generally.

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. The Department has considered the impact of this rule on State and local governments and has determined that this rule does not have federalism implications. Therefore, under section 6(b) of the Executive Order, a federalism summary is not required.

Executive Order 12988, Civil Justice Reform

This proposed 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 is not intended to have retroactive effect unless so specified in the Effective Dates section of the final rule. 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 proposed rule, in accordance with Departmental Regulation 4300–004, ''Civil Rights Impact Analysis,'' to identify and address any major civil rights impacts the proposed rule might have on program participants on the basis of age, race, color, national origin, sex (including gender identity and sexual orientation), or disability. We believe that the provisions of the FRA and the requirements for verification and screening will have a potential impact on certain protected groups as it relates to SNAP work requirements. However, an adverse impact analysis could not be conducted due to data limitations for the potential impact on individuals based on race, ethnicity, gender, and age that may be subject to the time limit. We

also believe that the addition of the new ABAWD exceptions will provide greater and continuous access to SNAP benefits for SNAP applicants and participants. We find that the implementation of mitigation strategies and monitoring will lessen these potential impacts.

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.

The Department expects this proposed rule will impact tribes to a no greater or lesser degree than other applicant or eligible SNAP households. FNS provided an opportunity for consultation on March 15, 2024. The Tribes had minimal comments, but one Tribe raised two concerns. First, the Tribe described the challenges and burden that former foster care youth face in obtaining formal documentation needed to verify that they were in foster care, especially in rural areas. FNS appreciates these concerns and the proposed requirements in this rule are intended to reduce this burden on individuals by requiring the State agency to use information already available to verify exception status. Second, the Tribe raised concerns over the decrease in the allotment of discretionary exemptions from 12 to 8 percent of the ABAWD caseload. FNS recognizes this concern, however, the decrease in discretionary exemptions is a statutory provision of the FRA and therefore, cannot be changed by this rulemaking.

If a Tribe requests further consultation in the future, FNS will work with the Office of Tribal Relations to ensure meaningful consultation is provided.

Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. 35; 5 CFR 1320) requires the Office of Management and Budget (OMB) approve all collections of information 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. The agency is requesting a revision for OMB Control Number 0584–0479 for these new, existing, and changing provisions in this rule. These changes are contingent upon OMB approval under the Paperwork Reduction Act of 1995. Additionally, when the information collection requirements have been approved, FNS will publish a separate action in the **Federal Register** announcing OMB's approval.

Comments on this proposed rule must be received by May 30, 2024. Send comments to the Office of Information and Regulatory Affairs, OMB, Attention: Desk Officer for FNS, Washington, DC 20503. Please also send a copy of your comments to Catrina Kamau, Chief, Certification Policy Branch, 1320 Braddock Place, 5th Floor; Alexandria, Virginia 22314. For further information, or for copies of the information collection requirements, please contact Catrina Kamau indicated above.

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 document will be summarized and included in the request for OMB approval. All comments will also become a matter of public record.

Title: Supplemental Nutrition Assistance Program: Work Requirements and Screening.

OMB Number: 0584–0479.

Expiration Date: 2/28/2026.

Type of Request: Revision to an existing collection.

Abstract: This proposed rule would amend SNAP regulations to implement changes made by the Fiscal Responsibility Act (FRA) of 2023. Some of the proposed changes would modify current regulations resulting in an increase in the reporting burden for State agencies, while others will result in no change.

The FRA amended the exceptions from the time limit, increasing the upper limit of the age-based exception from 50 to 55 over two years and adding three new exceptions for homeless individuals, veterans, and individuals aging out of foster care. The changes to the age-based exception will result in an increase in the number of individuals subject to the time limit, while the new exceptions will result in a decrease. The Department estimates a net increase in the number of individuals subject to the time limit. As a result, the Department estimates an increase in burden for State agencies and individuals. The Department anticipates additional burden related to verification of work hours and countable months, issuance and review of the Consolidated Work Notice, and the review of the oral explanation of the work requirements for individuals newly subject to the time limit. The Department also anticipates additional burden related to the issuance and review of the Notice of Adverse Action for individuals newly subject to the time limit who reach three countable months and become ineligible. The Department is accounting for this net increase in individuals subject to the time limit and the resulting additional burden in this information collection.

The FRA amended the SNAP program purpose to include assisting low-income individuals in obtaining employment and earnings. The Department does not anticipate any burden related to this change. The FRA also reduced the annual allotment of discretionary exemptions and reduced carryover of unused exemptions. The Department does not estimate any change in burden related to reporting of discretionary exemptions, which is covered under OMB Control Number 0584–0594 (Food Programs Reporting System (FPRS); expiration date: 09/30/2026).

In addition to implementing the provisions of the FRA, this proposed rule would also establish regulations that require State agencies to screen individuals for exemptions from the general work requirements and exceptions from the time limit. Currently, State agencies are required to screen individuals for exemptions from the general work requirements and exceptions from the time limit at initial and recertification application. However, this requirement is not captured in regulations and the related burden not captured in any existing information collection. The Department is including new burden related to screening in this information collection, which is required to ensure State agencies apply ABAWD policy correctly.

This proposed rule would also amend regulations to require State agencies to use all available information to verify exception status, when questionable, before requiring individuals to provide verification. The Department does not

anticipate a change in the burden related to the verification of questionable information, which is covered under OMB Control Number 0584–0064 (SNAP Forms: Applications, Periodic Reporting, Notices; expiration date: 02/29/2024). The Department anticipates an increase in burden related to verification of questionable exception status, which will be offset by a decrease in burden related to the verification provision of this proposed rule.

The Department also anticipates start-up burden related to the statutory and regulatory changes. State agencies will need to update their eligibility systems and notices to include the new exceptions and changes to the age-based exception. State agencies will also need to update their policy manuals and documents with the changes to ABAWD eligibility and the screening requirements. Lastly, State agencies will need to develop and provide training on the new requirements to State agency staff.

These new requirements necessitate a revision to OMB Control Number 0584–0479 (Expiration Date: 02/28/2026). The Department is seeking a renewal of OMB Control Number 0584–0479 during the Final Rule phase. OMB Control Number 0584–0479 currently covers burden related to preparation and submission of ABAWD waivers. ABAWD waivers are submitted via the Waiver Information Management System (WIMS), and the burden for this submission which is covered under OMB Control Number 0584–0083 (Operating Guidelines, Forms, Waivers, Program and Budget Summary Statement; expiration date: 9/30/2026). The proposed rule would not make changes to burden covered under OMB Control Number 0584–0083. Due to the addition of new burden items, the Department recommends changing the title of 0584–0479 to ''Supplemental Nutrition Assistance Program: Work Requirements and Screening.''

Start-Up Burden

Respondents: State Agencies.

Estimated Number of Respondents: 53 State Agencies and 107,370 eligibility workers.

Estimated Number of Respondents per Respondent: 2,029 responses.

Estimated Total Annual Burden on Respondents: 473,857 hours, an increase of 473,857 hours from current inventory of 0 hours in 0584–0479.

Ongoing Burden

Respondents: State Agencies and Individuals.

Estimated Number of Respondents: 53 State Agencies and 26,801,899.49 Individuals.

Estimated Number of Respondents per Respondent: 505,696.88 responses per State Agency and one (1) per Individual.

Estimated Total Annual Burden on Respondents: 3,617,537.24 hours (1,809,350.12 hours for State Agencies and 1,808,187.12 hours for Individuals), an increase of 3,616,374.244 hours from current inventory of 1,163 hours in 0584–0479.

The total burden for this rulemaking is 4,090,231.24 burden hours and 53,711,362.97 total annual responses. This represents an increase to the burden hours for OMB Control Number 0584–0479, resulting in a total inventory of 4,091,394.24 burden hours (4,090,231.24 new burden hours + 1,163 existing burden hours) and 53,711,362.97 responses (unchanged).

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Activity	Citation	Number of Respondents	Frequency of Response	Total Annual Responses	Hours per Response	Annual Burden (hours)	Hourly Wage Rate	Total Annualized Cost of Respondent Burden	Previously Approved Burden Hours	Change in Burden Hours Due to Program Change	Total Change in Burden Hours
A	B	C	D	E = C x D	F	G = E x F	H	I = (G x H) / 2	J	K = G - J	L = J + K
Start-Up Burden											
Affected Public: State Agencies											
Update of eligibility system with new requirements (including coding for modified exceptions, updating language on the Notice of Adverse Action and Consolidation Work Notice)	7 CFR 273.24(c)(7), (8), (9), and (10)	53	1	53	4,729	250,637	$52.69	$13,207,216.46	0	250,637	250,637
Update policy manuals, guidance, and other documents with new requirements	7 CFR 273.24(c)(7), (8), (9), and (10), 273.24(k), 273.24(l), 273.7(b)(3)	53	1	53	80	4,240	$51.18	$216,996.42	0	4,240	4,240
Develop and provide training to staff on new requirements	7 CFR 273.24(c)(7), (8), (9), and (10), 273.24(k), 273.24(l), 273.7(b)(3)	53	1	53	80	4,240	$51.18	$216,996.42	0	4,240	4,240
Take training on new requirements	7 CFR 273.24(c)(7), (8), (9), and (10), 273.24(k), 273.24(l), 273.7(b)(3)	107,370	1	107,370	2	214,740	$31.48	$6,760,251.41	0	214,740	214,740
Reporting Burden Total for Start-Up Burden		**53**	**2,029**	**107,529**	**4,891**	**473,857**	**$43.05**	**$20,401,460.71**	**0**	**473,857**	**473,857**
Ongoing Burden											
Affected Public: State Agencies											
Applying Modified Exceptions											

Activity	Citation	Number of Respondents	Frequency of Response	Total Annual Responses	Hours per Response	Annual Burden (hours)	Hourly Wage Rate	Total Annualized Cost of Respondent Burden	Previously Approved Burden Hours	Change in Burden Hours Due to Program Change	Total Change in Burden Hours
Additional verification of hours worked and countable months in another State at initial or recertification application for ABAWDs newly subject to the work requirement	7 CFR 273.2(f)(1), (f)(2), and (f)(8)(i)	53	6,919.83	366,751	0.0917	33,619	$31.75	$1,067,301.31	0	33,619	33,619
Additional issuance of the Consolidated Work Notice for ABAWDs newly subject to the work requirement	7 CFR 273.7(c)(1)	53	6,919.83	366,751	0.083	30,563	$31.75	$970,273.92	0	30,563	30,563
Additional review of the oral explanation of the work requirements for ABAWDs newly subject to the work requirement	7 CFR 273.7(c)(1)	53	6,919.83	366,751	0.083	30,563	$31.75	$970,273.92	0	30,563	30,563
Additional issuance of the Notice of Adverse Action for ABAWDs newly subject to the work requirement who do not meet it	7 CFR 273.13(a)	53	5,981.13	317,000	0.067	21,133	$31.75	$670,922.05	0	21,133	21,133
Screening Requirements											
Screening for exemptions from the general work requirement at initial application	7 CFR 273.7(b)(3)	53	286,490.57	15,184,000	0.067	1,012,267	$31.75	$32,136,531.09	0	1,012,267	1,012,267

Activity	Citation	Number of Respondents	Frequency of Response	Total Annual Responses	Hours per Response	Annual Burden (hours)	Hourly Wage Rate	Total Annualized Cost of Respondent Burden	Previously Approved Burden Hours	Change in Burden Hours Due to Program Change	Total Change in Burden Hours
Screening for exemptions from the general work requirement at recertification application	7 CFR 273.7(b)(3)	27	79,603.77	2,149,302	0.067	143,287	$31.75	$4,548,940.13	0	143,287	143,287
Screening for exceptions from the ABAWD work requirement and time limit at initial application	7 CFR 273.24(k)	53	79,603.77	4,219,000	0.067	281,267	$31.75	$8,929,400.99	0	281,267	281,267
Screening for exceptions from the ABAWD work requirement and time limit at recertification application or during the certification period	7 CFR 273.24(k)	53	72,308.38	3,832,344	0.067	255,490	$31.75	$8,111,053.88	0	255,490	255,490
ABAWD Waivers											
Preparation and submission of Labor Market Data to support ABAWD waiver request	7 CFR 273.24(f)	33	1	33	35	1,155	$32.04	$37,010.68	1,155	0	0
Preparation and submission of Labor Surplus Area designation or EB Trigger Notice criteria to support ABAWD waiver request	7 CFR 273.24(f)	2	1	2	4	8	$36.41	$291.24	8	0	0
Reporting Burden Sub-Total for Ongoing Burden to State Agencies		**53**	**505,696.88**	**26,801,934.49**	**0.068**	**1,809,350.12**	**$31.46**	**$56,923,719.52**	**1,163**	**1,808,187**	**1,808,187**
Affected Public: Individuals											
Applying Modified Exceptions											

Activity	Citation	Number of Respondents	Frequency of Response	Total Annual Responses	Hours per Response	Annual Burden (hours)	Hourly Wage Rate	Total Annualized Cost of Respondent Burden	Previously Approved Burden Hours	Change in Burden Hours Due to Program Change	Total Change in Burden Hours
Additional response to verification of hours worked and countable months in another State at initial or recertification application for ABAWDs newly subject to the work requirement	7 CFR 273.2(f)(1), (f)(2), and (f)(8)(i)	366,751	1	366,751	0.0917	33,619	$22.02	$740,287.30	0	33,619	33,619
Additional review of the Consolidated Work Notice for ABAWDs newly subject to the work requirement	7 CFR 273.7(c)(1)	366,751	1	366,751	0.083	30,563	$22.02	$672,988.45	0	30,563	30,563
Additional review of the oral explanation of the work requirements for ABAWDs newly subject to the work requirement	7 CFR 273.7(c)(1)	366,751	1	366,751	0.083	30,563	$22.02	$672,988.45	0	30,563	30,563
Additional review of the Notice of Adverse Action for ABAWDs newly subject to the work requirement who do not meet it	7 CFR 273.13(a)	317,000	1	317,000	0.067	21,133	$22.02	$465,356.00	0	21,133	21,133
Screening Requirements											
Screening for exemptions from the general work requirement at initial application	7 CFR 273.7(b)(3)	15,184,000	1	15,184,000	0.067	1,012,267	$22.02	$22,290,112.00	0	1,012,267	1,012,267
Screening for exemptions from the general work requirement at recertification application	7 CFR 273.7(b)(3)	2,149,302	1	2,149,302	0.067	143,287	$22.02	$3,155,175.17	0	143,287	143,287

Activity	Citation	Number of Respondents	Frequency of Response	Total Annual Responses	Hours per Response	Annual Burden (hours)	Hourly Wage Rate	Total Annualized Cost of Respondent Burden	Previously Approved Burden Hours	Change in Burden Hours Due to Program Change	Total Change in Burden Hours
Screening for exceptions from the ABAWD work requirement and time limit at initial application	7 CFR 273.24(k)	4,219,000	1	4,219,000	0.067	281,267	$22.02	$6,193,492.00	0	281,267	281,267
Screening for exceptions from the ABAWD work requirement and time limit at recertification application or during the certification period	7 CFR 273.24(k)	3,832,344	1	3,832,344	0.067	255,490	$22.02	$5,625,880.99	0	255,490	255,490
Reporting Burden Sub-Total for Ongoing Burden to Individuals		**26,801,899.49**	**1**	**26,801,899.49**	**0.067**	**1,808,187.12**	**$22.02**	**$39,816,280.36**	**0**	**1,808,187**	**1,808,187.12**
Reporting Burden Total for Ongoing Burden		**26,801,952.49**	**2**	**53,603,833.97**	**0.067**	**3,617,537.24**	**$26.74**	**$96,739,999.88**	**1,163**	**3,616,374**	**3,616,374.24**
Reporting Burden Total for All Burden		**26,802,005.49**	**2**	**53,711,362.97**	**0.076**	**4,091,394.24**	**$28.63**	**$117,141,460.58**	**1,163**	**4,090,231**	**4,090,231.24**

BILLING CODE 3410–30–P

E-Government Act Compliance

The Department is committed to complying with the E-Government Act of 2002, 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 271

Administrative practice and procedures, Employment, Supplemental Nutrition Assistance Program.

7 CFR Part 273

Administrative practice and procedure, Able-bodied adults without dependents, Employment, Time limit, Work requirements.

Accordingly, the Food and Nutrition Service proposes to amend 7 CFR part 271 and 273 as follows:

■ 1. The authority citation for parts 271 and 273 continues to read as follows:

Authority: 7 U.S.C. 2011–2036.

PART 271—GENERAL INFORMATION AND DEFINITIONS

■ 2. In § 271.1, amend paragraph (a) by adding two sentences at the end of the paragraph to read as follows:

§ 271.1 General purpose and scope.

(a) * * * That program includes as a purpose to assist low-income adults in obtaining employment and increasing their earnings. Such employment and earnings, along with program benefits, will permit low-income households to obtain a more nutritious diet through normal channels of trade by increasing food purchasing power for all eligible households who apply for participation.

* * * * *

■ 3. In § 271.2, revise the definitions of ''homeless individual'' and ''screening'' to read as follows:

§ 271.2 Definitions

* * * * *

Homeless individual means

(1) An individual who lacks a fixed and regular nighttime residence, including, but not limited to, an individual who will imminently lose their nighttime residence; or

(2) An individual whose primary nighttime residence is:

(i) A supervised shelter designed to provide temporary accommodations (such as a welfare hotel or congregate shelter);

(ii) A halfway house or similar institution that provides temporary residence for individuals intended to be institutionalized;

(iii) A temporary accommodation for not more than 90 days in the residence of another individual; or

(iv) A public or private place not designed for, or ordinarily used, as a regular sleeping accommodation for human beings (a hallway, a bus station, a lobby, or similar places).

* * * * *

Screening means an evaluation by the eligibility worker as to whether a person meets an exemption from the general work requirements, meets an exception from the able-bodied adults without dependents time limit, or should or should not be referred for participation in an employment and training program. Screening for participation in employment and training programs is not considered an approvable E&T component.

* * * * *

PART 273—CERTIFICATION OF ELIGIBLE HOUSEHOLDS

■ 3. In § 273.7, add paragraph (b)(3) to read as follows:

§ 273.7 Work provisions.

* * * * *

(b) * * *

(3) State agencies must screen individuals to determine if they meet an exemption listed in paragraph (b)(1) of this section at certification and recertification.

* * * * *

■ 4. In § 273.24:

■ a. Amend paragraph (c)(1) by removing the number ''50'' and adding in its place ''55'';

■ b. Amend paragraph (c)(5) by removing ''or'' at the end of the paragraph;

■ c. Amend paragraph (c)(6) by removing the period and adding a semicolon in its place;

■ d. Add paragraphs (c)(7) through (10);

■ e. Amend paragraph (g)(3) by removing the number ''12'' and adding in its place ''8'';

■ f. Amend paragraph (h)(2)(i) by adding a sentence at the end; and

■ g. Add paragraphs (k) and (l).

The additions read as follows:

§ 273.24 Time Limit for able-bodied adults.

* * * * *

(c) * * *

* * * * *

(7) Homeless, as defined in § 271.2 of this chapter;

(8) A veteran, defined as an individual who, regardless of the conditions of their discharge or release from, served in the United States Armed Forces (such as Army, Marine Corps, Navy, Air Force, Space Force, Coast Guard, and National Guard), including an individual who served in a reserve component of the Armed Forces, or served as a commissioned officer of the Public Health Service, Environmental Scientific Services Administration, or the National Oceanic and Atmospheric Administration; or

(9) An individual who is 24 years of age or younger and who was in foster care under the responsibility of any State, District, U.S. Territories, Indian Tribal Organization, or Unaccompanied Refugee Minors Program on the date of attaining 18 years of age, including those who remain in extended foster care in States that have elected to extend foster care in accordance with section 475(8)(B)(iii) of the Social Security Act (42 U.S.C. 675(8)(B)(iii) or those who leave extended foster care before the maximum age.

(10) Unless otherwise changed by law, the exceptions provided at paragraphs (c)(7) through (9) of this section cease to have effect on October 1, 2030, and the age limit provided in paragraph (c)(1) of this section reverts from ''55 years of age or older'' to ''50 years of age or older'' on October 1, 2030.

* * * * *

(h) * * *

(2) * * *

(i) * * * Starting in FY 2026, FNS will increase the estimated number of exemptions allocated to the State agency for the subsequent fiscal year by the remaining balance of unused exemptions earned for the previous fiscal year.

* * * * *

(k) *Screening.* The State agency must screen individuals for exceptions from the time limit listed under paragraph (c) of this section at certification and recertification. The State agency must not assign countable months unless it has screened the individual and determined that no exception applies.

(1) Changes in exception status during the certification period.

(i) *Loss of an exception.* If during the certification period an individual has a change in circumstances that results in the loss of an exception from the time limit, the State agency cannot begin assigning countable months until it screens the individual to determine whether any other exception applies.

(ii) *Newly meeting an exception.* If during the certification period an individual subject to the time limit has a change in circumstance that results in the individual now meeting an exception, the State agency must act promptly to apply the exception and

cannot assign a countable month once the State receives information that is not questionable. If the State agency determines the information is questionable, the State agency must act promptly to verify the information. Once verified, the State agency must apply the exception and cannot assign countable months.

(l) *Verification of exceptions.* If the State agency determines an individual's exception status under paragraph (c) of this section is questionable, the State agency must first attempt to verify exception status using information available to the State agency, such as information from other public assistance programs through data sharing, before requiring individuals provide documentary evidence or other sources of verification.

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

This proposed rulemaking is necessary to amend Supplemental Nutrition Assistance Program (SNAP) regulations to reflect mandates within the Fiscal Responsibility Act (FRA) of 2023 (Pub. L. 118–5) establishing changes to SNAP's work requirements and time limit for several groupings of adults. The FRA also directs the U.S. Department of Agriculture (the Department) to add to the program purpose language in the Food and Nutrition Act of 2008 (the Act), as amended. The proposed rule amends SNAP regulations to incorporate several provisions of the FRA: adjust SNAP's able-bodied adult without dependents (ABAWD) work requirement and time limit on a phased-in approach to newly included individuals who are aged 50–54; establish new exceptions for individuals who are veterans, homeless, and youth aged 24 or younger who have aged out of a foster care program from SNAP's ABAWD work requirement and time limit; decrease State agencies' annual allotment of discretionary exemptions for individuals subject to the ABAWD time limit from 12 percent to 8 percent; and limit State agencies' ability to carryover unused discretionary exemptions beyond one year. The provisions outlined above will be phased in between the enactment of the legislation in June 2023, through October 2025, with several provisions sunsetting October 1, 2030. The proposed rule also makes a discretionary amendment to the regulations requiring State agencies to screen individuals for exceptions to the time limit, as well as exemptions from the general work requirement, as State agencies must screen for both to adequately determine if an individual should be subject to the time limit. The Department is proposing to amend the regulations to clarify requirements for screening to improve consistency in program operations across States and provide quality customer service.

II. Summary of Impacts

The Department estimates the net total increase in federal transfers (SNAP benefit spending) associated with the provisions of this proposed rule to be approximately $2.8 billion over the nine years Fiscal Year (FY) 2023–FY 2031, averaging $306.5 million per year. Over the nine-year period FY 2023–FY 2031,[27] this is the net result of a reduction in transfers of $6.3 billion by terminating benefits to about 2.0 million individuals and reducing the benefits of 103,000 individuals by $155.2 million, and an increase in transfers of $9.2 billion due to about 2.7 million individuals meeting exceptions from the ABAWD time limit. Over the nine-year period, federal administrative costs (not including transfers) are estimated to total $252.5 million, or an annual average of $28.1 million. Total State agency administrative expenses are also estimated to be approximately $252.5 million over the nine-year period, or an annual average of $28.1 million. Costs associated with administrative burden to individual SNAP participants are estimated to be approximately $322.0 million over the nine-year period, or an annual average of $35.8 million. See Table 1 for a year-by-year presentation of changes to transfers, federal administrative costs, State agency administrative costs, and burden costs to individual participants.

This proposed rule will primarily affect SNAP participants who are subject to the ABAWD work requirement and time limit, which the Department estimates to be approximately 9.3 percent of SNAP participants upon full implementation of the FRA's provisions in FY 2026. However, many of these participants will meet the work requirement or receive an exception, so far fewer will lose eligibility for SNAP.

The estimated net impact of the proposed rule's change in the age-based exceptions and three new exceptions is a net increase in SNAP participation of about 55,000 individuals per year when fully implemented. In FY 2026, this includes 345,000 participants losing eligibility, 369,000 participants retaining eligibility through one of the new exceptions, and about 30,000 new participants. See Table 8 for year-by-year details on additional participation and transfer impacts.

The rule is estimated to increase administrative burden for most State SNAP agencies at initial implementation, throughout the period the provisions are in effect, and at the sunset of the provisions that expire on October 1, 2030. The rule is expected to result in a one-time administrative burden of 473,857 total hours (about $10.3 million in FYs 2023 and 2024 after 50 percent federal cost reimbursement[28]) in start-up costs for State agencies. Ongoing State agency administrative burden is expected to increase annually by an average of about 1.4 million total hours for 53 State agencies (about $25.3 million annually after 50 percent federal cost reimbursement). The one-time total State agency administrative burden of sunsetting the applicable provisions within this proposed rule is estimated to be 625,024 total hours (about $15.0 million in FYs 2030 and 2031 after 50 percent federal cost reimbursement). The rule provisions will impose additional administrative burden on participants who are subject to the ABAWD work requirement, estimated to be an ongoing average annual burden of 1.4 million hours for all individuals impacted, or (about $35.3 million annually), as well as will impose a one-time burden during the sunsetting of applicable provisions of 151,167 hours (or about $4.0 million in FY 2031). In addition to the federal cost of the 50 percent reimbursement to State agencies, the rule is expected to result in a one-time administrative burden of 90 hours at implementation (or $6,760 in FY 2024) and a one-time administrative burden of 63 hours at sunset (or $5,813 in FY 2030) to the Federal Government. The impacts of the proposed rule's provisions are summarized in the following table (Table 1).

[27] A nine-year analysis period is used to align with the implementation and sunset periods established by the FRA. See discussion of baseline and time horizon of analysis for more detail.

[28] Fifty percent of State agencies' allowable SNAP administrative costs are reimbursed by the Federal Government, as defined at 7 CFR 277.4(b).

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. Due to the primary focus on transfer

Table 1: Summary of Federal Budget Impacts, FY 2023-2031

In Millions of Dollars (rounded to nearest thousand)	FY 2023	FY 2024	FY 2025	FY 2026	FY 2027	FY 2028	FY 2029	FY 2030	FY 2031	FY 2023 - FY 2031 Total
Transfers - SNAP benefit spending ($millions)										
Raising the ABAWD age limit from 50 to 55	*	-$267.12	-$773.96	-$1,055.16	-$1,070.85	-$1,086.22	-$1,101.42	-$1,112.78	$0.00	**-$6,467.53**
New exceptions for homeless, veteran, and former foster youth	*	$634.46	$1,205.83	$1,323.28	$1,343.43	$1,363.24	$1,382.89	$1,397.97	$574.73	**$9,225.83**
Total Estimated Transfers* **	*	**$367.34**	**$431.86**	**$268.11**	**$272.58**	**$277.02**	**$281.46**	**$285.18**	**$574.73**	**$2,758.30**
Discounted Transfer Impact										
2 percent	*	$353.08	$406.95	$247.69	$246.88	$245.99	$245.03	$243.40	$480.91	**$2,469.94**
*Federal and State Administrative Costs** ($millions)*										
State Administrative Costs – Implementation	$8.50	$1.76	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	**$10.25**
State Administrative Costs – Ongoing	$0.13	$8.84	$29.63	$30.74	$31.45	$32.17	$32.91	$33.67	$27.72	**$227.26**
State Administrative Costs – Sunsetting	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$10.05	$4.94	**$14.99**
Federal Costs – Implementation	$0.00	$0.01	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	**$0.01**
Federal Costs – Federal Share of State Administrative Expenses	$8.63	$10.60	$29.63	$30.74	$31.45	$32.17	$32.91	$43.72	$32.66	**$252.51**
Federal Costs – Sunsetting	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.01	$0.00	**$0.01**
Total Federal and State Costs* **	**$17.26**	**$21.20**	**$59.26**	**$61.48**	**$62.90**	**$64.34**	**$65.82**	**$87.44**	**$65.33**	**$505.03**
Household Burden Costs ($millions)										
Total Household Burden Costs* **	**$0.19**	**$12.36**	**$41.45**	**$43.00**	**$43.99**	**$45.00**	**$46.04**	**$47.10**	**$42.81**	**$321.95**
Total Estimated Costs (*Federal, State, and Household Costs*)* **	**$17.45**	**$33.56**	**$100.72**	**$104.49**	**$106.89**	**$109.35**	**$111.86**	**$134.53**	**$108.14**	**$826.98**
Discounted Cost Impact										
2 percent	$17.11	$32.26	$94.91	$96.53	$96.81	$97.10	$97.38	$114.82	$90.48	**$737.40**

* Nominal transfer impacts are expected in FY 2023 for provisions of the FRA that went into effect September 1, 2023.

** Federal and State Administrative Costs are estimated post-50 percent federal reimbursement.

*** Totals may not add due to rounding.

effects in this near-term analysis, the Department has used a discount rate of 2 percent. Increases in SNAP benefit payments are categorized as transfers; increases in administrative burden for State agencies, households, and the Federal Government are categorized as costs.

Table 2: Accounting Statement

	Primary Estimate	Year Dollar	Discount Rate	Period Covered
Benefits – Qualitative: The new exceptions from the ABAWD time limit for veterans, individuals experiencing homelessness, and some individuals formerly in foster care will allow these vulnerable populations to retain SNAP eligibility and benefits. In turn, these individuals may not experience an increase in food insecurity or poverty which could have broader societal impacts such as reduced healthcare costs or impacts on other nutrition assistance. Additionally, the proposed rule will ensure consistent application of screening practices across State agencies.				
Annualized Monetized ($millions/year)	N/A	2023	2%	FY 2023-2031
Costs – Administrative: This proposed rule will result in one-time burdens for State agencies and the Federal Government at implementation and at sunset of the provisions within this rule. There will also be ongoing costs to State agencies, the Federal Government, and households throughout the duration of the rule's provisions. Qualitative: Increasing the age of individuals subject to the ABAWD work requirement and time limit will negatively impact those individuals who will become ineligible for SNAP and lose SNAP benefits. In turn, these individuals may experience increases in food insecurity and poverty which could have broader societal impacts such as increased healthcare costs or impacts on other nutrition assistance, such as food banks.				
Annualized Monetized ($millions/year)	$90.34	2023	2%	FY 2023-2031
Transfers – This proposed rule will increase the net amount of benefit payments to SNAP participants.				
Annualized Monetized ($millions/year)	$302.60	2023	2%	FY 2023-2031

In the discussion that follows, there is a section-by-section description of the effects of the proposed rule on SNAP participants, the Federal Government, and State agencies administering SNAP.

III. Background

A. Work Requirements in SNAP

The Food and Nutrition Act of 2008 (the Act), as amended, establishes national eligibility standards for SNAP, including work requirements for certain individuals. The first of these requirements, referred to as the general work requirement, requires individuals between the ages of 16–59 who are able to work to register for work; accept an offer of suitable employment; not voluntarily quit or reduce hours of employment below 30-hours per week, without good cause; and participate in workfare or SNAP Employment and Training (E&T) [29] if required by the State agency. Most SNAP participants are exempt from the general work requirement because they are older adults, children, have a disability, or meet another exemption from the general work requirement listed in the Act.

A subset of individuals who are subject to the general work requirement are also subject to an additional requirement, referred to as the able-bodied adult without dependents (ABAWD) work requirement. Prior to the FRA, individuals subject to the ABAWD work requirement were individuals ages 18 to 49 who do not have a child (under age 18) in their SNAP household and are not considered disabled by SNAP rules.[30] The Act limits individuals who are subject to the ABAWD work requirement and time limit, also referred to as time-limited participants,

[29] The SNAP Employment and Training (E&T) program helps SNAP participants gain skills and find work that moves them forward to self-sufficiency. Depending on whether a State agency operates a mandatory E&T program, individuals in some States may be required to participate in the State's E&T program as a condition of meeting work requirements. Federal funding for SNAP E&T was $384 million in FY 2023.

[30] In SNAP, an individual is considered disabled if they receive federal disability or blindness payments under the Social Security Act, including Supplemental Security Income (SSI), receive state disability or blindness payments based on SSI rules, receive disability retirement benefits from a governmental agency because of a permanent disability, receive an annuity under the Railroad Retirement Act and are eligible for Medicare or are considered disabled under SSI; are a veteran who is totally disabled, permanently homebound, or in need of regular aid and attendance; or are the surviving spouse or child of a veteran who is receiving VA benefits and is considered permanently disabled.

to receiving SNAP benefits for 3 months in a 36-month period (the time limit) unless they are meeting the ABAWD work requirement, live in an area where the time limit is waived due to a lack of sufficient jobs or a high unemployment rate, or are otherwise exempt. If an individual subject to the ABAWD work requirement and time limit receives SNAP benefits in a month when they did not meet the work requirement or otherwise were waived or excepted from the time limit as noted above, that month is considered a ''countable'' month and counts as 1 of the 3 months within the 36-month period where the individual may still retain SNAP eligibility. The Act provides exceptions from the ABAWD work requirement and time limit based on certain individual circumstances, such as physical or mental limitations that limit ability to work, need to care for a dependent household member, pregnancy, or meeting an exemption from the general work requirement. Individuals can meet the ABAWD work requirement by working, participating in a qualifying work program, or any combination of the two, for at least 20 hours per week (averaged monthly to 80 hours per month). Individuals can also meet the ABAWD work requirement by participating in and complying with workfare. For the purposes of meeting the ABAWD work requirement, working includes unpaid or volunteer work that is verified by the State agency.

B. Characteristics of Individuals Subject to the ABAWD Work Requirement and Time Limit

The Department estimates that in FY 2024, approximately 9 percent of SNAP participants are ages 18 to 49 and subject to the ABAWD work requirement, and 84 percent of them are in one-person SNAP households.[31] These time-limited participants have very low household gross income, averaging only 32 percent of the federal poverty line (FPL). For comparison, the average SNAP household has a gross income twice as high, or about 65 percent of the FPL. About 21 percent of time-limited participants are experiencing homelessness at the time of SNAP certification or recertification.[32] Research indicates that time-limited participants who are not meeting the ABAWD work requirement can face significant barriers to finding or increasing their employment. A 2021 USDA study in 9 States found that 5 to 12 percent of SNAP participants subject to the time limit were meeting the work requirement when those States reinstated the time limit after the Great Recession. Participants who were homeless were much less likely to meet the ABAWD work requirement. The study also found the reinstatement of the time limit substantially reduced SNAP participation among individuals subject to the time limit, with no evidence of increased employment or earnings.[33]

C. Factors That Permit Time-Limited Individuals To Continue Participating in SNAP Beyond Three Months

As previously discussed, some individuals who are subject to the ABAWD work requirement may meet an exception from the time limit. The Act also allows for waivers of the time limit in geographic areas with an unemployment rate over 10 percent or an insufficient number of jobs to provide employment for individuals, as defined at 7 CFR 273.24(f). Individuals residing in areas with a waiver of the time limit continue receiving benefits even if they are not meeting the ABAWD work requirement for more than 3 months in a 36-month period. Lastly, the Act establishes an annual allotment of discretionary exemptions that State agencies may use to extend eligibility for a time-limited participant who is not meeting the ABAWD work requirement. Each discretionary exemption can extend eligibility for one participant for one month and a single participant can receive multiple one-month discretionary exemptions. As defined by law, each State agency's allotment of discretionary exemptions is calculated annually by the Department, based on the total number of time-limited participants in the State who have exceeded three countable months due to the time limit in the preceding fiscal year, known as ''covered'' individuals. Prior to the FRA, State agencies' annual allotments of discretionary exemptions were based on 12 percent of the total number of covered individuals in the State. If a State agency did not use the exemptions, they could be carried over indefinitely.

D. FRA Legislative Updates

The FRA [34] amended the Act, revising the definition of who is subject to the ABAWD work requirement and time limit, exceptions from the time limit, procedures for the calculation and carryover of discretionary exemptions, as well as the program purpose. Based on these changes, the Department is proposing to amend the regulations to reflect the requirements of the FRA. The FRA also required the Department to publicize all available State requests for waivers authorized by Sec. 6(o)(4)(A), including supporting data, and all Department approvals of waivers within 30 days of enactment. The Department complied with this requirement and is not proposing rulemaking relating to this provision.

E. Baseline and Time Horizon of Analysis

Our baseline for measuring the costs, benefits, and transfers associated with this proposed rule is the Department's estimated SNAP participation and benefit spending for FYs 2023–2031, shown in Table 3 below. The baseline represents the Department's best estimate of SNAP participation and spending (in nominal dollars) in the absence of the provisions included in this proposed rule. All costs related to administrative burden for State agencies, the Federal Government and households are measured against currently approved burden estimates in OMB Control No. 0584–0479.

This regulatory impact analysis (RIA) uses FY 2023–FY 2031 as the timeframe for analysis because this range fully incorporates the implementation and sunsetting periods of FRA provisions. A 9-year analysis period (rather than a more typical 5-year or 10-year period) is used to align with the implementation period established by the FRA, beginning in September 2023. While some of the provisions included in the FRA and in the proposed rule will be ongoing, others are expected to sunset at the start of FY 2031. As a portion of SNAP participants will not be affected by the sunset immediately upon the start of the fiscal year, but rather at their screening that will take place during FY 2031, the Department expects there will be some continuing transfer impacts in FY 2031, as well as administrative costs associated with the sunsetting of certain provisions in FYs 2030 and 2031. Thus, the Department determined that the period FY 2023–FY 2031 is the appropriate period to assess the proposed rule's economic effects.

[31] Note: The Department estimates that individuals subject to the ABAWD work requirement are a larger share of the caseload than would be suggested by the most recent SNAP QC data available (from pre-pandemic FY 2020). This is due to the extended suspension of the ABAWD time limit during the COVID–19 Public Health Emergency by the Families First Coronavirus Response Act (FFCRA). While the pre-pandemic FY 2020 QC data suggests this group accounts for 7.3 percent of SNAP participants, the Department believes 9 percent is a more accurate estimate for the start of FY 2024. This estimate is based on caseload trends in the wake of the Great Recession when the time limit was similarly temporarily lifted by the American Recovery and Reinvestment Act of 2009.

[32] Based on tabulation of pre-pandemic FY 2020 SNAP QC data.

[33] Wheaton, Laura et al. (2021) *The Impact of SNAP Able-Bodied Adults Without Dependents (ABAWD) Time Limit Reinstatement in Nine States.* Prepared by the Urban Institute for the USDA Food and Nutrition Service, 2021. Available at: *https://www.fns.usda.gov/snap/impact-snap-able-bodied-adults-without-dependents-abawd-time-limit-reinstatement-nine.*

[34] Full text of the law can be found at: *https://www.congress.gov/bill/118th-congress/house-bill/3746/text.*

Table 3: Estimated SNAP Participation and Benefit Baseline[35]

	FY 2023	FY 2024	FY 2025	FY 2026	FY 2027	FY 2028	FY 2029	FY 2030	FY 2031
Participation (000s)	42,390	42,925	42,092	41,703	41,377	41,026	40,666	40,161	39,538
Benefits (nominal $millions)	104,349	108,301	110,203	112,213	114,384	116,687	118,801	120,666	122,089

F. Methodology

Multiple data sources were used to estimate how the provisions in the proposed rule would affect SNAP participants, State agencies, and the Federal Government. Methodology and estimates are discussed in this section, according to the data source used. To estimate the effects of the proposed rule's provisions, the proportion of SNAP participants likely to be affected by each provision was derived from the following data sources. Those ratios were then applied to the Mid-Session Review of the FY 2024 President's Budget baseline for SNAP spending and participation to produce estimates of changes in participation and benefit spending (in nominal dollars) for future years. These were the most recent baseline inputs available at the time this analysis was prepared.

SNAP Quality Control Data

The estimates provided in this RIA are primarily based on SNAP Quality Control (QC) data from the pre-pandemic portion of FY 2020,[36] and the SNAP baseline included in Table 3. At the time of analysis, this is the most recent period for which the Department has QC data from all 53 State agencies due to interruptions in QC data collection during the COVID–19 Public Health Emergency. SNAP QC data are collected annually as part of the ongoing effort to determine the accuracy of SNAP certification actions.[37] Data are collected for a sample of SNAP households that is statistically representative at both the national and state levels. The pre-pandemic FY 2020 QC dataset includes data from 18,319 households, including information on household earnings, household composition, and participant characteristics that permit inference of ABAWD status (*e.g.,* age, disability status, presence of children in the SNAP household, and whether the individual is exempt from the SNAP general work requirement). The data also include information that can be used to infer employment status (*e.g.,* amount of monthly earned income). The sample of households included in the pre-pandemic FY 2020 dataset are weighted to be representative of the SNAP caseload during that period nationally and in each State.

Estimates derived from the QC data include:

50–54-Year-Olds Newly Subject to the ABAWD Work Requirement and Time Limit

- Share of SNAP participants that are likely to be newly subject to the ABAWD work requirement and time limit due to the FRA's change to include 50-to-54-year-olds (2.0 percent of total SNAP participants). Among this group, we estimated:
  - The share that are likely meeting the ABAWD work requirement, based on information about employment status and earnings (10.6 percent).
  - The share that are likely to increase their work hours in order to begin meeting the ABAWD work requirement, based on earnings information (2.28 percent). Specifically, this estimate is based on the share of individuals who were estimated to work 15–19 hours per week.
  - The share that are likely to be excepted from the ABAWD work requirement for reasons other than the three new exceptions temporarily established by the FRA (*e.g.,* a physical or mental limitation that limits ability to work) because they are exempt from the general work requirement for a reason other than disability (33 percent).
  - The average monthly per person benefit received by individuals in this group (26.6 percent of the Thrifty Food Plan (TFP)).

New Exception for Homelessness

- Share of time-limited participants (between the ages of 18–54) who are also experiencing homelessness (20.6 percent). Among this group, we estimated:
  - The share that are likely meeting the ABAWD work requirement, based on information about employment status and earnings (2.7 percent).
  - The share that are likely to increase their work hours in order to begin meeting the ABAWD work requirement (1 percent).[38] Because these individuals would begin meeting the ABAWD work requirement, they are removed from the pool of individuals we estimate would receive an exception from the time limit.
  - The share that are likely to be excepted from the ABAWD work requirement for reasons other than the three new exceptions temporarily established by the FRA (*e.g.,* a physical or mental limitation that limits ability to work) because they are exempt from the general work requirement for a reason other than disability (32 percent).
  - The average monthly per person benefit received by individuals in this group (29.9 percent of the TFP).

Estimation of New SNAP Participation Based on the New FRA Exceptions

- To estimate the likely increase in SNAP participation as a result of the new exceptions in place, the Department estimated a 1 percent increase in the share of childless adults without disabilities between the ages of 18 and 49 in the SNAP baseline. This modest estimate is based on the fact that the FRA provisions went into effect at a time when many areas had waivers of the time limit due to high unemployment rates that occurred during the COVID–19 pandemic. Hence, many of these individuals made eligible by the new exceptions may have already been participating in SNAP.

Changes in the Share of the Time-Limited SNAP Participants Between FY 2020 and FY 2024

- The Department believes the number of time-limited SNAP participants increased between the period for which we have SNAP QC data (pre-pandemic FY 2020) and the end of FY 2023, when the FRA's provisions began to take effect. This is due to the temporary suspension of the ABAWD time limit for the duration of the COVID–19 Public Health Emergency authorized by the Families First Coronavirus Response Act (FFCRA).
- Given that time-limited participants largely did not accrue countable months prior to July 2023 due to the temporary suspension of the ABAWD time limit during the pandemic, the Department believes time-

[35] Each year as part of the process of developing the President's Budget, the Department produces estimates of expected SNAP participation and benefit spending over a ten-year period. Estimates in this Regulatory Impact Analysis are based on Department Estimates for the Mid-Session Review of the FY 2024 President's Budget; benefit values for FY 2023 reflect certified benefit amounts (excluding emergency allotments authorized during the COVID–19 Public Health Emergency).

[36] SNAP QC data from the pre-pandemic period covers October 2019 to February 2020, as data collection after February 2020 was limited by the COVID–19 public health emergency.

[37] Detailed information on the QC review process, including sampling requirements and procedures for conducting QC reviews, can be found on the FNS website at: *http://www.fns.usda.gov/snap/quality-control.*

[38] Note: We use 1 percent for this group, rather than 2.28 percent, based on the assumption that individuals experiencing homelessness will face greater challenges in increasing their work hours due to unstable housing, transportation barriers, inconsistent access to hygiene materials or professional clothing, and other challenges related to homelessness, as described by sources such as the Urban Institute (*https://www.urban.org/urban-wire/why-it-so-hard-people-experiencing-homelessness-just-go-get-job,*), the National Alliance to End Homelessness (*https://endhomelessness.org/resource/overcoming-employment-barriers/*), and the University of Michigan School of Public Health (*https://sph.umich.edu/pursuit/2020posts/homelessness-and-job-security-challenges-and-interventions.html*).

limited participants were a larger share of total participants at the end of FY 2023 and beginning of FY 2024 than indicated by the pre-pandemic FY 2020 QC data (7.3 percent) when fewer geographic areas had waivers of the time limit.

- The Department opted to use FY 2013 SNAP QC data as a proxy estimate for increased participation by time-limited individuals. In 2009, the time limit was similarly suspended nationwide for an extended period by the American Recovery and Reinvestment Act of 2009 and most States continued to qualify for and use Statewide waivers through FY 2013 due to high unemployment rates that lingered after the Great Recession. FY 2013 SNAP QC data indicate that time-limited participants were 9.0 percent of total SNAP participants.
- Correspondingly, the Department assumed that time-limited participants ages 18–49 make up a larger share of participants (9.0 percent) at the start of FY 2024, before declining to back to 7.3 percent of participants in FY 2025 and subsequent years as was seen in pre-pandemic FY 2020 when unemployment rates were lower. This adjustment was not made to time-limited participants ages 50–54 because their share of total participants was similar in the FY 2013 and pre-pandemic FY 2020 QC data.

Veterans' Participation in SNAP and ABAWD Status From American Community Survey (ACS) Data

Given that the SNAP QC data do not include information about veteran status, the Department relied on 2022 American Community Survey (ACS) data to estimate how many individuals participating in SNAP may be subject to the ABAWD work requirement *and* are veterans. The ACS data were tabulated to determine how many individuals in the U.S. have prior military service, are between the ages of 18–54, participate in SNAP, do not have a disability,[39] and do not have a child in their household.[40] Compared to the total number of individuals reporting SNAP participation in the 2022 ACS, this resulted in an estimate that 0.22 percent of SNAP participants may be eligible for the new exception from the ABAWD time limit for veterans. Without data on how many of these veterans would be exempt from the ABAWD work requirement for reasons other than the three new exceptions temporarily established by the FRA (*e.g.,* a physical or mental limitation that limits ability to work), we assume the same share as time-limited participants ages 18 to 49 (32 percent).

Without data on average monthly per person benefits for time-limited participants who are also veterans, we assume that they receive the same average benefit as 18-to-54-year-old time-limited participants who are not working at least 20 hours per week (25.9 percent of the TFP).

Former Foster Youths' Participation in SNAP From Administration for Children and Families (ACF)

The SNAP QC data do not include information about participants that were formerly in the foster care system. The Department was unable to find a national survey that would permit it to estimate how many former foster youth between the ages of 18–24 participate in SNAP, nor to determine the share who may be considered subject to the ABAWD work requirement and time limit. In the absence of reliable data, the Department generated an estimate based on information available from the Administration for Children and Families (ACF) on how many youth age out of the foster care system each year, nationally. ACF indicates that about 20,000 youth emancipate from foster care each year,[41] resulting in a total cohort of 18–24-year-old former foster youth of up to 140,000 individuals. We adjusted the 140,000 cohort size downward to reflect the fact that about 68 percent of the U.S. population lives in States that have opted to provide foster care up to age 21,[42] so there are likely proportionally fewer 18-to-20-year-olds in the total former foster youth population. The adjustment resulted in an estimate that 99,000 former foster youth could fall into the 18–24 age group that would be eligible for the new exception from the time limit.

However, not all 99,000 individuals would participate in SNAP and be considered subject to the ABAWD work requirement. Using the best-available data and research on former foster youth outcomes, the Department assumes that approximately 65 percent of individuals in this group may be SNAP-ineligible, are already meeting the ABAWD work requirement, or are not subject to the ABAWD work requirement (for reasons that can include being a student, having a child in their household, or having a disability).[43] In the absence of precise data to inform the estimate, the Department estimated that the remaining 35 percent of this group will benefit from the new exception (about 35,000 individuals per year).

Without data on average monthly per person benefits for time-limited participants who are also former foster youth up to age 24, we assume that they receive the same average monthly benefit as 18-to-49-year-old time-limited participants who are not working at least 20 hours per week (25.7 percent of the TFP).

SNAP ABAWD Waiver Coverage and ACS Data on Low-Income Population

Waivers of the ABAWD time limit play a significant role in determining the number of participants who are subject to the time limit at any given time. The Department determined it was necessary to estimate the share of time-limited participants who are likely to live in a waived area to more accurately determine how many individuals would lose or retain eligibility annually due to the FRA. Without this adjustment, estimates would overstate both the increase in transfers associated with time-limited participants retaining SNAP eligibility because of the new exceptions, and the decrease in transfers associated with individuals ages 50–54 newly becoming subject to the ABAWD work requirement and time limit, and subsequently losing eligibility.

Internal analyses were conducted to estimate the share of participants subject to the ABAWD work requirement likely to live in a waived area at two different points in time, based on the assumption that FY 2023 would have a higher level of waiver coverage, declining to stabilize at a lower rate in FY 2026:

(1) Quarter 2 of FY 2023, to reflect a ''high'' degree of waiver coverage as FRA provisions began to go into effect, when many State agencies still had statewide waivers of the time limit due to high unemployment rates that occurred during the COVID–19 pandemic; and

(2) Quarter 1 of FY 2020, to reflect a ''low'' degree of waiver coverage that occurred in the pre-pandemic months, after an extended period of relatively low unemployment rates nationally.

To conduct these analyses, we identified the local areas covered by FNS-approved waivers[44] of the ABAWD time limit in each of the two above-noted time periods. Then, ACS data were used to determine the share of the low-income population (defined as below 125 percent of the FPL) in the U.S. that lived in those waived areas; the low-income population was used as a proxy for SNAP participants. The results of these analyses indicated that in a period of ''high'' waiver coverage, 55 percent of SNAP participants likely live in an area with a waiver of the time limit, and in periods of ''low'' waiver coverage, about 40 percent of SNAP participants likely live in an area with a waiver of the time limit. Additionally, analysis of SNAP QC data on the distribution of participants aged 50–54 indicates that the share of SNAP participants who live in an area with a waiver is about 10 percentage points lower, compared to those aged 18–49 years. Thus, we assume waiver coverage

[39] As defined in SNAP rules.

[40] The ACS variables used to create this tabulation were: DRATX (''Veteran service connected disability rating''); HUPAC_RC1 (''HH presence and age of children recode''); FS (''Yearly food stamp/Supplemental Nutrition Assistance Program (SNAP) recipiency''); MIL_RC1 (''Military service recode''); SSIP_RC1 (''Supplementary Security Income past 12 months recode''); and AGEP_RC1 (''Age recode'').

[41] The United States Department of Health and Human Services, Administration for Children and Families publishes an annual Adoption and Foster Care Analysis and Reporting System (AFCARS) Report. The most recent report uses FY 2021 data. *https://www.acf.hhs.gov/sites/default/files/documents/cb/afcars-report-29.pdf.*

[42] This estimate is based on information in ''States with Approval to Extend Care Provide Independent Living Options for Youth up to Age 21'' from the Government Accountability Office, *https://www.gao.gov/assets/gao-19-411.pdf.*

[43] Sources informing this estimate include: The Annie E. Casey Foundation, *https://www.aecf.org/resources/future-savings;* Chapin Hall at the University of Chicago, *https://www.chapinhall.org/wp-content/uploads/Midwest-Eval-Outcomes-at-Age-26.pdf;* the United States Department of Agriculture, *https://www.fns.usda.gov/snap/characteristics-snap-households-fy-2020-and-early-months-covid-19-pandemic-characteristics;* and ABAWD Waiver coverage rates, *https://www.fns.usda.gov/snap/ABAWD/waivers.*

[44] All FNS-approved ABAWD Waivers are publicly-available at *https://www.fns.usda.gov/snap/ABAWD/waivers.*

among those aged 50–54 years was 10 percentage points lower than those aged 18–49 years who are subject to the ABAWD work requirement. The Department assumed that FY 2023 would have ''high'' waiver coverage and would decline each year to reach ''low'' waiver coverage in FY 2026.

State-Reported Data on Discretionary Exemption Usage

To assess the effects of the FRA's provisions limiting States agencies' discretionary exemption allotments to 8 percent of covered individuals and preventing carryover of unused exemptions beyond one fiscal year, the Department examined State agency-reported data on discretionary exemption usage. States are required to provide this data to the Department on an annual basis. The Department examined data from FY 2016–FY 2019 to understand how many exemptions States typically use. Those data indicated that State agencies typically use less than an 8 percent allotment of discretionary exemptions. The four-year period FY 2016–FY 2019 was used to represent a multi-year period during which the time limit was not lifted nationally.

Estimating the Value of State Agency, Federal, and Participant Burden

Cost estimates in this RIA account for increased burden for State agencies, the Federal Government, and SNAP participants. Hourly labor rates used to monetize burden hours in this analysis align with those presented in the proposed rule's burden table:

- *State agency program staff:* FY 2023 fully-loaded labor rate is $31.48. This is based on Bureau of Labor Statistics (BLS) May 2022 estimates of the median hourly wage rate for occupation code 21–1090, Miscellaneous Community and Social Service Specialists ($23.67) multiplied by 1.33 to represent fully-loaded wages.
- *State agency program manager:* FY 2023 fully-loaded labor rate is $51.18. This is based on BLS May 2022 estimates of the median hourly wage rate for occupation code 11–9151, Social and Community Service Managers ($38.48) multiplied by 1.33 to represent fully-loaded wages.
- *State agency computer developers:* FY 2023 fully-loaded labor rate is $52.69. This is based on BLS May 2022 estimates of the median hourly wage rate for occupation code 15–0000, Computer and Mathematical Operations ($39.62) multiplied by 1.33 to represent fully-loaded wages.
- *Federal program analyst:* FY 2023 fully-loaded labor rate is $71.38. This is based on OPM 2023 salary data for the Washington-Baltimore-Arlington, DC–MD–WV–PA locality pay region for a GS–13 Step 1 employee ($53.67) multiplied by 1.33 to represent fully-loaded wages.
- *Federal supervisory analyst*: FY 2023 fully-loaded labor rate is $84.36. This is based on OPM 2023 salary data for the Washington-Baltimore-Arlington, DC–MD–WV–PA locality pay region for a GS–14 Step 1 employee ($63.43) multiplied by 1.33 to represent fully-loaded wages.
- *Federal division director:* FY 2023 fully-loaded labor rate is $99.22. This is based on OPM 2023 salary data for the Washington-Baltimore-Arlington, DC–MD–WV–PA locality pay region for a GS–15 Step 1 employee ($74.60) multiplied by 1.33 to represent fully-loaded wages.
- *SNAP participants:* FY 2023 labor rate is $22.02. This is based on the Current Population Survey (CPS) FY 2023 median weekly wage for full-time and salary workers, ages 16 and up ($1,101/week, divided by 40 hours to produce an hourly rate of $27.525). Because burden on SNAP participants reflects activities, like completing SNAP forms, that occur outside of an employment setting, the hourly rate derived from the weekly wage is discounted by 20 percent to remove the value of taxes and other work-related costs, resulting in $22.02.

The labor rates presented above are inflated for estimates of burden costs in future years using CPI–W projections from the Office of Management and Budget's (OMB) FY 2025 President's Budget Economic Assumptions. All administrative expense estimates presented in this RIA are based on labor rates that have been inflated based on CPI–W projections.

IV. Section-by-Section Analysis

The increases and decreases in SNAP benefit transfers, administrative costs, and burden hours associated with each provision of the proposed rule are discussed separately in this section of the RIA. Throughout the section-by-section analysis, FY 2026 is used as a reference year to provide an indication of the proposed rule's effect after all provisions have been phased-in.

A. Requirement To Add Purpose Language to the Food and Nutrition Act of 2008

Discussion: This provision of the FRA requires the Department to add the following program purpose to The Act: ''That program includes as a purpose to assist low-income adults in obtaining employment and increasing their earnings. Such employment and earnings, along with program benefits, will permit low-income households to obtain a more nutritious diet through normal channels of trade by increasing food purchasing power for all eligible households who apply for participation.'' The Department proposes adding this language as an addition to 7 CFR 271.1(a), where the general purpose and scope of SNAP are defined.

Effect on SNAP Participants: As this provision is administrative, the Department expects it will not impact program participants in a quantifiable way.

Effect on State Agencies: The Department expects no State agency burden to be incurred as a direct result of this provision.

Effect on Federal Spending: The Department expects no changes in federal administrative costs or transfers to be incurred as a direct result of this provision.

B. Requirement To Update Exceptions From the ABAWD Time Limit

There are four components that comprise this provision, which expands the category of individuals subject to the ABAWD work requirement and time limit by adjusting the upper age limit from 49 to 54, on a phased-in timeline between September 2023 to October 2024, as well as creates three new categories of exceptions from the ABAWD time limit. All components of this provision will sunset on October 1, 2030, pending any future legislative changes.

Changes to Age-Based Exceptions

Discussion: This provision gradually raises the upper age limit defining who is subject to SNAP's ABAWD work requirement from age 49 to age 54, thereby expanding the group of SNAP participants who are subject to the time limit. Specifically, the upper age limit changed from age 49 to age 50 on September 1, 2023; from age 50 to age 52 on October 1, 2023; and will change from age 52 to age 54 on October 1, 2024. Upon full phase-in of these adjustments, the ABAWD time limit will apply to adults aged 18 through 54 until the sunset of this provision on October 1, 2030. This provision will sunset immediately on October 1, 2030, and is not subject to a phase-out period in FY 2031.

Only individuals aged 50 to 54 who do not qualify for an exception from the ABAWD time limit (such as a physical or mental condition that limits ability to work, need to care for a dependent household member, or meeting an exemption from the general SNAP work requirement) would be newly considered subject to the ABAWD time limit.

Effect on SNAP Participants: The Department expects the changes to the age-based exception to decrease program participation among SNAP participants ages 50 to 54 who are newly subject to the ABAWD work requirement and time limit from implementation in FY 2023 until sunset of the provision. If these individuals are not able to meet the ABAWD work requirement, the time limit will take effect and they will lose program eligibility after 3 months of SNAP participation per 36-month period unless that individual qualifies for an exception, receives a discretionary exemption, or lives in an area with a waiver of the time limit.

In FY 2026, when this provision is fully implemented, the Department (using SNAP QC data) estimates 1.8 percent of all SNAP participants, approximately 753,000 individuals (450,000 individuals ages 50 to 52, and 302,000 individuals ages 53 to 54) may be impacted by the age adjustments and be newly subject to the ABAWD work requirement and time limit because they meet the new definition of an ABAWD and are not working 20 or more hours per week.

The Department estimates that a small share (about 2.3 percent) of these individuals will be able to gain or increase their employment to at least 20 hours per month to retain SNAP eligibility. The Department based this estimate on the share of these individuals that are estimated to work at least 15 hours but less than 20 hours per week. As a result of the increased work hours, SNAP benefits for these individuals will decrease by an average of $121 per month in FY 2026. This small share of new individuals (about 17,000 people in FY 2026) subject to the ABAWD time limit will not lose SNAP eligibility because of the time limit.

The Department estimates that 33 percent of the remaining individuals will qualify for an exception from the ABAWD work requirement and time limit for reasons other

than the three new exceptions temporarily established by the FRA (*e.g.,* a physical or mental condition that limits ability to work) because they are exempt from the SNAP general work requirement for a reason other than disability.

Finally, the Department estimates that approximately 30 percent of the remaining individuals ages 50 to 54 will live in areas covered by a waiver of the time limit and, therefore, will not be subject to the time limit.

After these adjustments discussed above, in FY 2026 the Department estimates 345,000 individuals will lose SNAP eligibility and an average of $272 per month in SNAP benefits due to the change in the upper age limit. Individuals who lose eligibility due to the time limit may rejoin SNAP after the expiration of the 36-month period or sooner by meeting the ABAWD work requirement, though a 2021 USDA study on the ABAWD time limit suggests employment outcomes are unlikely to improve among those who lose eligibility due to the time limit. The primary results in the study found that the ABAWD time limit has a small, statistically significant negative impact on employment outcomes.[45] A sensitivity analysis among a smaller group of time-limited participants in this study showed no statistically significant impact of the ABAWD time limit on employment in two States and a small positive impact on employment in a third State. Therefore, the Department estimates that very few individuals who lose SNAP eligibility will be able to increase their work hours to regain SNAP eligibility within the 36-month period, particularly in light of the barriers adults over the age of 50 can face in re-entering the job market such as employer age discrimination, increased likelihood on health challenges, and lack of training opportunities, among other reasons.[46]

At full implementation in FY 2026, the Department estimates that benefit losses among 50-to-54-year-olds newly subject to the ABAWD time limit will represent a 0.94 percent reduction in total annual SNAP benefit spending (transfers), or about $1.1 billion. The Department estimates federal transfers to decrease over the nine-year analysis period of FY 2023 to FY 2031 by a total of $6.5 billion because of this provision.

In addition to the direct impacts discussed above, there are additional secondary impacts which are difficult to quantify. The individuals who will lose eligibility for SNAP benefits are likely to experience hardship through increased food insecurity or poverty. This, in turn, could have societal impacts through increased healthcare costs related to increases in food insecurity and poverty or impacts on other nutrition assistance, including food banks. The Department notes that while there are studies that describe the relationships between SNAP, food security, poverty, and health care costs, these studies do not permit estimation of potential impacts on transfers specific to the dispersed ABAWD population that might be affected by this proposed rule.

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[45] Wheaton, Laura et al. (2021) *The Impact of SNAP Able-Bodied Adults Without Dependents (ABAWD) Time Limit Reinstatement in Nine States.* Prepared by the Urban Institute for the USDA Food and Nutrition Service, 2021. Available at: *https://www.fns.usda.gov/snap/impact-snap-able-bodied-adults-without-dependents-abawd-time-limit-reinstatement-nine.*

[46] Thomassen K, Sundstrup E, Skovlund SV, Andersen LL. Barriers and Willingness to Accept Re-Employment among Unemployed Senior Workers: The SeniorWorkingLife Study. Int J Environ Res Public Health. 2020 Jul 25;17(15):5358. doi: 10.3390/ijerph17155358. PMID: 32722360; PMCID: PMC7439115.

Table 4: Participation and Federal Transfer Impacts of Changes to Age-Based Exceptions

Time-Limited Participants Ages 50 to 54 Losing Eligibility	Percent of Group	FY24	FY25	FY26	FY27	FY28	FY29	FY30	FY31^	Total Cost
Time-limited participants ages 50 to 54 not working 20+ hours per week (000s)		-464	-760	-753	-747	-740	-734	-725	N/A	
Adjust for phase-in at certification/recertification**		232	153							
Increase work hours to 20+ hours per week	2.28%	5	14	17	17	17	17	17	N/A	
Already receiving exception (e.g., unfit for work)	33%	75	196	243	241	239	237	234	N/A	
Share that reside in area with time limit waiver		40%	35%	30%	30%	30%	30%	30%	N/A	
Reside in area with time limit waiver		61	139	148	147	145	144	142	N/A	
Total time-limited participants ages 50 to 54 estimated to lose eligibility due to changes to age-based exceptions*		**-91**	**-258**	**-345**	**-342**	**-339**	**-336**	**-332**	**0**	
	Share of TFP									
Benefit loss for those losing eligibility	26.6%	-$259	-$265	-$272	-$278	-$284	-$291	-$297	N/A	
Benefit decline for those who increase work hours	11.9%	-$116	-$118	-$121	-$124	-$127	-$130	-$133	N/A	
Average months of benefit loss per year for those losing eligibility		11	11	11	11	11	11	11	N/A	
Total Savings from time-limited participants ages 50 to 54 losing eligibility/benefits ($millions)*		**-$267**	**-$774**	**-$1,055**	**-$1,071**	**-$1,086**	**-$1,101**	**-$1,113**	**$0**	**-$6,468**

* Totals may not add due to rounding

** This row reduces the total number of participants by the proportion that is not impacted during years in which the provisions phase-in.

^ The age group shown in this table is no longer subject to the ABAWD time limit in FY 2031 because the provision will sunset on October 1, 2030.

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New Exceptions

In addition to expanding the group of individuals subject to the ABAWD work requirement and time limit, the FRA provides new exceptions from the time limit for individuals experiencing homelessness, who are veterans, or individuals through age 24 who were participating in foster care on their 18th birthday (or higher age if the State offers extended foster care to a higher age). Below each of these new exceptions is analyzed individually. The impact of the new exceptions on federal transfers and on SNAP participants will be itemized within discussion of each exception, while the aggregate impacts on transfers, federal burden, State agency burden, and SNAP participant burden will be summarized after the discussion of each new exception.

Individuals Experiencing Homelessness

Discussion: Prior to the FRA, individuals who were experiencing homelessness and not meeting the ABAWD work requirement could only continue to participate in SNAP after accruing three countable months if the State agency chose to use the State's allotment of discretionary exemptions to provide the individual with an exception from the time limit on a month-by-month basis (until the State has depleted its allotment of discretionary exemptions). A State agency may also consider an individual experiencing homeless to be ''unfit for work,'' and thereby exempt from the general work requirement and thus the ABAWD time limit.

The FRA provides exceptions from the time limit for individuals experiencing homeless. To consistently implement this provision nationwide, the Department is proposing to standardize the definition of a ''homeless individual'' at 7 CFR 271.2 as follows:

''*Homeless individual* means

(1) An individual who lacks a fixed and regular nighttime residence, including, but not limited to, an individual who will imminently lose their primary nighttime residence, provided that primary nighttime residence will be lost within 14 days, no subsequent housing has been identified and the individual lacks support networks or resources needed to obtain housing; or

(2) An individual whose primary nighttime residence is:

(i) A supervised shelter designed to provide temporary accommodations (such as a welfare hotel or congregate shelter);

(ii) A halfway house or similar institution that provides temporary residence for individuals intended to be institutionalized;

(iii) A temporary accommodation for not more than 90 days in the residence of another individual; or

(iv) A place not designed for, or ordinarily used, as a regular sleeping accommodation for human beings (a hallway, a bus station, a lobby or similar places).''

Prior to the FRA, State SNAP agencies were already required to screen for households experiencing homelessness to identify households eligible for the homeless shelter deduction. Using SNAP QC data, the Department estimates that approximately 3.2 percent of all SNAP participants experience homelessness. However, SNAP participants subject to the ABAWD time limit are much more likely to experience homelessness. In the most recent data available to the Department 20.6 percent of time-limited participants experience homelessness.[47]

In FY 2026 when this provision is fully implemented, the Department (using SNAP QC data) estimates 1.8 percent of all SNAP participants, approximately 766,000 individuals (615,000 individuals ages 18 to 49, and 151,000 individuals ages 50 to 54) experiencing homelessness may be affected by the new exception from the ABAWD work requirement and time limit because they meet the definition of a time-limited participant and are not working 20 or more hours per week.

The Department estimates that a small share (about 1 percent) of these individuals will be able to gain or increase their employment to at least 20 hours per week to retain SNAP eligibility. Compared to the general population of time-limited participants in SNAP, fewer participants who are experiencing homelessness are meeting the work requirement in the QC data. Additionally, individuals experiencing homelessness can face substantial barriers to gaining or retaining employment, including poor access to transportation, poor access to health care, and stigma against individuals experiencing homelessness. Therefore, the Department believes the share of time-limited individuals who are experiencing homelessness that will be able to increase their work hours is likely smaller than the 2.3 percent observed amongst all time-limited participants in the SNAP QC data.

The Department estimates that 32 percent of the remaining individuals will be excepted from the ABAWD work requirement and time limit for reasons other than the three new exceptions temporarily established by the FRA (*e.g.,* a physical or mental condition that limits ability to work) because they are exempt from the general work requirement for a reason other than disability. Finally, the Department estimates that approximately 40 percent of the remaining individuals will live in areas covered by a waiver of the time limit and, therefore, would not be subject to the time limit in absence of this provision.

After these adjustments discussed above, in FY 2026 the Department estimates 309,000 individuals experiencing homelessness between the ages of 18 and 54 will retain SNAP eligibility beyond 3 months in a 36-month period (averaging to 11 months of benefits gained per individual per year) and continue receiving an average of $305 per month, per person, in SNAP benefits because of the new exception for individuals experiencing homelessness. At full implementation in FY 2026, this represents a 0.92 percent increase in total annual SNAP benefit spending (transfers), or about $1.0 billion. The Department estimates federal transfers to increase over the nine-year period of FY 2023 to FY 2031 by a total of $7.3 billion because of this new exception for individuals experiencing homelessness.

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[47] This estimate includes 50-to-54-year-olds newly subject to the ABAWD work requirement and time limit.

Table 5: Participation and Federal Transfer Impacts of New Exception for Individuals Experiencing Homelessness

INDIVIDUALS EXPERIENCING HOMELESSNESS	Percent of Group	FY24	FY25	FY26	FY27	FY28	FY29	FY30	FY31	Total Cost
Homeless time-limited participants ages 18 to 49 not working 20+ hours per week (000s)		937	621	615	610	605	600	592	583	
Adjust for phase-in at certification/recertification and phase-out**		-469							-292	
Increase work hours to 20+ hours per week	1.00%	-5	-6	-6	-6	-6	-6	-6	-3	
Already receiving exception (e.g., pregnant, unfit for work)	32%	-148	-197	-195	-193	-192	-190	-188	-92	
Share that reside in area with time limit waiver		50%	45%	40%	40%	40%	40%	40%	40%	
Reside in area with time limit waiver		-158	-188	-166	-164	-163	-162	-160	-79	
Total homeless time-limited participants ages 18 to 49 estimated to retain eligibility*		158	230	248	247	244	242	239	118	
Homeless time-limited participants ages 50 to 54 not working 20+ hours per week (000s)		93	152	151	149	148	147	145	N/A	
Adjust for phase-in at certification/recertification**		-46								
Increase work hours to 20+ hours per week	1.00%	0	-2	-2	-1	-1	-1	-1	N/A	
Already receiving exception (e.g., unfit for work)	32%	-15	-48	-48	-47	-47	-46	-46	N/A	
Share that reside in area with time limit waiver		50%	45%	40%	40%	40%	40%	40%	N/A	
Reside in area with time limit waiver		-16	-46	-41	-40	-40	-40	-39	N/A	
Total homeless time-limited participants ages 50 to 54 estimated to retain eligibility*		16	56	61	60	60	59	59	N/A	
TOTAL Homeless Time-Limited Participants Ages 18 to 54 Retaining Eligibility*		**173**	**286**	**309**	**307**	**304**	**302**	**298**	**118**	
	Share of TFP									
Benefit gain for those retaining eligibility	29.9%	$291	$298	$305	$312	$319	$326	$334	$342	
Months of benefit gain per year for those retaining eligibility		11	11	11	11	11	11	11	11	
Total Cost from Homeless Time-Limited Participants ages 18 to 54 Retaining Eligibility ($millions)*		**$555**	**$938**	**$1,037**	**$1,053**	**$1,068**	**$1,083**	**$1,094**	**$443**	**$7,271**

* Totals may not add due to rounding

** This row reduces the total number of participants by the proportion that is not impacted during years in which the provisions phase-in and phase-out.

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Veterans

Discussion: The FRA additionally provides a new exception from the ABAWD time limit for time-limited participants who are veterans. No previous unique work requirement exceptions have been applied to veterans in SNAP. To implement this change, the Department identified the need to standardize a definition of who is considered a veteran. The Department proposes to define veteran at 7 CFR 273.34(c)(8) as an individual who, regardless of the conditions of their discharge or release from, served in the United States Armed Forces (such as the Army, Marine Corps, Navy, Air Force, Space Force, Coast Guard, and National Guard), including an individual who served in a reserve component of the Armed Forces, or served as a commissioned officer of the Public Health Service, Environmental Scientific Services Administration, or the National Oceanic and Atmospheric Administration.

Effect on SNAP Participants: The Department does not collect information on SNAP applicants' and participants' military service history, so it is unable to precisely estimate how many SNAP participants may benefit from the veteran exception. Based on data from the 2022 ACS, the Department estimates 2.5 percent of SNAP participants are veterans, but a much smaller share (0.22 percent) may be veterans who are subject to the ABAWD work requirement and time limit.

In FY 2026, when the FRA's provisions are fully implemented, the Department estimates approximately 92,000 individuals (63,000 individuals between the ages of 18 and 49 and 29,000 individuals ages 50 to 54) are veterans that may be affected by the new exception to the ABAWD work requirement and time limit because they meet the definition of a time-limited participant and are likely not working 20 or more hours per week.

The Department estimates that 32 percent of these individuals will qualify for an exception from the ABAWD work requirement for reasons other than the three new exceptions temporarily established by the FRA (*e.g.,* a physical or mental condition that limits ability to work) because they are exempt from the SNAP general work requirement for a reason other than disability.

Finally, the Department estimates that approximately 40 percent of remaining individuals ages 18 to 49 and 30 percent of the remaining individuals ages 50 to 54 will live in areas covered by a geographic waiver of the time limit and, therefore, will not be subject to the time limit.

After these adjustments discussed above, in FY 2026 the Department estimates 39,000 individuals who are veterans between the ages of 18 and 54 will retain SNAP eligibility beyond 3 months in a 36-month period (averaging to 11 months of benefits gained per individual per year) and continue receiving an average of $264 per month, per person, in SNAP benefits because of the new exception from the time limit for veterans. At full implementation in FY 2026, this represents a 0.10 percent increase in total annual SNAP benefit spending (transfers), or about $115.0 million. The Department estimates federal transfers to increase over the nine-year period of FY 2023 to FY 2031 by a total of $787.6 million as a result of this new exception.

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Table 6: Participation and Federal Transfer Impacts of New Exception for Veterans

VETERANS	Percent of Group	FY24	FY25	FY26	FY27	FY28	FY29	FY30	FY31	Total Cost
Veteran time-limited participants ages 18 to 49 not working 20+ hours per week (000s)		95	63	63	62	62	61	60	59	
Adjust for phase-in at certification/recertification and phase-out**		-48							-30	
Already receiving exception (e.g., pregnant, unfit for work)	32%	-15	-20	-20	-20	-20	-20	-19	-9	
Share that reside in area with time limit waiver		50%	45%	40%	40%	40%	40%	40%	40%	
Reside in area with time limit waiver		-16	-19	-17	-17	-17	-17	-16	-8	
Total veteran time-limited participants ages 18 to 49 estimated to maintain eligibility*		16	24	26	25	25	25	25	12	
Veteran time-limited participants ages 50 to 54 not working 20+ hours per week (000s)		18	29	29	29	29	28	28	N/A	
Adjust for phase-in at certification/recertification**		-9								
Already receiving exception (e.g., unfit for work)	32%	-3	-9	-9	-9	-9	-9	-9	N/A	
Share that reside in area with time limit waiver		40%	35%	30%	30%	30%	30%	30%	N/A	
Reside in area with time limit waiver		-2	-7	-6	-6	-6	-6	-6	N/A	
Total veteran time-limited participants ages 50 to 54 estimated to maintain eligibility*		4	13	14	14	14	14	13	N/A	
TOTAL Veteran Time-Limited Participants Ages 18 to 54 Retaining Eligibility*		**20**	**37**	**39**	**39**	**39**	**38**	**38**	**12**	
	Share of TFP									
Benefit gain for those retaining eligibility	25.9%	$252	$258	$264	$270	$277	$283	$289	$296	
Months of benefit gain per year for those retaining eligibility		11	11	11	11	11	11	11	11	
Total Cost Veteran Time-Limited Participants ages 18 to 54 Retaining Eligibility ($millions)*		**$55**	**$104**	**$115**	**$116**	**$118**	**$120**	**$121**	**$39**	**$788**

* Totals may not add due to rounding

** This row reduces the total number of participants by the proportion that is not impacted during years in which the provisions phase-in and phase-out.

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Individuals Who Were in Foster Care

Discussion: The third new exception from the time limit prescribed by the FRA is for SNAP participants aged 24 and under who were in foster care on their 18th birthday or such higher age as the State has elected under Sec. 475(8)(B)(iii) of the Social Security Act. The Department notes that this definition does not require that an individual was in foster care in the State in which they are applying for or receiving SNAP benefits.

In creating the implementation guidance, the Department clarified that ''foster care under the responsibility of a State'' includes foster care programs run by Districts, Territories, or Indian Tribal Organizations. The Department also clarified that the exception applies to individuals who are in foster care when they reach 18 years of age even if they elect to stay in foster care up to the State's maximum age, as well as individuals aged 18 to 24 who were in foster care at the time they turned 18 years of age, even if the individual exits extended foster care before the maximum age.

Effect on SNAP Participants: The Department does not collect data on SNAP applicants' and participants' history in foster care, so it is unable to precisely estimate how many individuals will benefit from the new exception for former foster youth. Based on information from the Adoption and Foster Care Analysis and Reporting System (AFCARS) [48] about how many youth age out of foster care each year, the Department estimates that there are approximately 99,000 individuals between the ages of 18 and 24 who were in foster care at their 18th birthday but have since emancipated. Of those 99,000 individuals, the Department estimates that about 35,000 may be SNAP participants (0.08 percent of all SNAP participants) who are subject to the ABAWD work requirement and are not otherwise qualified for an exception. The remaining 64,000 individuals in this group are assumed to be not eligible for SNAP, already meeting the ABAWD work requirement, or not subject to the ABAWD work requirement and time limit (for reasons that can include being a student, having a child in their household, or having a disability).

In FY 2026, among these 35,000 individuals, the Department estimates that approximately 40 percent will live in areas that are covered by a geographic waiver of the time limit, and therefore will not be subject to the time limit. Therefore, the Department estimates about 21,000 individuals who are former foster youth will retain SNAP eligibility beyond 3 months in a 36-month period (averaging to 11 months of benefits gained per individual per year) and continue receiving an average of $262 per month in FY 2026 because of this new exception. In FY 2026, this represents a 0.05 percent increase in total annual SNAP benefit spending (transfers), or about $60.0 million. The Department estimates federal transfers to increase over the nine-year period of FY 2023 to FY 2031 by a total of $425.4 million as a result of this new exception.

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[48] Per ACF guidance to States, States must include in AFCARS all children in foster care under the responsibility for placement or care of the State title IV–B/IV–E agency, which includes Unaccompanied Refugee Minors. More detail can be found at: *https://www.acf.hhs.gov/orr/policy-guidance/clarification-unaccompanied-refugee-minor-urm-eligibility-chafee-independent.*

Table 7: Participation and Federal Transfer Impacts of New Exception for Individuals Who Were in Foster Care

FORMER FOSTER YOUTH	Percent of Group	FY24	FY25	FY26	FY27	FY28	FY29	FY30	FY31	Total Cost
Former foster youth through age 24 (000s)		35	35	35	35	35	35	35	35	
Adjust for phase-in at certification/recertification and phase-out**		-17							-17	
Share that reside in area with time limit waiver		50%	45%	40%	40%	40%	40%	40%	40%	
Reside in area with time limit waiver		-9	-16	-14	-14	-14	-14	-14	-7	
Total Former Foster Youth Time-Limited Participants Estimated to Retain Eligibility*		**9**	**19**	**21**	**21**	**21**	**21**	**21**	**10**	
	Share of TFP									
Benefit gain for those retaining eligibility	25.7%	$250	$256	$262	$268	$274	$280	$287	$293	
Months of benefit gain per year for those retaining eligibility		11	11	11	11	11	11	11	11	
Total Cost from Former Foster Youth Time-Limited Participants Retaining Eligibility ($millions)*		**$24**	**$54**	**$60**	**$61**	**$63**	**$64**	**$66**	**$34**	**$425**

* Totals may not add due to rounding

** This row reduces the total number of participants by the proportion that is not impacted during years in which the provisions phase-in and phase-out.

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Combined Impacts for All Changes to Exceptions—Federal Transfers

As a result of this proposed rule, the estimated net impact of the change in the age-based exceptions and the three new exceptions is an average net increase in SNAP participation of about 55,000 individuals per year when fully implemented in FY 2026. In FY 2026, this includes 345,000 participants losing eligibility, 369,000 participants retaining eligibility, and about 30,000 new participants.[49] The Department estimates that a small number of new participants (ages 18–49) will newly begin receiving SNAP benefits due to the new exceptions allowing individuals who are experiencing homelessness, are veterans, or were formerly in the foster care system to participate in SNAP who otherwise may have thought they would be ineligible due to the ABAWD work requirement and time limit. The Department estimates federal transfers to increase over the nine-year period of FY 2023 to FY 2031 by a total of $2.8 billion as a result of the change in the age-based exceptions and the new exceptions in the FRA. On an annual basis, federal transfers are estimated to increase by an average of $306.5 million.

In addition to the direct impacts discussed above, there are additional secondary impacts which are difficult to quantify. The individuals who will retain eligibility for SNAP benefits are less likely to experience increased food insecurity or poverty than if they had lost access to SNAP benefits in absence of the new exceptions provided by the FRA. This in turn could have societal impacts through decreased healthcare costs related to food insecurity and poverty or impacts on other nutrition assistance, including food banks. The Department notes that while there are studies that describe the relationships between SNAP, food security, poverty, and health care costs, these studies do not permit estimation of potential impacts on transfers specific to the dispersed ABAWD population that might be affected by this proposed rule.

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[49] This estimate of about 30,000 new participants assumes an increase of roughly 1 percent in the baseline number of time-limited adults ages 18 to 49. This is the Department's best estimate in the absence of better data.

Table 8: Combined Participation and Federal Transfer Impacts of Exception Updates

Summary of SNAP Benefit Transfers Due to the SNAP Proposed Rule Implementing *The Fiscal Responsibility Act of 2023*									
	FY24	**FY25**	**FY26**	**FY27**	**FY28**	**FY29**	**FY30**	**FY31**	**Total Cost**
Total time-limited participants ages 50 to 54 estimated to lose eligibility (000s)	-91	-258	-345	-342	-339	-336	-332	N/A	
Total savings from time-limited participants ages 50 to 54 losing eligibility/benefits ($millions)	-$267	-$774	-$1,055	-$1,071	-$1,086	-$1,101	-$1,113	N/A	-$6,468
Total homeless, veteran, and former foster youth time-limited participants ages 18 to 54 retaining eligibility (000s)	202	342	369	367	364	361	357	140	
Total cost from time-limited participants ages 18 to 54 retaining eligibility ($millions)	$634	$1,096	$1,212	$1,230	$1,249	$1,267	$1,280	$516	$8,484
New Participants (000s)	-	31	30	30	30	30	29	14	
Total Cost from New Participants ($millions)	$0	$110	$111	$113	$115	$116	$117	$59	$742
NET PARTICIPANT IMPACT (000s)*	**111**	**114**	**55**	**55**	**54**	**54**	**54**	**155**	
NET COST ($millions)*	**$367**	**$432**	**$268**	**$273**	**$277**	**$281**	**$285**	**$575**	**$2,758**

* Totals may not add due to rounding.

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Combined Impacts for All Changes to Exceptions—Household Burden Costs

The Department expects there to be an increased time burden for 50-to-54-year-old SNAP participants who are newly considered to be subject to the ABAWD time limit. These individuals will be required to report work hours and review and respond to notices informing them of the ABAWD work requirement and time limit. Based on estimates provided in the burden table prepared for the proposed rule's information collection request, an estimated 366,751 individuals will experience an annual 15.5-minute burden related to these activities for total time of 94,744 hours annually and an annual cost of $2.3 million in FY 2026. In addition, 317,000 individuals within this group will also need to review and respond to Notices of Adverse Action (NOAAs) when they lose SNAP eligibility due to not meeting the work requirement, estimated to be an additional 4-minute burden per person for a time of 21,133 hours annually and a total annual cost of $502,616 in FY 2026.

Upon sunset of this provision on October 1, 2030, the upper limit of ages subject to the ABAWD work requirement will reverse to age 49 and the three new exceptions will be removed, pending any future legislative updates. Any 50-to-54-year-old participants who were subject to the time limit will stop accruing any countable months immediately at October 1, 2030. The Department expects 50-to-54-year-old participants who lost eligibility due to the time limit to return to the program gradually beginning in FY 2031.

However, the Department is unable to estimate whether some eligible individuals will not return to the program due to being unaware of changes in the work requirement rules, stigma, or any other reason. As individuals who had not been subject to the time limit during the duration of this rule due to the three new exceptions within the rule become subject to the time limit at their next recertification or screening during FY 2031, the Department estimates a one-time burden on 490,271 participants of 15.5 minutes related to work reporting administrative activities for a total of $3.4 million in FY 2031. While a portion of this group is expected to meet the work requirement, receive an exemption, or meet a different exception from the time limit, approximately 367,703 individuals are expected to have an additional 4-minute burden to review and respond to NOAAs, at a one-time total approximate cost of $653,188 in FY 2031.

Combined Impacts for All Changes to Exceptions—State Agency Administrative Costs

Implementation: State agencies began incurring administrative costs to implement the FRA's changes to exceptions from the ABAWD time limit in FY 2023 through various administrative activities, such as updating State eligibility systems; preparing for and executing worker training; updating relevant applications, notices, and forms; updating State SNAP regulations; and spending additional time with program participants to discuss program changes in relation to the individual's case.

The State administrative burden for initial implementation activities for all provisions of the proposed rule is estimated to be approximately 473,857 hours, totaling $10.3 million for start-up activities in FYs 2023 and 2024 for 53 State agencies, after 50 percent federal cost reimbursement. The Department is unable to disaggregate the portion of that cost that applies specifically to each provision of the proposed rule.

Ongoing: On an ongoing basis, State agencies will need to discuss the ABAWD work requirement, verify hours worked, and provide appropriate noticing to individuals who are newly subject to the ABAWD work requirement and time limit (estimated at 366,751 participants). This is estimated to take 15.5 minutes per individual and cost an estimated $1.6 million in FY 2026, after 50 percent federal cost reimbursement. The State agency will incur an additional 4-minute burden for each of the estimated 317,000 participants who will need to be issued Notices of Adverse Action (NOAAs) due to not meeting the work requirement for a total annual cost of $359,285 in FY 2026, after 50 percent federal cost reimbursement.

Sunsetting: For the sunsetting of this provision on October 1, 2030, the Department estimates that State agencies will again need to complete eligibility system updates; train eligibility workers; update relevant applications, notices, and forms; update State SNAP regulations; and spend time with program participants who will be impacted by this change. The sunsetting administrative costs are estimated to be a total one-time burden of 625,024 hours, equating to about $15.0 million for 53 State agencies in FYs 2030 and 2031 after 50 percent federal cost reimbursement.

Combined Impacts for All Changes to Exceptions—Federal Administrative Costs

Implementation: In addition to the federal transfer effects previously discussed, the Department expects it will take the Federal Government approximately 90 hours to make all administrative updates pertaining to implementation of this rule, resulting in an estimated one-time total expense of $6,760 in FY 2024. However, the Department is unable to disaggregate the portion of those 90 hours that apply specifically to each provision of the proposed rule. Additionally, the federal share of State agencies' administrative expenses to implement all provisions of the proposed rule is estimated to be a total one-time cost of $10.3 million for start-up activities in FYs 2023 and 2024. Similarly, the Department is unable to disaggregate the portion of that cost that applies specifically to each provision of the proposed rule.

Ongoing: To provide administrative support throughout the duration of the FRA's changes to exceptions from the ABAWD time limit, the Department estimates ongoing administrative costs to the Federal Government to be on average $32.2 million annually during years of full implementation (FY 2026–FY 2030) for the federal share of State agencies' ongoing administrative expenses.

Sunsetting: When the FRA exception provisions sunset on October 1, 2030, the Department estimates the federal administrative burden in FY 2030 to be a one-time cost of $5,813, and a one-time cost of $15.0 million in FYs 2030 and 2031 for the Federal share of State agencies' administrative expenses.

C. Requirement To Adjust the Number of Discretionary Exemptions Available to State Agencies Each Year

Discussion: The FRA reduces the allotment of discretionary exemptions State agencies will accrue in each fiscal year. Prior to the FRA, each fiscal year each State agency accrued an allotment of one-month exemptions equal to 12 percent of its at-risk time-limited participants; this FRA provision lowers that rate to 8 percent, beginning with the allotment State agencies have available for use in FY 2024. The provision also restricts each State's ability to carryover unused discretionary exemptions between fiscal years from all unused discretionary exemptions to only those allotted during the prior fiscal year. Starting in FY 2026, State agencies will only carryover unused discretionary exemptions earned for the previous fiscal year, not including historical balances.

Effect on SNAP Participants: It is difficult to predict the precise impacts of these two changes within each State, as well as across States. If a State agency was consistently using a high proportion of discretionary exemptions under the prior allotment of 12 percent, a small number of SNAP participants in that State may no longer receive a discretionary exemption and therefore lose SNAP eligibility as a result of the ABAWD time limit. If a State agency was not using a high proportion of their discretionary exemptions prior to the FRA change, this change may have no effect on SNAP participants in that State. The most recent data available to Department indicate that State agencies typically use less than an 8 percent allotment of discretionary exemptions. Between FY 2016 and FY 2019, only five instances were identified in which a State did not exceed their annual allotment, but used more exemptions than they would have earned for the fiscal year, assuming an allotment based on 8 percent of covered individuals.[50] As a result, this analysis scores the provision to lower allotments to 8 percent of covered individuals as having, at most, a nominal effect on SNAP benefit spending (transfers).

However, those State agencies that have exceeded an 8 percent allotment have tended to use many more exemptions than they had accrued for the relevant fiscal year. In other words, those States drew upon their banks of carried over exemptions. In the FY 2016–FY 2019 period, there were 33 instances of State agencies using carried over exemptions. Over those 33 instances, a total of 832,048 ''banked'' exemptions were used. Given that one exemption permits one time-limited participant to participate in SNAP for one additional month, this equates to

[50] Based on State agency-reported data on discretionary exemption usage. FY 2016–FY 2019 is used as the most recent period of data available as these are the most recent years in which State agencies used discretionary exemptions and during which the time limit was not waived nationwide by FFCRA.

approximately 69,337 individuals gaining a full year of SNAP participation (832,048 divided by 12 months) over the four-year period, or 17,334 individuals annually, on average. The Department does not have information on why States opted to use carried over exemptions in each of these cases. However, State agencies are known to use discretionary exemptions to exempt individuals from the time limit in areas that have been affected by a natural disaster or to mitigate the effects of an area losing coverage by a waiver of the time limit.

Beyond FY 2025, State agencies will no longer carryover unused exemptions indefinitely, which will reduce some State agencies' banks of available exemptions. As a result, State agencies may have reduced ability to use discretionary exemptions to extend time-limited individuals' SNAP participation in similar scenarios. However, the Department is unable to predict how many such scenarios could occur in future years and how a State agency would choose to use discretionary exemptions, nor how many individuals subject to the ABAWD time limit may be affected.

In FY 2024 and FY 2025, the Department anticipates that State agency application of discretionary exemptions could change as State agencies attempt to ''spend down'' discretionary exemptions that will otherwise expire. This ''use-or-lose'' scenario could incentivize some State agencies to use more discretionary exemptions in FYs 2024 and 2025, which could result in fewer individuals losing SNAP eligibility due to the ABAWD time limit in these two fiscal years. However, given that State agencies typically under-use the discretionary exemptions available to them, the Department does not expect measurable changes to SNAP participation or transfers to occur.

Effect on State Agencies: The implementation of this provision may require some State agencies to reconsider the State's approach to using discretionary exemptions, which could add burden hours for these State agencies. We are unable to estimate how many State agencies may be affected, but estimate the administrative burden to be nominal.

Effect on Federal Spending: The Department estimates nominal changes in federal transfers because of reductions in discretionary exemption allotments, from 12 percent to 8 percent, and restrictions on carryover of unused exemptions beyond one fiscal year.

While a decrease in available discretionary exemptions would mean a federal transfer savings if States consistently used all discretionary exemptions available to them each year prior to the reduction, State agencies' past patterns of discretionary exemption usages suggest they will not fully apply all discretionary exemptions available to them.

As previously discussed in the analysis of changes to exceptions, the Department expects it will take the Federal Government approximately 90 hours to make all administrative updates pertaining to implementation of this rule, resulting in an estimated one-time total expense of $6,760 in FY 2024. However, the Department is unable to disaggregate the portion of those 90 hours that apply specifically to each provision of the proposed rule.

Additionally, as previously discussed, the federal share of State agencies' administrative expenses to implement all provisions of the proposed rule is estimated to be a total one-time cost of $10.3 million in FYs 2023 and 2024. Similarly, we are unable to disaggregate the portion of that cost that applies specifically to each provision of the proposed rule. This provision is not expected to generate any ongoing administrative costs to the Federal Government. Finally, there are no sunsetting administrative costs pertaining to this provision, as it is enacted on a permanent basis.

D. Screening

Discussion: This provision would require State agencies to evaluate individuals to determine if they are subject to the time limit or if they qualify for an exception. This includes determining if an individual is exempt from the general work requirement, as individuals are not subject to the time limit if they meet an exemption from the general work requirement. The Department refers to this process as ''screening.'' Screening would be required at initial and recertification application and State agencies would be prohibited from assigning countable months to an individual if the State agency has not screened them for exceptions, including the new exceptions established by the FRA. If an individual subject to the time limit has a change in circumstances that result in them now meeting an exception, the State agency cannot assign a countable month if the information is not questionable. This is a longstanding expectation of State agencies that the Department proposes to outline at 7 CFR 271.2, 273,7(b)(3), and 273.24(k) to ensure countable months are not applied inappropriately.

Effect on SNAP Participants: This provision is intended to ensure that SNAP participants are not incorrectly deemed ineligible for SNAP for not meeting the ABAWD work requirement, without first requiring the State agency to determine that they are not eligible for any exceptions. The Department does not currently have information available that would permit it to estimate how many individuals may retain SNAP eligibility because of more effective screening for exceptions from the time limit and exemptions from the SNAP work requirements. Among those who do retain eligibility as a result of this provision, the Department estimates each individual will continue to receive an average of $252 in monthly SNAP benefits (25.9 percent of the TFP in FY 2024).

Aside from benefit impacts of this provision, SNAP participants are expected to bear an administrative burden due to increased screening. FNS estimates that screening for exceptions from the ABAWD work requirement and screening for exemptions from the general work requirement each require approximately 4 minutes of a participant's time. Some participants will only incur a 4-minute burden because they are only subject to the general work requirement. Individuals subject to the ABAWD work requirement are also subject to the general work requirement and therefore will incur 8 minutes of burden, per screening. In total, screening will affect approximately 19.0 million SNAP participants and equal approximately 1.7 million additional hours annually in FY 2026. This would equate to an estimated annual burden of $40.2 million across all individuals in FY 2026. Because this provision of the rule does not sunset, there are no expected burden costs of sunsetting this provision.

Effect on State Agencies: State agencies are expected to bear the administrative cost of updating their internal screening policies and practices; train workers on new procedures; and carry out any other administrative steps necessary to implement this provision. As discussed previously, the State administrative burden for initial implementation activities for all provisions of the proposed rule is estimated to be approximately 473,857 hours, totaling $10.3 million for start-up activities (including system changes) in FYs 2023 and 2024 for 53 State agencies, after 50 percent federal cost reimbursement. The Department is unable to disaggregate the portion of that administrative cost that applies specifically to each provision of the proposed rule.

Due to the additional estimated 4 or 8 minutes of time spent with participants during the screening process, explained above, the annual projected administrative burden to State agencies is 1.7 million hours, or approximately $28.8 million annually in FY 2026 after 50 percent federal cost reimbursement. Because this provision of the rule does not sunset, there are no expected administrative costs of sunsetting this provision.

Effect on Federal Spending: Federal administrative burden associated with implementing the final rule have been discussed in previous sections of the RIA. The federal share of State agencies' administrative expenses to comply with this update is estimated to be approximately $28.8 million annually in FY 2026 for 53 State SNAP agencies. There are no sunsetting administrative costs pertaining to this provision, as it is enacted on a permanent basis.

V. Distributive Impacts

A. Differences in State-Level Impacts

Effects of the FRA's provisions in the proposed rule vary by State due to differences in demographics, as well as differences in how States administer SNAP. For example, States that regularly qualify for and request waivers of the ABAWD time limit will have smaller portions of their participants affected by changes to the ABAWD work requirement. The provision to make 50-to-54-year-olds subject to the ABAWD work requirement and time limit will have slightly different effects on States' participants, depending on the share of their participants that falls into the newly expanded ABAWD age range. While 2 percent of all SNAP participants are estimated to fall into the expanded 50-to-54-year-old age range of time-limited participants, the share of each State's SNAP participants varies from 0.5 percent in Nebraska, to 4.8 percent in the U.S. Virgin Islands. See Appendix Table A for estimates for each State.

Similarly, the distribution of individuals experiencing homelessness across the U.S. is not uniform. Information available from the U.S. Department of Housing and Urban Development (HUD) indicates that the homeless population in the U.S. is concentrated in a handful of States. The January 2023 Point-in-Time estimates [51] of homeless individuals from HUD indicate that over half of all individuals experiencing homelessness in the U.S. (56.8 percent) lived in just five States: California, New York, Florida, Washington, and Texas. California, alone, accounted for 27.8 percent of all individuals experiencing homelessness.

The share of each State's SNAP participants who are experiencing homelessness, or are time-limited participants *and* experiencing homelessness, also varies. Nationally, about 3.2 percent of SNAP participants are experiencing homelessness, according to pre-pandemic FY 20 SNAP QC data. More specifically, about 1.9 percent of SNAP participants are considered subject to the ABAWD work requirement and experiencing homelessness. The State with the lowest share of time-limited participants experiencing homelessness is Mississippi (0.1 percent) and the State with the highest share is California (5.9 percent). See Appendix Table B for estimates for each State.

It should be noted that the accuracy of the estimates in this section can be affected by the size of a State's caseload. States with smaller caseloads also have smaller SNAP QC data samples, which can affect the reliability of State-level estimates based on the QC data.

B. Differences Among Subgroups

While the ABAWD work requirement and time limit do not apply to individuals who are considered disabled or elderly by SNAP rules, the Department acknowledges that some SNAP participants who are elderly or disabled may nevertheless be affected by the provisions in this proposed rule. A small share of individuals subject to the ABAWD work requirement and time limit (8.3 percent) are in a SNAP household with an elderly or disabled person. If these individuals lose eligibility because of the ABAWD time limit, their household will experience a decrease in total SNAP benefits available to the household. The provisions included in this proposed rule will not affect SNAP households with children, as individuals subject to the ABAWD work requirement, by definition, do not have children in their SNAP household.

Individuals affected by the provisions in the proposed rule are more likely to be male, when compared all adults between ages 18 and 54 in the SNAP caseload (50 percent, compared to 35 percent). While participants subject to the ABAWD work requirement and time limit between ages 18 and 54 are equally divided between males and females, those who are over age 50 are more likely to be female (54 percent) and those who experience homelessness are more likely to be male (61 percent). See Table 9, below, for estimates of the sex of SNAP participants in several subgroups affected by the proposed rule's provisions. The Department does not have data on the sex of SNAP participants who are subject to the ABAWD work requirement and time limit who are also veterans or former foster youth.

Table 9: Sex of SNAP Participants Affected by Proposed Rule's Provisions

Sex	All SNAP participants ages 18-54	Time-limited participants, ages 18-49	Time-limited participants, ages 50-54	All time-limited participants, ages 18-54	Time-limited participants, ages 18-54 experiencing homelessness
Male	35%	51%	46%	50%	61%
Female	65%	49%	54%	50%	39%
Total	100%	100%	100%	100%	100%

Data from pre-pandemic FY 2020 SNAP QC data.

The distribution of races and Hispanic ethnicity among SNAP participants affected by the proposed rule is generally similar to the distribution among all SNAP participants ages 18 to 54, with the exception of homeless time-limited participants. SNAP participants subject to the ABAWD work requirement ages 18 to 54 have roughly the same likelihood of being white or black (42 percent and 27 percent, respectively) as all SNAP participants ages 18 to 54 (42 percent and 26 percent). However, SNAP participants who are subject to the ABAWD work requirement and experiencing homeless are less likely to be white (36 percent) than SNAP participants ages 18 to 54 (42 percent), and more likely to be black or Hispanic or Latino of any race (30 percent and 17 percent, respectively) compared to all SNAP participants ages 18 to 54 (26 percent and 12 percent). It is important to note that the Department does not have data on the race or ethnicity of 14 percent of SNAP participants ages 18 to 54, which could affect these estimates. See Table 10, below, for estimates of the race and ethnicity of SNAP participants in several subgroups affected by the proposed rule's provisions. The Department does not have data on the race or ethnicity of SNAP participants who are subject to the ABAWD work requirement who are also veterans or former foster youth.

[51] Available here: *https://www.huduser.gov/portal/datasets/ahar/2023-ahar-part-1-pit-estimates-of-homelessness-in-the-us.html.*

Table 10: Race and Ethnicity of SNAP Participants Affected by Proposed Rule's Provisions

Race/Ethnicity	All SNAP participants ages 18-54	Time-limited participants, ages 18-49	Time-limited participants, ages 50-54	All time-limited participants, ages 18-54	Time-limited participants, ages 18-54 experiencing homelessness
White	42%	41%	45%	42%	36%
American Indian/Alaska Native	1%	2%	1%	2%	2%
Asian	2%	1%	1%	1%	1%
Black or African American	26%	26%	28%	27%	30%
Native Hawaiian or Pacific Islander	0.5%	0.4%	0.3%	0.4%	0.3%
Multiple Races	2%	2%	2%	2%	3%
Hispanic or Latino of any race	12%	14%	12%	14%	17%
Missing	14%	13%	11%	13%	11%
Total*	100%	100%	100%	100%	100%

Data from pre-pandemic FY 2020 SNAP QC data.

*Totals may not add due to rounding.

VI. Uncertainties

A. Effectiveness of Screening for New Exceptions

In this analysis, the Department assumes that all individuals subject to the ABAWD work requirement are correctly screened for qualifying exceptions. For example, we assume that all individuals who are experiencing homelessness and subject to the ABAWD work requirement are correctly excepted from the time limit. Human error is likely to result in some share of individuals not receiving an exception for which they qualify, and it is also possible that some participants will not disclose information that could lead to an exception (for example, a participant may not want to disclose their experience with the foster care system). As a result, the count of SNAP participants who lose eligibility or retain eligibility due to the proposed rule could be higher or lower in reality. However, given that the Department estimates that the share of individuals losing eligibility is very similar to the share receiving one of the three new exceptions, we do not anticipate that the overall net transfer impact of the rule would change significantly.

B. ABAWD Waiver Coverage in Future Years

The number of SNAP participants who are subject to the ABAWD time limit at any given time is affected by the extent of geographic waivers of the ABAWD time limit. In this RIA, we assume the national unemployment rate will remain low through FY 2031.

As a result, we also assume that fewer SNAP participants (about 40 percent) will live in an area covered by a waiver of the time limit than is true during economic downturns, like the Great Recession or the COVID–19 public health emergency. If a higher share of individuals live in an area where the time limit is waived, then both transfer increases and decreases will be reduced. Fewer 50-to-54-year-olds would lose eligibility due to the time limit, reducing transfer savings. Conversely, if individuals who receive an exception from the time limit due to being a veteran, homeless, or a qualifying former foster youth live in an area with a waiver of the time limit, there would be no transfer increase associated with their retaining eligibility because of an exception.

Alternatively, if a lower share of individuals live in an area where the time limit is waived, then both transfer increases and decreases would rise. However, given that the Department estimates that the share of individuals losing eligibility is very similar to the share of individuals retaining eligibility, we do not anticipate that the overall net transfer impact of the rule would change significantly.

C. Number of Individuals Who Will Be Eligible for New Exceptions for Veterans and Former Foster Youth

Unlike homelessness, the Department does not gather data on whether SNAP applicants or participants are veterans or former foster youth. Therefore, we are unable to precisely estimate how many individuals who may be subject to the ABAWD work requirement may benefit from these two new exceptions. This RIA contains the Department's best estimates of how many individuals may be affected. If the number of individuals who receive one of these two new exceptions is higher than anticipated, there would be a slight increase in transfers. If the number is lower than anticipated, there would be a slight decrease in transfers. Given that the Department believes time-limited individuals who are veterans or former foster youth up to age 24 make up a small portion of SNAP

participants (cumulatively, approximately 0.22 percent of participants), we do not expect this uncertainty to result in significant changes to the net transfer impact associated with the proposed rule.

VII. Sensitivity Analysis

Table 11, below, illustrates how the RIA's estimates might change if different assumptions regarding the uncertainties discussed above were used. Sensitivity analysis estimates were produced using the same general methodology as the primary estimates in the RIA. Alternative assumptions used for the sensitivity analysis include:

A. Assume 10 percent of estimated groups receiving a new exception are not appropriately identified during screening and do not receive the exception.

B. Assume employment outcomes are worse than anticipated and waiver coverage settles at 10 percentage points higher than projected.

C. Assume employment outcomes are better than anticipated and waiver coverage settles at 10 percentage points lower than projected.

Table 11 breaks down each scenario's impact on overall federal transfers during the first year of full implementation (FY 2026), as well as over the nine-year analysis period of this RIA, FY 2023 through FY 2031.

Table 11: Sensitivity Analysis

Estimated Change in SNAP Benefits ($Millions)	One-Year (FY 2026)	Nine-Year (FY 2023 – 2031)
In RIA as proposed	$268.1	$2,758.3
Scenario A: Assume 10% less effective screening for exceptions	$135.8	$1,835.7
Scenario B: Assume 10 percentage point increase in waiver coverage	$214.3	$2,229.1
Scenario C: Assume 10 percentage point decrease in waiver coverage	$322.0	$3,287.5

The proposed rule would result in a 0.27 percent increase in total SNAP benefit spending over the nine-year period of analysis, or $268.1 million in FY 2026 and $2.8 billion over FY 2023–FY 2031. If screening for the three new exceptions in this rule were to be conducted with only 90 percent efficacy (thereby reducing the number of those excepted by 10 percent) as demonstrated in Scenario A, total SNAP benefit spending would increase to a smaller degree, by 0.18 percent. In FY 2026, Scenario A would decrease the cost of the proposed rule by $132.2 million, compared to the primary estimates in this RIA. Over the nine-year period FY 2023–FY 2031, Scenario A would decrease the cost of the proposed rule by approximately $922.6 million, compared to the primary estimates in this RIA. The smaller increase in transfers under Scenario A is due to fewer time-limited participants retaining SNAP eligibility as a result of the FRA's three new exceptions from the time limit.

Analyses of Scenarios B and C indicate that a 10-percentage point increase or decrease to the share of individuals covered under waivers of the time limit would result in a corresponding $53.8 million increase or decrease in overall SNAP spending in reference year FY 2026 ($529.2 million over FY 2023–FY 2031) compared to the primary estimates in this RIA. This represents approximately a 0.05 percentage-point increase or decrease in transfer spending.

VIII. Alternatives

With one exception, the policy changes analyzed in this RIA were prescribed by the FRA; therefore, assessment of policy alternatives is limited. The proposed rule would implement changes to exceptions form the ABAWD work requirement and time limit in a way that closely adheres to the FRA's statutory language. In order to provide needed guidance to State agencies implementing the FRA's changes to the ABAWD work requirement, the Department has provided definitions of who qualifies for the FRA's new exceptions from the time limit for individuals experiencing homelessness, veterans, and former foster youth up to age 24 in this proposed rulemaking. However, these definitions do not expand upon the categories included in the FRA.

The Department has determined the clarification of definitions of who qualifies for the FRA's new exceptions would have limited effect on the welfare effects of the rule. The Department did not consider alternative definitions for these groups because it sought to align its definitions with the terms used in the FRA and with definitions used by federal agencies who are experts in serving those groups, to the extent allowable by the Food and Nutrition Act of 2008, as amended.

The Department is proposing one addition to the FRA's required provisions to amend the regulations to clarify requirements for screening individuals for exceptions from the work requirements and time limit. This added provision would require State agencies to screen for exceptions at initial and recertification application and prohibits them from assigning countable months to an individual if the State agency has not screened the individual for exceptions. Further, it also addresses State agency responsibilities when an individual experiences a change in circumstances during the certification period that results in a change in exception status.

The Department considered finalizing the proposed rule without this screening requirement. Omitting the screening requirement would not have a measurable effect on transfers, but would reduce State administrative expenses, household burden expenses, and federal administrative costs; the precise reduction in administrative costs for this provision alone cannot be disaggregated from the projected administrative costs.

However, in the absence of regulations clarifying screening requirements, questions from State agencies arose during FRA implementation of how and when it may identify if an individual meets one of the new exceptions from the time limit. As such, the Department determined that standardizing national screening practices was necessary to improve consistency in program operations and provide quality customer service in line with the December 13, 2021, Executive Order on *Transforming Federal Customer Experience and Service Delivery to Rebuild Trust in Government*. To effectively ensure screening practices are standard across State agencies, the Department is proposing to require State agencies to first screen for exemptions from the general work requirement, as this is an important first step in evaluating which, if any, work requirements apply to an individual, since individuals are not subject to the time limit if they meet an exemption from the general work requirement. The proposed rule therefore clarifies requirements on both screening for the

general work requirement, as well as to determine whether an individual is subject to the time limit, in order to ensure uniform national practices.

The Department did not consider any other alternatives for inclusion in the proposed rule.

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Appendix Table A:

Estimated share of the SNAP participants who are 50-to-54-year-old time-limited participants, by State

State	Share of participants that are 50-to-54-years-old and time-limited
Alabama	1.8%
Alaska	3.0%
Arizona	2.5%
Arkansas	2.0%
California	2.9%
Colorado	3.0%
Connecticut	3.4%
Delaware	2.4%
District of Columbia	4.7%
Florida	2.0%
Georgia	1.5%
Guam	2.5%
Hawaii	2.2%
Idaho	1.3%
Illinois	1.8%
Indiana	1.1%
Iowa	2.6%
Kansas	1.3%
Kentucky	2.3%
Louisiana	1.5%
Maine	1.0%
Maryland	3.5%
Massachusetts	1.8%
Michigan	2.3%
Minnesota	1.9%
Mississippi	2.2%
Missouri	2.3%
Montana	2.7%
Nebraska	0.5%
Nevada	1.1%
New Hampshire	0.8%
New Jersey	0.9%
New Mexico	2.1%
New York	1.5%
North Carolina	2.5%
North Dakota	1.0%
Ohio	2.8%

Oklahoma	2.3%
Oregon	2.1%
Pennsylvania	1.6%
Rhode Island	2.0%
South Carolina	3.5%
South Dakota	2.1%
Tennessee	2.1%
Texas	0.7%
Utah	1.2%
Vermont	1.5%
Virginia	2.5%
Virgin Islands	4.8%
Washington	2.6%
West Virginia	1.7%
Wisconsin	1.4%
Wyoming	1.5%
U.S. Total	2.0%

Appendix Table B:

Estimated share of the SNAP participants who are time-limited and experiencing homelessness, by State

State	Share of participants experiencing homelessness	Share of participants who are time-limited and experiencing homelessness
Alabama	1.1%	0.7%
Alaska	5.7%	3.0%
Arizona	5.6%	4.8%
Arkansas	2.8%	2.1%
California	7.5%	5.9%
Colorado	7.7%	4.3%
Connecticut	2.9%	2.5%
Delaware	1.6%	0.8%
District of Columbia	7.6%	2.0%
Florida	2.3%	1.0%
Georgia	2.1%	1.0%
Guam	2.6%	0.8%
Hawaii	3.4%	1.6%
Idaho	1.2%	0.5%
Illinois	2.1%	1.2%
Indiana	2.7%	0.4%
Iowa	3.2%	1.5%
Kansas	2.4%	1.2%
Kentucky	1.4%	0.6%
Louisiana	1.4%	1.3%
Maine	1.9%	0.7%
Maryland	6.5%	2.6%
Massachusetts	7.0%	3.6%
Michigan	4.2%	1.1%
Minnesota	3.8%	2.3%
Mississippi	0.6%	0.1%
Missouri	4.8%	2.3%
Montana	3.2%	2.6%
Nebraska	2.4%	1.5%
Nevada	4.2%	3.4%
New Hampshire	2.9%	1.7%
New Jersey	1.9%	0.5%
New Mexico	5.2%	3.9%
New York	1.8%	1.0%
North Carolina	1.7%	0.9%
North Dakota	2.0%	0.2%
Ohio	2.9%	1.1%
Oklahoma	2.6%	1.7%
Oregon	3.3%	2.5%

Pennsylvania	0.4%	0.4%
Rhode Island	8.0%	5.6%
South Carolina	1.5%	0.9%
South Dakota	2.7%	1.4%
Tennessee	2.9%	1.0%
Texas	0.8%	0.2%
Utah	4.5%	2.6%
Vermont	5.8%	2.0%
Virginia	0.5%	0.5%
Virgin Islands	1.4%	1.0%
Washington	7.1%	5.3%
West Virginia	0.3%	0.3%
Wisconsin	5.8%	2.7%
Wyoming	1.9%	0.4%
U.S. Total	**3.2%**	**1.9%**

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Part III

Department of Health and Human Services

Administration for Children and Families

45 CFR Part 410

Unaccompanied Children Program Foundational Rule; Final Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

45 CFR Part 410

RIN 0970–AC93

Unaccompanied Children Program Foundational Rule

AGENCY: Office of Refugee Resettlement (ORR), Administration for Children and Families (ACF), U.S. Department of Health and Human Services (HHS).

ACTION: Final rule.

SUMMARY: This final rule adopts and replaces regulations relating to key aspects of the placement, care, and services provided to unaccompanied children referred to the Office of Refugee Resettlement (ORR), pursuant to ORR's responsibilities for coordinating and implementing the care and placement of unaccompanied children who are in Federal custody by reason of their immigration status under the Homeland Security Act of 2002 (HSA) and the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA). This final rule establishes a foundation for the Unaccompanied Children Program (UC Program) that is consistent with ORR's statutory duties, for the benefit of unaccompanied children and to enhance public transparency as to the policies governing the operation of the UC Program. This final rule implements the 1997 *Flores* Settlement Agreement (FSA). As modified in 2001, the FSA provides that it will terminate 45 days after publication of final regulations implementing the agreement. ORR anticipates that any termination of the settlement based on this final rule would only be effective for those provisions that affect ORR and would not terminate provisions of the FSA that apply to other Federal Government agencies.

DATES: *This final rule is effective:* July 1, 2024.

FOR FURTHER INFORMATION CONTACT: Toby Biswas, Director of Policy, Unaccompanied Children Program, Office of Refugee Resettlement, Administration for Children and Families, Department of Health and Human Services, Washington, DC, (202) 205–4440 or *UCPolicy-RegulatoryAffairs@acf.hhs.gov.*

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Table of Abbreviations

ACF—Administration for Children and Families
DHS—U.S. Department of Homeland Security
DOJ—U.S. Department of Justice
EOIR—Executive Office for Immigration Review
FSA—*Flores* Settlement Agreement
HHS—U.S. Department of Health and Human Services
HSA—Homeland Security Act of 2002
INS—Immigration and Naturalization Service
OMB—Office of Management and Budget
ORR—Office of Refugee Resettlement, U.S. Department of Health and Human Services
TVPRA—William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008
UC Program—Unaccompanied Children Program

II. Executive Summary

A. Purpose of the Regulatory Action

On October 4, 2023, the Office of Refugee Resettlement (ORR) published a notice of proposed rulemaking (NPRM or proposed rule), to replace and supersede regulations at 45 CFR part 410, and to codify policies and requirements concerning the placement, care, and services provided to unaccompanied children in Federal custody by reason of their immigration status and referred to ORR.[1] The NPRM was based on statutory authorities and requirements provided under the Homeland Security Act of 2002 (HSA) [2] and the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA),[3] and proposed to implement the terms of the 1997 *Flores* Settlement Agreement (FSA) that create responsibilities for HHS and ORR. ORR proposed in the NPRM that the requirements apply to all care provider facilities, including both standard programs and non-standard programs, as defined below, unless otherwise specified (88 FR 68909). ORR noted that the proposed rule was necessary to codify a uniform set of standards and procedures that will help to ensure the safety and well-being of unaccompanied children in ORR care, implement the substantive terms of the FSA, and enhance public transparency as to the policies governing the operation of the Unaccompanied Children Program (UC Program).

The proposed rule provided a 60-day public comment period, which ended on December 4, 2023. This final rule responds to comments received and adopts the proposed rule, with some changes as discussed herein. ORR thanks the public for commenting on the NPRM.

B. Summary of Select Provisions

This final rule codifies ORR policies and requirements for the placement, care, and services provided to unaccompanied children in Federal custody by reason of their immigration status and referred to ORR, as discussed in section IV of this final rule. In subpart A, ORR is finalizing its proposal to define terms that are relevant to the criteria and requirements in the NPRM and to codify the general principles that apply to the care and placement of unaccompanied children in ORR care. In subpart B, ORR is finalizing its proposals regarding the criteria and requirements that apply with respect to placement of unaccompanied children at ORR care provider facilities, including specific criteria for placement at particular types of ORR care provider facilities. In subpart C, ORR is finalizing policies and procedures regarding the release of unaccompanied children from ORR care to vetted and approved sponsors. In subpart D, ORR is finalizing the standards and services that it must meet and provide to unaccompanied children in ORR care provider facilities. In subpart E, ORR is finalizing requirements for the safe transportation of unaccompanied children while in ORR's care. In subpart F, ORR is finalizing reporting requirements for care provider facilities such that ORR may compile and maintain statistical information and other data on unaccompanied children. In subpart G, ORR is finalizing requirements and policies regarding the transfer of unaccompanied children in ORR care. In subpart H, ORR is finalizing requirements for determining the age of an individual in ORR care. In subpart I, ORR is finalizing its proposal to codify requirements for emergency or influx facilities (EIFs), which are ORR facilities

that are opened during a time of emergency or influx. In subpart J, ORR is finalizing requirements regarding the availability of administrative review of ORR decisions. Finally, in subpart K, ORR is finalizing its proposal to establish an independent ombud's office that would promote important protections for all children in ORR care.

C. Summary of Costs and Benefits

This final rule codifies current ORR requirements for compliance with the FSA, court orders, and statutes, as well as certain requirements under existing ORR policy and cooperative agreements. As discussed in section VII.A of this final rule, HHS and ORR expect these requirements to impose limited additional costs, including those costs incurred by the Federal Government to increase the provision of legal services to unaccompanied children in limited circumstances, to supplement costs incurred by grant recipients in order to comply with the finalized requirements (see below), to establish a risk determination hearing process, and to establish the Unaccompanied Children Office of the Ombuds (UC Office of the Ombuds) and other administrative staffing needs. In subpart D at § 410.1309, ORR is finalizing its proposal, to the greatest extent practicable, subject to available resources as determined by ORR, and consistent with section 292 of the Immigration and Nationality Act (INA) (8 U.S.C. 1362), that all unaccompanied children who are or have been in ORR care would have access to legal advice and representation in immigration legal proceedings or matters funded by ORR. In subpart J, ORR is finalizing the establishment of a risk determination hearing process. To facilitate this process, ORR has developed forms for use by unaccompanied children, their parents/legal guardians, or their legal representatives for which we estimate the costs of completion to range from $10,187 to $56,589 per year. In subpart K, ORR discusses the establishment of an Office of the Ombuds for the UC Program. In addition to the Ombuds position itself, ORR anticipates the need for support staff in the office. ORR estimates the annual cost of establishing and maintaining this office would be $1,718,529, which includes the cost of 10 full-time personnel, as discussed in further detail in VII.A.2 of this final rule.

ORR also notes that all care provider facilities and service providers discussed in this final rule are recipients of Federal awards (*e.g.,* cooperative agreements or contracts), and the costs of maintaining compliance with these proposed requirements are allowable costs under the Basic Considerations for cost provisions at 45 CFR 75.403 through 75.405,[4] in that the costs are reasonable, necessary, ordinary, treated consistently, and are allocable to the award. If there are additional costs associated with the policies discussed in this final rule that were not budgeted, and cannot be absorbed within existing budgets, the recipient would be able to submit a request for supplemental funds to cover the costs.

III. Background and Purpose

A. The UC Program

The purpose of this rule is to codify policies, standards, and protections for the UC Program, consistent with the HSA and TVPRA, and to implement the substantive requirements of the FSA as they pertain to ORR. On March 1, 2003, section 462 of the HSA transferred responsibilities for the care and placement of unaccompanied children from the Commissioner of the Immigration and Naturalization Service (INS) to the Director of ORR. The HSA defines certain relevant terms and establishes ORR responsibilities with respect to unaccompanied children. The HSA defines ''unaccompanied alien child,'' a term ORR uses synonymously with ''unaccompanied child,'' as ''a child who—(A) has no lawful immigration status in the United States; (B) has not attained 18 years of age; and (C) with respect to whom—(i) there is no parent or legal guardian in the United States; or (ii) no parent or legal guardian in the United States is available to provide care and physical custody.'' [5] The TVPRA, meanwhile, added requirements for other executive branch departments and agencies to expeditiously transfer unaccompanied children in their custody to ORR's care and custody once identified, and together with HHS and other specified federal agencies to establish policies and programs to ensure unaccompanied children are protected from human trafficking and other criminal activities.[6] Both statutes are described in further detail in the paragraphs below. Pursuant to these statutory requirements, the UC Program provides a safe and appropriate environment for unaccompanied children in ORR custody. In most cases, unaccompanied children enter ORR custody via transfer from DHS. When DHS immigration officials, or officials from other Federal agencies or departments, transfer an unaccompanied child in their custody to ORR, ORR promptly places the unaccompanied child in the least restrictive setting that is in the best interests of the child, taking into consideration danger to self, danger to the community, and risk of flight. ORR considers the unique nature of each child's situation, the best interest of the child, and child welfare principles when making placement, clinical, case management, and release decisions. To carry out its statutory responsibilities, and consistent with its responsibilities under the FSA, ORR currently funds residential care providers that provide temporary housing and other services to unaccompanied children in ORR custody. These care providers have been primarily State-licensed and must also meet ORR requirements to ensure a high-quality level of care. These multiple providers comprise a continuum of care for children, including placements in individual and group homes, shelter, heightened supervision, secure facilities, and residential treatment centers. While in ORR custody, unaccompanied children are provided with classroom education, healthcare, socialization/recreation, mental health services, access to religious and legal services, and case management. Unaccompanied children generally remain in ORR custody until they are released to a vetted and approved parent or other sponsor in the United States, are repatriated to their home country, obtain legal status, or otherwise no longer meet the statutory definition of an unaccompanied child (*e.g.,* turn 18). Consistent with the limits of its statutory authority, and in accordance with current ORR policy, all children who turn 18 years old while in ORR's care and custody are transferred to DHS for a custody determination. Once transferred to DHS, that agency considers placement in the least restrictive setting available after taking into account the individual's danger to self, danger to the community, and risk of flight, in accordance with applicable legal authority.

B. History and Statutory Structure

1. HSA and TVPRA

The HSA abolished the former INS and created DHS. The HSA transferred many of the immigration functions from the INS to DHS, but it transferred functions under the immigration laws of the United States with respect to the care of unaccompanied children to ORR.[7] The HSA makes the ORR Director responsible for a number of functions with respect to unaccompanied children, including coordinating and implementing their care and placement, ensuring that unaccompanied children's interests are considered in actions and

decisions relating to their care, making and implementing placement determinations, implementing policies with respect to the care and placement of children, and overseeing the infrastructure and personnel of facilities in which unaccompanied children reside.[8] The HSA also states that ORR shall not release unaccompanied children from custody upon their own recognizance, and requires ORR to consult with appropriate juvenile justice professionals and certain Federal agencies in relation to placement determinations to ensure that unaccompanied children are likely to appear at all hearings and proceedings in which they are involved; are protected from smugglers, traffickers, and others who might seek to victimize or otherwise engage them in criminal, harmful, or exploitative activity; and are placed in a setting in which they are not likely to pose a danger to themselves or others.[9] ORR notes that under its current policies, such consultation is subject to privacy protections for unaccompanied children. For example, ORR restricts sharing certain case-specific information with the Executive Office for Immigration Review (EOIR) and DHS that may deter a child from seeking legal relief. Subject to such protections, ORR provides notification of the placement decisions to U.S. Immigration and Customs Enforcement (ICE) and, if referred by U.S. Customs and Border Protection (CBP), to CBP. ORR provides the following notification information: identifying information of the unaccompanied child, ORR care provider name and address, and ORR care provider point of contact (name and telephone number).[10]

In 2008, Congress passed the TVPRA, which further elaborated duties with respect to the care and custody of unaccompanied children. The TVPRA provides that, except as otherwise provided with respect to certain unaccompanied children from contiguous countries,[11] and consistent with the HSA, the care and custody of all unaccompanied children, including responsibility for their detention, where appropriate, is the responsibility of the Secretary of HHS. The TVPRA states that each department or agency of the Federal Government must notify HHS within 48 hours upon the apprehension or discovery of an unaccompanied child or any claim or suspicion that a noncitizen individual in the custody of such department or agency is under the age of 18.[12] The TVPRA states further that, except in exceptional circumstances, any department or agency of the Federal Government that has an unaccompanied child in its custody shall transfer the custody of such child to HHS not later than 72 hours after determining such child is an unaccompanied child. Furthermore, the TVPRA requires the Secretary of HHS and other specified Federal agencies to establish policies and programs to ensure that unaccompanied children in the United States are protected from traffickers and other persons seeking to victimize or otherwise engage such children in criminal, harmful, or exploitative activity.[13] The TVPRA describes requirements with respect to safe and secure placements for unaccompanied children, safety and suitability assessments of potential sponsors for unaccompanied children, legal orientation presentations, access to counsel, and child advocates, among other requirements. HHS delegated its authority under the TVPRA to the Assistant Secretary for Children and Families, which then re-delegated the authority to the Director of ORR.[14]

2. The Flores Settlement Agreement Terms and Implementation

On July 11, 1985, four noncitizen children in INS [15] custody filed a class action lawsuit in the U.S. District Court for the Central District of California on behalf of a class of minors detained in the custody of the INS (*Flores* litigation).[16] At that time, the INS was responsible for the custody of minors entering the United States unaccompanied by a parent or legal guardian. The *Flores* litigation challenged ''(a) the [INS] policy to condition juveniles' release on bail on their parents' or legal guardians' surrendering to INS agents for interrogation and deportation; (b) the procedures employed by the INS in imposing a condition on juveniles' bail that their parents' or legal guardians' [sic] surrender to INS agents for interrogation and deportation; and (c) the conditions maintained by the INS in facilities where juveniles are incarcerated.'' [17] The plaintiffs claimed that the INS's release and bond practices and policies violated, among other things, the INA, the Administrative Procedure Act (APA), and the Due Process Clause and Equal Protection Guarantee under the Fifth Amendment.[18] After over 10 years of litigation, the U.S. Government and *Flores* plaintiffs entered into the ''*Flores* Settlement Agreement,'' which was approved by the district court as a consent decree on January 28, 1997.[19]

The FSA applies to both unaccompanied children, as defined in the HSA, and to children accompanied by their parents or legal guardians,[20] but ORR notes that this final rule is intended specifically to codify requirements regarding the care of unaccompanied children who have been transferred to the care and custody of ORR. As relevant to ORR, the FSA imposes several substantive requirements for Government custody of unaccompanied children, including requiring that they be placed in the ''least restrictive setting appropriate to the minor's age and special needs,'' [21] and establishing a general policy favoring release of unaccompanied children where it is determined that detention of the unaccompanied child is not required either to secure the child's timely appearance for immigration proceedings or to ensure the unaccompanied child's safety or that of others.[22] When release is appropriate, the FSA establishes an order of priority with respect to potential sponsors. If no sponsor is available, an unaccompanied child will be placed at a care provider facility licensed by an appropriate State agency, or, in the discretion of the Government, with another adult individual or entity seeking custody. Under the original terms of the FSA, unaccompanied children whom the former INS was unable to release upon apprehension and detention remained in INS custody, typically in a licensed program, until they could be appropriately released; currently, under the FSA, unaccompanied children who are not released remain in ORR legal custody and may be transferred or released only under the authority of ORR. The FSA also mandates that any noncitizen child who remains in Government custody for removal proceedings is entitled to a bond hearing before an immigration judge, ''unless the [child] indicates on the Notice of Custody Determination form that he or she refuses such a hearing.'' [23] The FSA contains many other provisions relating to the care of unaccompanied children, including the minimum standards required at licensed care provider facilities described in Exhibit 1.

The FSA states that within 120 days of the final district court approval of the agreement, the Government shall initiate action to publish the relevant and substantive terms of the Agreement in regulation.[24] In 1998, the INS published a proposed rule based on the substantive terms of the FSA, entitled ''Processing, Detention, and Release of Juveniles.'' [25] Over the subsequent years, that proposed rule was not finalized. The FSA originally included a termination date, but in 2001, the parties agreed to extend the agreement

and added a stipulation that terminates the FSA ''45 days following defendants' publication of final regulations implementing t[he] Agreement.'' [26] In January 2002, the INS reopened the comment period on the 1998 proposed rule,[27] but the rulemaking was ultimately terminated. Thus, as a result of the 2001 Stipulation, the FSA remains in effect. The U.S. District Court for the Central District of California has continued to rule on various motions filed in the case and oversee enforcement of the FSA.

3. The 2019 Final Rule

On September 7, 2018, DHS and HHS issued a joint proposed rule, entitled ''Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children'' (2018 Proposed Rule).[28] The purpose of the proposed rule was to implement the substantive terms of the FSA, and thus enable the district court to terminate the agreement. The rule proposed to adopt provisions that were intended to parallel the relevant substantive terms of the FSA, with some modifications to reflect statutory and operational changes put in place since the FSA was entered into in 1997, along with certain other changes.[29] A final rule was promulgated on August 23, 2019 (2019 Final Rule), which comprised two sets of regulations: one issued by DHS and the other by HHS. The HHS regulations addressed only the care and custody of unaccompanied children.[30] The DHS regulations addressed other provisions of the FSA that pertained to DHS, including the requirement that after DHS apprehends unaccompanied children it should transfer them to the custody of HHS.[31]

After DHS and HHS issued the 2018 Proposed Rule and before the 2019 Final Rule was published, plaintiffs in the *Flores* litigation filed a Motion to Enforce the FSA. The court deferred ruling on the Motion, ordering DHS and HHS to file a notice upon issuance of final regulations, which DHS and HHS did in August 2019. Later that month, DHS and HHS also filed a Notice of Termination and Motion in the Alternative to Terminate the FSA, while Plaintiffs filed a supplemental brief addressing their Motion to Enforce. Plaintiffs' Motion to Enforce presented the following two separate but related issues: (1) whether the 2019 Final Rule would effectively terminate the FSA, and (2) if not, to what extent the Court should enjoin the Government from implementing the 2019 Final Rule. On September 27, 2019, approximately one month after the 2019 Final Rule was published, the District Court for the Central District of California entered an Order granting Plaintiffs' Motion to Enforce insofar as it sought an order declaring that the Government failed to terminate the FSA, denied the Government's Motion to Terminate the FSA, and issued a permanent injunction consistent with its order.[32]

On December 29, 2020, in *Flores* v. *Rosen,* the U.S. Court of Appeals for the Ninth Circuit affirmed in part and reversed in part the District Court Order.[33] Regarding the HHS regulations applicable to the care and custody of unaccompanied children in the 2019 Final Rule, the Court of Appeals held that the regulations were ''largely consistent'' with the FSA, with two exceptions.[34] First, it held that the HHS regulation allowing placement of a minor in a secure facility upon an agency determination that the minor is otherwise a danger to self or others broadened the circumstances in which a minor may be placed in a secure facility, and therefore was inconsistent with the FSA. Second, it held that provisions providing a hearing to unaccompanied children held in secure or staff-secure placement only if requested was inconsistent with the FSA's opt-out process for obtaining a bond hearing. Although the Ninth Circuit held that the majority of the HHS regulations could take effect, it also held that the District Court did not abuse its discretion in declining to terminate the portions of the FSA covered by those regulations, noting that the Government moved to ''terminate the Agreement in full, not to modify or terminate it in part.'' [35] Consistent with its findings, the Ninth Circuit held that the FSA ''therefore remains in effect, notwithstanding the overlapping HHS regulations'' and that the Government, if it wished, could move to terminate those portions of the FSA covered by the valid portions of the HHS regulations.[36]

Separately, a group of states brought litigation in the District Court for the Central District of California seeking to enjoin the Government from implementing the 2019 Final Rule (*California* v. *Mayorkas*), based on other grounds including the APA.[37] The court stayed the case, given the related litigation brought by *Flores* plaintiffs, which culminated in the Ninth Circuit decision in *Flores* v. *Rosen.* After that decision, the plaintiffs in *California* v. *Mayorkas* filed a supplemental briefing requesting a narrowed preliminary injunction, alleging that several portions of the HHS provisions of the 2019 Final Rule violated the APA. Subsequently, the parties entered into settlement discussions. On December 10, 2021, the parties informed the court that HHS did not plan to seek termination of the FSA under the terms of the stipulation or to ask the court to lift its injunction of the HHS regulations. Instead, HHS would consider a future rulemaking that would more broadly address issues related to the custody of unaccompanied children by HHS and that would replace the rule being challenged in *California* v. *Mayorkas.* Based on this agreement, the court ordered that the *California* v. *Mayorkas* litigation should be placed into abeyance with regard to the Plaintiffs' claims against HHS while HHS engaged in new rulemaking to replace and supersede the HHS regulations in the 2019 Final Rule.[38] Further, among other things, HHS agreed that while it engaged in new rulemaking, it would not seek to lift the injunction of the 2019 Final Rule or seek to terminate the FSA as to HHS under the 2019 Final Rule, and that it would make best efforts to submit an NPRM to OMB by April 15, 2023, providing quarterly updates to the Court should it not meet that deadline.[39] In accord with the relevant order, ORR made best efforts to submit the NPRM to OMB, and ultimately sent the document to OMB on April 28, 2023.[40] The NPRM initiated that broader rulemaking effort, and reflected the stipulated agreement in *California* v. *Mayorkas.* The NPRM applied, as relevant, the findings of the Ninth Circuit regarding the 2019 Final Rule in *Flores* v. *Rosen.* Because the permanent injunction of the 2019 Final Rule was never lifted, and the FSA continued to remain in effect, ORR does not anticipate that any third parties would have developed reliance interests on the HHS regulations in the 2019 Final Rule. Differences between the 2019 Final Rule and this final rule are discussed in relevant portions of the preamble below.

4. Lucas R. Litigation

Another ongoing lawsuit involving ORR, filed in 2018, also has ramifications for this rule. *Lucas R.* v. *Becerra,*[41] a class action lawsuit, was filed in the U.S. District Court for the Central District of California, alleging ORR had violated the FSA, the TVPRA, the U.S. Constitution, and section 504 of the Rehabilitation Act of 1973 (section 504). Based on the plaintiffs' allegations, the court certified five plaintiff classes comprising all children in ORR custody:

(1) who are or will be placed in a secure facility, medium-secure facility, or residential treatment center (RTC), or whom ORR has continued to detain in any such facility for more than 30 days, without being afforded notice and an opportunity to be heard before a neutral and detached

decisionmaker regarding the grounds for such placement (*i.e.,* the ''step-up class'');

(2) whom ORR is refusing or will refuse to release to parents or other available custodians within 30 days of the proposed custodian's submission of a complete family reunification packet on the ground that the proposed custodian is or may be unfit (*i.e.,* ''the unfit custodian class'');

(3) who are or will be prescribed or administered one or more psychotropic medications without procedural safeguards (*i.e.,* the ''drug administration class'');

(4) who are natives of non-contiguous countries and to whom ORR is impeding or will impede legal assistance in legal matters or proceedings involving their custody, placement, release, and/or administration of psychotropic drugs (*i.e.,* the ''legal representation class''); and

(5) who have or will have a behavioral, mental health, intellectual, and/or developmental disability as defined in 29 U.S.C. [section] 705, and who are or will be placed in a secure facility, medium-secure facility, or [RTC] because of such disabilities (*i.e.,* the ''disability class'').[42]

On August 30, 2022, the U.S. District Court for the Central District of California granted preliminary injunctive relief concerning the allegations of the unfit custodian, step-up, and legal representation classes. As of October 31, 2022, ORR implemented new policies and procedures on issues identified in the Court's preliminary injunction order, which ORR is codifying in this final rule. As stated in the NPRM, as of September 2023, ORR remained in active litigation in the *Lucas R.* class action. The proposed rule stated that depending on developments in the case, ORR may incorporate additional provisions in the final rule (88 FR 68913).

On January 5, 2024, the Court issued an order preliminarily approving settlement agreements that the parties negotiated regarding the legal representation, drug administration, and disability classes.[43] A final approval hearing is scheduled for May 2024. As discussed in this final rule, ORR is finalizing some proposals from the NPRM as modified to account for developments in the *Lucas R.* litigation. As described herein, in this final rule, ORR intends to codify the requirements of the *Lucas R.* preliminary injunction. In addition, in this final rule, ORR is incorporating the terms of the anticipated legal representation settlement, among other enhancements to legal services for unaccompanied children. However, ORR is not incorporating in the final rule all of the various detailed provisions in the settlements concerning the drug administration and disability classes, although ORR is incorporating many commenters' recommendations in these areas. The drug administration and disability settlements themselves contemplate implementation over time, thereby affording ORR an opportunity to see how the terms of those settlements work in practice as they are implemented, and to assess whether changes may be needed over time due to evolving circumstances. The disability settlement in particular requires that ORR work with experts to undertake a year-long comprehensive needs assessment to evaluate the adequacy of services, supports, and resources currently in place for children with disabilities in ORR's custody across its network, and to identify gaps in the current system, which will inform the development of a disability plan and future policymaking that best address how to effectively meet the needs of children with disabilities in ORR's care and custody. Therefore, while ORR is not codifying all the terms of the anticipated disability and drug administration settlement agreements in this final rule, ORR is implementing terms in this rule that broadly reflect its commitment to ensuring that unaccompanied children are protected from discrimination and have equal access to the UC Program, as is consistent with section 504, and that psychotropic medications are administered appropriately in the best interest of the child and with meaningful oversight.

C. Statutory and Regulatory Authority

As discussed above, under the HSA and TVPRA, the ORR Director[44] is responsible for the care and placement of unaccompanied children. Under the HSA, ORR is responsible for ''coordinating and implementing the care and placement of [unaccompanied children] who are in Federal custody by reason of their immigration status,'' ''identifying a sufficient number of qualified individuals, entities, and facilities to house [unaccompanied children],'' ''overseeing the infrastructure and personnel of facilities in which [unaccompanied children reside],'' and ''conducting investigations and inspections of facilities and other entities in which [unaccompanied children] reside, including regular follow-up visits to such facilities, placements, and other entities, to assess the continued suitability of such placements.''[45] Under the TVPRA, Federal agencies are required to notify HHS within 48 hours of apprehending or discovering an unaccompanied child or receiving a claim or having suspicion that a noncitizen in their custody is under 18 years of age.[46] The TVPRA further requires that, absent exceptional circumstances, any Federal department or agency must transfer an unaccompanied child to the care and custody of HHS within 72 hours of determining that a noncitizen child in its custody is an unaccompanied child. The TVPRA requires that HHS and other specified Federal agencies establish policies and programs to ensure that unaccompanied children are protected from traffickers and other persons seeking to victimize or exploit children.[47] Among other things, it also requires HHS to place unaccompanied children in the least restrictive setting that is in the best interest of the child, and states that in making such placements it may consider danger to self, danger to the community, and risk of flight. As previously discussed, the Secretary of HHS delegated the authority under the TVPRA to the Assistant Secretary for Children and Families,[48] who in turn delegated the authority to the Director of ORR.[49] It is under this delegation of authority that ORR now issues regulations describing how ORR meets its statutory responsibilities under the HSA and TVPRA and implements the relevant and substantive terms of the FSA for the care and custody of unaccompanied children.

In addition to requirements and standards related to the direct care of unaccompanied children, HHS is establishing a new UC Office of the Ombuds to create a mechanism that allows unaccompanied children and stakeholders to raise concerns with ORR policies and practices to an independent body. The Ombuds will be tasked with fielding concerns from any party relating to the implementation of ORR regulations, policies, and procedures; reviewing individual cases, conducting site visits and publishing reports, including reports on systemic issues in ORR custody, particularly where there are concerns about access to services or release from ORR care; and following up on grievances made by children, sponsors, or other stakeholders. As stated in the NPRM, at 88 FR 68913, HHS has authority to establish this office under its authority to ''establish policies and programs to ensure that unaccompanied alien children in the United States are protected from traffickers and other persons seeking to victimize or otherwise engage such children in criminal, harmful, or exploitative activity.''[50]

D. Basis and Purpose of Regulatory Action

The purpose of this rule is to finalize a regulatory framework that (1) codifies policies and practices related to the care

and custody of unaccompanied children, consistent with ORR's statutory authorities; and (2) implements relevant provisions of the FSA. The FSA describes ''minimum'' standards for care of unaccompanied children at licensed care provider facilities, but Congress subsequently enacted legislation establishing requirements for the UC Program. This final rule implements the protections set forth in the FSA and broadens them consistent with the current legal and operational environment, which has significantly changed since the FSA was signed over 25 years ago.

E. Severability

This is a comprehensive rule containing many subparts that address many distinct aspects of the UC Program. To the extent any subpart or portion of a subpart is declared invalid by a court, ORR intends for all other subparts to remain in effect. For example, ORR expects that if a court were to invalidate Subpart B (or any of Subpart B's discrete provisions) relating to the placement of a child, all other subparts—such as Subpart C (release of the child), Subpart D (minimum standards and services), Subpart E (transportation), etc.—may continue to operate and should remain operative independently of the invalidated subpart.

Additionally, each Subpart also contains many distinct provisions, many of which may also operate independently of one another; thus, the invalidation of one particular provision within a particular subpart would not necessarily have implications for other aspects of that subpart. For example, within Subpart D, the provision of access to routine medical and dental care, and other forms of healthcare at § 410.1307 would not be impacted by the invalidation of the provision of structured leisure time activities at § 410.1302(c)(4) or provision of legal services under § 410.1309. ORR intends that if one or more provisions within a subpart are invalidated, that all other provisions of that subpart (and all other subparts of the rule) remain in effect.

IV. Discussion of Elements of the Proposed Rule, Public Comments, Responses, and Final Rule Actions

Subpart A—Care and Placement of Unaccompanied Children

ORR proposed in the notice of proposed rulemaking (NPRM) to codify requirements and policies regarding the placement, care, and services provided to unaccompanied children in ORR custody (88 FR 68914). The following provisions identify the scope of this part, the definitions used throughout this part, and principles that apply to ORR placement, care, and services decisions.

ORR received many comments on the proposed rule that were not directed at any specific proposal and will address those here.

Comment: Many commenters supported the proposed rule, stating that it improved public transparency as to the policies governing the program and provided rights and protections for unaccompanied children. Many commenters supported codifying practices based on the HSA and TVPRA and implementing and enhancing the terms of the FSA and stated that a uniform set of standards and procedures would create conformity and clarity to provide for the well-being of unaccompanied children in ORR care. Several commenters cited ORR's efforts to clarify, strengthen, and codify these requirements and ensure the consistent implementation of child welfare principles and protections for children in ORR's custody. Another commenter commended ORR on its efforts to incorporate child-centered, trauma-informed principles into the regulatory standards for the UC Program and adopting more inclusive language. Other commenters appreciated that the provisions are tailored to the individualized needs of unaccompanied children and ensure protection from individuals who seek to exploit or victimize unaccompanied children.

Response: ORR thanks the commenters for their support.

Comment: One commenter encouraged ORR to provide clarity and more specifics in areas where appropriations would impact the ability to carry out the proposed rule.

Response: ORR thanks the commenter. As discussed in Section VI, funding for UC Program services is dependent on annual appropriations from Congress. The regulations specifically mention that post-release services (PRS) and funding for legal service providers are limited to the extent appropriations are available. The availability of child advocates and the enhancement of certain services, such as the transition to a community-based care model, are also impacted by appropriations. ACF's Justification of Estimates for Appropriation Committees provides additional information regarding the impact of its requested budget.[51]

Comment: One commenter indicated that sections within this document do not align with the latest policy updates.

Response: ORR thanks the commenter and has included discussion of policy updates throughout this final rule as applicable.

Comment: Some commenters expressed that the rule would circumvent accountability, provide less transparency, and harm children.

Response: ORR thanks the commenters for their comments. ORR believes that codifying these requirements will provide more accountability and will strengthen the UC Program to better protect children. The NPRM notice and comment process provided additional transparency and provided the public an opportunity to comment on ORR's processes and policies.

Comment: Many commenters expressed opposition to the rule and cited concerns that the proposed regulations did not do enough to prevent child trafficking.

Response: ORR appreciates and shares the public's concern for the welfare of unaccompanied children that come through its care, as well as the need to mitigate and prevent human trafficking. Among other similar responsibilities, HHS, together with other specified agencies, has a duty to ''establish policies and programs to ensure that unaccompanied alien children in the United States are protected from traffickers and other persons seeking to victimize or otherwise engage such children in criminal, harmful, or exploitative activity. . . .'' [52] Accordingly, these agencies, including ORR, have developed extensive policies and procedures to protect unaccompanied children and that are memorialized in subregulatory guidance and memoranda of agreement (MOA).[53] This rule contains provisions that are consistent with HHS's statutory responsibilities, many of which codify and strengthen current policy. For example, this rule codifies ORR's historic practice of screening all unaccompanied children for potential trafficking concerns, including during intake, assessments, and sponsor assessments, and its use of Significant Incident Reports to report such concerns. The rule also codifies the requirement that ORR refer concerns of human trafficking to ACF's Office on Trafficking in Persons (OTIP) within 24 hours in accordance with reporting requirements under the Trafficking Victims Protection Act of 2008. OTIP reviews the concerns to assess whether the unaccompanied child is eligible for benefits and services. Concerns of human trafficking are also reported to OTIP by post-release service providers, the ORR National Call Center (NCC),

legal services providers, law enforcement, child welfare entities, healthcare providers, other child-serving agencies, and advocates.

Under this rule, if ORR care provider staff, such as a case manager or clinician, suspect that a child is a victim of trafficking or is at risk of trafficking at any point during their interaction with an unaccompanied child, they must make a referral to HHS's ACF OTIP and to DHS's Homeland Security Investigations Division and DHS's Center for Countering Human Trafficking for further investigation. OTIP provides further assistance to ensure that victims can access appropriate care and services. Such care is then coordinated with ORR to provide direct referrals for grant-funded comprehensive case management services, medical services, food assistance, cash assistance, and health insurance tailored to the child's individual needs. While ORR does not retain legal custody of unaccompanied children post-release, ORR considers what, if any, additional action should be taken consistent with its legal authorities, including but not limited to: reporting the matter to local law enforcement; child protective services; or state child welfare licensing authorities; providing PRS to the released child and their sponsor, if the child is still under 18; requiring corrective action to be taken against a care provider facility to remedy any failure to comply with Federal and state laws and regulations, licensing and accreditation standards; ORR policies and procedures, and child welfare standards; or providing technical assistance to the care provider facility, as needed, to ensure that deficiencies are addressed.

Comment: One commenter stated their belief that the proposed rule was subject to the National Environmental Policy Act (NEPA) and argued that ORR must conduct an environmental assessment prior to finalizing this rule or it will be in violation of NEPA. The commenter pointed to the location of a facility in a community as having an environmental impact.

Response: ORR disagrees that an environmental assessment is necessary under NEPA for two reasons. NEPA applies when there are ''major Federal actions significantly affecting the quality of the human environment.'' 42 U.S.C. 4332(C). However, in this rule, HHS is not taking any Federal action that would ''affect'' the quality of the human environment because it is essentially memorializing aspects of existing UC Program procedures in a regulation, rather than where they reside now, in a settlement agreement, statutes, and the ORR UC policy guide. Because the rule, as a general matter, does not materially change the UC Program, it does not significantly affect the quality of the human environment to implicate NEPA. With respect to the ''risk determination hearings'' described at § 410.1903, ORR notes that those hearings already occur, but at DOJ instead of at HHS, as set forth in this rule.

With respect to the creation of the Office of the Ombuds, as described in subpart K, HHS has determined that the Ombuds Office falls under a categorical exclusion as delineated in the HHS General Administration Manual,[54] which describes certain categories of actions that do not require environmental review. Specifically, the Office of the Ombuds falls under Section 30–20–40(B)(2)(g), which excludes ''liaison functions (*e.g.,* serving on task forces, ad hoc committees or representing HHS interests in specific functional areas in relationship with other governmental and non-governmental entities).'' To carry out its responsibility to confidentially and informally receive and investigate complaints and concerns related to unaccompanied children's experiences in ORR care, the Office will liaise with stakeholders in the UC Program, including both governmental and non-governmental entities, and as such it is subject to the HHS categorical exclusion.

In general, HHS has determined that the rule falls under a categorical exclusion in section 30–20–40(B)(2)(f) of the HHS General Administration Manual, which provides that environment impact statements and environmental assessments are not required for ''grants for social services (*e.g.,* support for Head Start, senior citizen programs or drug treatment programs) except projects involving construction, renovation, or changes in land use.'' The UC Program provides grants for social services. Although the commenter points to locating a facility as having environmental impact, the rule does not in any way address issues relating to site selection for ORR facilities (*i.e.,* the rule does not describe projects involving construction, renovation, or changes in land use). To the extent the UC Program going forward may engage in such activities, ORR would engage in proper environmental review for each such activity. This rule, however, does not implicate environmental review.

Comment: One commenter stated their belief that the proposed rule did not include a cost estimate or financial analysis of what the burden would be to American taxpayers, and stated that before the rule is finalized, the Office of Management and Budget should review the rule.

Response: The proposed rule, and this final rule, provide a cost estimate in the section titled Economic Analysis. The Office of Management and Budget reviewed the proposed and final rules before publication.[55]

Final Rule Action: ORR will finalize the majority of the proposals, with some changes as discussed throughout this rule.

Section 410.1000 Scope of This Part

ORR proposed in the NPRM, at § 410.1000(a), that the scope of this part pertain to the placement, care, and services provided to unaccompanied children in Federal custody by reason of their immigration status and referred to ORR (88 FR 68914). As described in section III of this final rule, ORR's care, custody, and placement of unaccompanied children is governed by the HSA and TVPRA, and ORR provides its services to unaccompanied children in accordance with the terms of the FSA. ORR also clarified that part 410 would not govern or describe the entire program. For example, part 411 (describing requirements related to the prevention of sexual abuse of unaccompanied children in ORR care) would remain in effect under this rule. ORR notes that its current policies and practices are described in the online ORR Policy Guide,[56] Field Guidance,[57] manuals describing compliance with ORR policies and procedures, and other communications from ORR to care provider facilities. ORR will continue to utilize these vehicles for its subregulatory guidance and will revise them in connection with publication of the final rule as needed to ensure compliance with the final rule. The provisions of this part would, in many cases, codify existing ORR policies and practices. Further, ORR will continue to publish subregulatory guidance as needed to clarify the application of these regulations.

ORR also proposed, at § 410.1000(b), that the provisions of this part are separate and severable from one another and that if any provision is stayed or determined to be invalid, the remaining provisions shall continue in effect (88 FR 68914). Additionally, ORR proposed in the NPRM at § 410.1000(c) that ORR does not fund or operate facilities other than standard programs, restrictive placements (which include secure facilities, including residential treatment centers, and heightened supervision facilities), or EIFs, absent a

specific waiver as described under § 410.1801(d) or such additional waivers as are permitted by law (88 FR 68914).

Comment: One commenter questioned the consistency of the level of detail used in the NPRM, stating that some parts of the proposed regulation were very detailed while other requirements were more general. The commenter suggested that the rule should include either a statement of general guiding principles from which specific policy and operational directives will be drawn or, conversely, should include all specific operational directives for all requirements, thus replacing existing or significantly modifying the existing ORR Policy Guide.

Response: ORR thanks the commenter for their comment. As clarified in the NPRM, part 410 will not govern or describe the entire program (88 FR 68914). Where the regulations contain less detail, subregulatory guidance will provide specific guidance on requirements. By keeping some of the requirements subregulatory, ORR will be able to make more frequent, iterative updates in keeping with best practices and to allow continued responsiveness to the needs of unaccompanied children and care provider facilities. The requirements codified in this rule, on the other hand, may in the future be amended only through future notice and comment rulemaking or changes in law.

Comment: One commenter stated that while they appreciated the Administration's work to codify standards, they believe it is also important to preserve ORR's ability to nimbly respond to emerging issues through updates to its policy guide, as ORR did during the COVID–19 pandemic. The commenter recommended that ORR include language making it clear that nothing in the final rule precludes ORR from updating policy and guidance to address emergent situations while prioritizing the best interests of children.

Response: ORR reiterates the clarification that part 410 will not govern or describe the entire program and that further guidance will be provided through subregulatory guidance in order to remain nimble to changing circumstances as the commenter suggests.

Final Rule Action: After consideration of public comments, ORR is finalizing § 410.1000 as proposed.

Section 410.1001 Definitions

ORR proposed in the NPRM, at § 410.1001, to codify the definitions of terms that apply to this part (88 FR 68914 through 68916). Some definitions are the same as those found in statute, or other authorities (*e.g.,* the definition of ''unaccompanied child'' is the same as the definition of ''unaccompanied alien child'' as found in the HSA, 6 U.S.C. 279(g)(2)). Notably, for purposes of this rule, ORR updated certain terms and definitions provided in the FSA (*e.g.,* the definition of ''influx''). In the NPRM, ORR provided an explanation for certain definitions, to further explain ORR's rationale when the rule applies the relevant terms. As discussed in this section, ORR is revising some of the proposed definitions.

ORR proposed in the NPRM the definition of ''care provider facility'' to generally describe any placement type for unaccompanied children, except out of network (OON) placements, and as a result is broader than the term ''standard program,'' provided below, which, for example, does not include EIFs (88 FR 68914). ORR also noted that this definition does not reference ''facilities for children with special needs,'' a term used in the definition of ''licensed program'' in the FSA and 45 CFR 411.5. ORR considered not using the term ''facilities for children with special needs'' within the part for the reasons set forth below in this section at the proposed definition of ''standard program.'' Moreover, ORR considered this definition for ''care provider facility'' to encompass any facility in which an unaccompanied child may be placed while in the custody of ORR, including any facility exclusively serving children in need of particular services and treatment.

ORR proposed in the NPRM a definition of ''disability'' that is distinct from the NPRM's proposed definition for a ''special needs unaccompanied child,'' discussed later in this section and which is derived specifically from the FSA (88 FR 68914). Although some unaccompanied children may have a disability and have special needs, the terms are not synonymous. For example, an unaccompanied child exiting ORR custody may be considered to have a disability within the definition set forth in section 504 even if the child does not require services or treatments for a mental and/or physical impairment.

ORR proposed in the NPRM a definition of ''emergency'' that differs from the definition previously finalized at 45 CFR 411.5, which defines the term as ''a sudden, urgent, usually unexpected occurrence or occasion requiring immediate action'' (88 FR 68914). ''Emergency,'' for purposes of the proposed rule, would reflect the term's usage in the context of the requirements proposed in the NPRM.

With respect to the definition of the proposed term ''EOIR accredited representative,'' ORR noted in the NPRM that DOJ refers to these individuals simply as ''accredited representatives,'' see 8 CFR 1292.1(a)(4), but for purposes of the NPRM, ORR adopted the term ''EOIR accredited representative'' (88 FR 68914).

ORR proposed in the NPRM that the definition of ''heightened supervision facility'' incorporate language consistent with the definition of ''medium secure facility'' provided in the FSA at paragraph 8 (88 FR 68914). This term replaces the term ''staff secure facility'' as used under existing ORR policies. ORR decided to change its terminology because it had become clear that the prior term was not well understood and did not effectively convey information about the nature of such facilities.

ORR proposed in the NPRM that the definition of ''influx'' would change the threshold for declaring an influx, for ORR's purposes, from the FSA standard, which ORR believes is out of date considering current migration patterns and its organizational capacity (88 FR 68914 through 68915). The FSA defines influx as ''those circumstances where the INS has, at any given time, more than 130 minors eligible for placement in a licensed program.'' ORR's definition, however, would not impact the rights, and responsibilities of other parties of the FSA. ORR believes that the proposed definition more appropriately reflects significantly changed circumstances since the inception of the FSA and provides a more realistic, fair, and workable threshold for implementing safeguards necessary in cases where a high percentage of ORR's bed capacity is in use. The 1997 standard of 130 minors awaiting placement does not reflect the realities of unaccompanied children referrals in the past decade, in which the number of unaccompanied children referrals each day typically exceeds, and sometimes greatly exceeds, 130 children. To leave this standard as the definition of influx would mean, in effect, that the program is always in influx status. Accordingly, ORR provided a more realistic and workable threshold for implementing safeguards necessary in cases where a high percentage of ORR bed capacity is in use.

With respect to the definition of ''post-release services,'' ORR noted in the NPRM that assistance linking families to educational resources may include but is not limited to, in appropriate circumstances, assisting with school enrollment; requesting an English language proficiency assessment; seeking an evaluation to determine whether the child is eligible

for a free appropriate public education (which can include special education and related services) or reasonable modifications and auxiliary aids and services under the Individuals with Disabilities Education Act or section 504; and monitoring the unaccompanied child's attendance and progress in school (88 FR 68915). ORR noted that while the TVPRA requires that follow-up services must be provided during the pendency of removal proceedings in cases in which a home study occurred, the nature and extent of those services would be subject to available resources.

ORR noted, in the NPRM, with respect to the proposed definition of ''runaway risk,'' the FSA and ORR policy currently use the term ''escape risk'' (88 FR 68915). See FSA paragraph 22 (defining ''escape risk'' as ''a serious risk that the minor will attempt to escape from custody,'' and providing a non-exhaustive list of factors ORR may consider when determining whether an unaccompanied child is an escape risk—*e.g.,* whether the unaccompanied child is currently under a final order of removal, the unaccompanied child's immigration history, and whether the unaccompanied child has previously absconded or attempted to abscond from Government custody). ORR proposed in the NPRM to update this term to ''runaway risk,'' which is a term used by state child welfare agencies and Federal agencies to describe children at risk from running away from home or their care setting (88 FR 68915). Rather than basing its determination of runaway risk solely on the factors described in the FSA, ORR proposed in the NPRM that such determinations must be made in view of a totality of the circumstances and should not be based solely on a past attempt to run away. This definition of runaway risk is consistent with how the term is used in the FSA to describe escape from ORR care, *i.e.,* from a care provider facility. ORR noted throughout the proposed rule that the TVPRA uses the term ''risk of flight,'' stating HHS ''may'' consider ''risk of flight,'' among other factors, when making placement determinations.[58] ORR understands that in the immigration law context, ''risk of flight'' refers to an individual's risk of not appearing for their immigration proceedings.[59] ORR proposed in the NPRM, with respect to its responsibilities toward unaccompanied children in its custody, to interpret ''risk of flight'' as including ''runaway risk,'' thereby adding runaway risk to the list of factors it would consider in making placement determinations. Runaway risk often overlaps with concern that an unaccompanied child may not appear for the child's immigration proceedings. ORR also noted that runaway risk may also relate to potential danger to self or the community, given the inherent risks to unaccompanied children who run away from custody (88 FR 68915).

With respect to the proposed definition of ''secure facility,'' ORR noted that the FSA uses but does not provide a definition for this term (88 FR 68915). Nevertheless, the proposed definition is consistent with the provisions of the FSA that apply to secure facilities. ORR also noted that the proposed definition differs from the definition in the 2019 Final Rule, which could have been read to indicate that any contract or cooperative agreement for a facility with separate accommodations for minors is a secure facility. Such a definition risks erroneously confusing other types of ORR placements that are not secure with secure placements and, therefore, ORR proposed in the NPRM an updated definition in the NPRM.

ORR proposed in the NPRM to change the definition of ''special needs unaccompanied child,'' to the term ''special needs minor'' as described within the FSA at paragraph 7 and by using the phrase ''intellectual or developmental disability'' instead of ''mental illness or retardation'' as used in the FSA (88 FR 68915). ORR understands that this update reflects current terminology which has superseded the terminology used in the FSA (''retardation''). Although an unaccompanied child with a disability, as defined in this section, could also be a ''special needs unaccompanied child'' as incorporated here, the definition of disability is broader and thus the terms are not synonymous. To further this clarification, ORR proposed in the NPRM a separate definition for disability earlier in this section that incorporates the meaning of the term across applicable governing statutory authorities. ORR also considered not defining and not using the term ''special needs unaccompanied child'' within the part for the reasons set forth below at proposed §§ 410.1103 and 410.1106.

ORR proposed in the NPRM a definition of ''standard program'' that reflects and updates the term ''licensed program'' at paragraph 6 of the FSA (88 FR 68915 through 68916). The FSA does not discuss situations where States discontinue licensing, or exempt from licensing, childcare facilities that contract with the Federal Government to care for unaccompanied children because such facilities provide shelter and services to unaccompanied children as has happened recently in some States.[60] ORR proposed in the NPRM a definition of ''standard program'' that is broader in scope to account for circumstances wherein licensure is unavailable in the State to programs that provide residential, group, or home care services for dependent children when those programs are serving unaccompanied children. ORR notes that most States where ORR has care provider facilities have not taken such actions, and that wherever possible standard programs would continue to be licensed consistent with current practice under the FSA. However, ORR considered substituting the term ''licensed program'' with the proposed updated term ''standard program'' in order to establish that the requirement that facilities in those States must still meet minimum standards, consistent with requirements for licensed facilities expressed in the FSA at Exhibit 1, in any circumstance in which a State will not license a facility because the facility is housing unaccompanied children.[61] ORR solicited comments on using the proposed definition of ''standard program'' in lieu of the term ''licensed program.''

ORR proposed in the NPRM a definition for ''standard program'' to encompass any program operating non-secure facilities that provide services to unaccompanied children in need of particular services and treatment or to children with particular mental or physical conditions (88 FR 68916). Given this, ORR believed the continued use of language such as ''facilities for children with special needs'' and ''facilities for special needs minors,'' as used in the FSA definition of ''licensed program,'' was unnecessary for this regulation, and potentially problematic for reasons discussed elsewhere within this section and at proposed §§ 410.1103 and 410.1106. ORR included this language to ensure consistency with the FSA, but it considered not using the term ''special needs unaccompanied child'' or specifying that facilities for special needs unaccompanied children operated by a standard program are covered by the requirements that apply to standard programs in the part. Therefore, ORR also solicited comments in this section on its proposal to not include in the definition of ''standard program'' the FSA terminology used in the term ''licensed program'' referencing facilities for special needs unaccompanied children or a facility for special needs unaccompanied children.

ORR proposed in the NPRM to define ''trauma bond'' consistent with how the Department of State's Office to Monitor and Combat Trafficking in Persons defines the term in its factsheet, Trauma

Bonding in Human Trafficking (88 FR 68916).[62]

ORR proposed in the NPRM to define ''trauma-informed,'' based upon its belief that a trauma-informed approach to the care and placement of unaccompanied children is essential to ensuring that the interests of children are considered in decisions and actions relating to their care and custody (88 FR 68916).[63] ORR interprets trauma-informed system, standard, process, or practices consistent with the 6 Guidelines To A Trauma-Informed Approach adopted by the Centers for Disease Control and Prevention (CDC) and developed by the Substance Abuse and Mental Health Services Administration (SAMHSA).

ORR received comments on the following definitions.

Attorney of Record

Comment: One commenter recommended changes to the definition of ''attorney of record.'' The commenter recommended that ORR revise the definition to specifically define an ''attorney'' as ''an individual licensed to practice law in any U.S. jurisdiction'' but then make clear that non-attorneys may represent a child in their immigration proceedings. The commenter also urged ORR to remove reference to the requirement that an attorney ''protects [unaccompanied children] from mistreatment, exploitation, and trafficking, consistent with 8 U.S.C. 1232(c)(5),'' explaining that the statute cited requires that HHS ensure counsel because that will protect unaccompanied children from mistreatment, exploitation, and trafficking, but not that counsel is required to protect the child. The commenter continued, that although in many instances having counsel will ensure a child's protection, the duty to protect, as outlined in the proposed definition, may conflict with an attorney's duty to represent the child's expressed interests as required by the rules of professional conduct.

Response: ORR thanks the commenter. The definition of attorney of record states that the attorney represents the unaccompanied child in legal proceedings, so ORR does not think it is necessary to also indicate that the attorney is licensed for such representation. ORR does agree with the commenter that the addition of the referenced language from the TVPRA improperly implies that the attorney is required to protect the child and that it should remove that language from the definition.

Final Rule Action: ORR is revising the proposed definition of ''attorney of record'' to remove the phrase ''and protects them from mistreatment, exploitation, and trafficking, consistent with 8 U.S.C. 1232(c)(5).''

Best Interest

Comment: Many commenters commented on the definition of ''best interest.'' Commenters recommended expanding the definition of ''best interest'' to more explicitly address the following factors: the impact of family relationships and importance of family integrity, the impact of Federal custody on an unaccompanied child's well-being, their safety, and their identity including their race, religion, ethnicity, sexual orientation, and gender identity.

Response: ORR thanks the commenters. ORR notes that the rule provides a non-exhaustive list of factors ORR may consider in evaluating what is in a child's best interest. ORR understands the listed factors to already encompass additional factors suggested by the commenters. Further, ORR notes that some of the factors recommended by commenters are also already provided as considerations for placement under § 410.1103. Having said that, ORR will further consider whether to expand on the definition of best interest in future policymaking.

Final Rule Action: ORR is finalizing the definition of ''best interest'' as proposed.

Care Provider Facility

Comment: One commenter supported the proposed term ''care provider facility,'' stating that by making it broader than ''standard program,'' it will help clarify the meaning of influx or emergency facilities. Another commenter recommended that the definition of ''care provider facility'' meet the definition of ''child care institution'' at section 472(c)(2)(A) of the Social Security Act in order to align all institutions and facilities serving vulnerable children residing within and across states, including but not limited to unaccompanied children.

Response: ORR thanks the commenter for their support. Regarding the definition in the Social Security Act, section 472(c)(2)(A) defines ''child care institution'' as ''a private child-care institution, or a public childcare institution which accommodates no more than 25 children, which is licensed by the State in which it is situated or has been approved by the agency of the State responsible for licensing or approval of institutions of this type as meeting the standards established for the licensing.'' Although ORR appreciates the comment, section 472 of the Social Security Act is specific to State payments to foster care programs and does not govern the ORR UC Program. Although ORR strives to place children in care settings with small numbers of children, it is not always possible to do so. Additionally, ORR has further requirements that care provider facilities must meet in addition to those relating to State licensing.

Final Rule Action: ORR is finalizing the term care provider facility as follows: *Care provider facility* means any physical site, including an individual family home, that houses one or more unaccompanied children in ORR custody and is operated by an ORR-funded program that provides residential services for unaccompanied children. Out of network (OON) placements are not included within this definition.

Case File

Comment: One commenter supported the inclusion of home study and PRS records as part of the case file definition and, by so doing, including such records as protected information, agreeing that unaccompanied children's case files and related information should receive strong safeguards from unauthorized access, misuse, and inappropriate disclosure. However, the commenter requested clarity regarding the meaning of ''correspondence'' within the definition, asking if it was meant to cover a limited set of materials regarding the child's unification, such as any correspondence with parents and sponsors done by ORR staff or provider case managers. The commenter expressed concern that this is not consistent with the other use of ''correspondence'' in the NPRM at § 410.1304(a)(2)(ii), where the word ''correspondence'' appears to be meant to include personal correspondence between the unaccompanied child and whomever the child wishes to correspond with, including a friend, relative, parent, attorney, or child advocate. Such materials should be the child's personal property and not the property of ORR.

Response: ORR thanks the commenter. ORR notes that the definition of case file is ''the physical and electronic records for each unaccompanied child that are pertinent to the care and placement of the child.'' Accordingly, personal correspondence that is not pertinent to the care and placement of the child would not be part of the case file. However, for the sake of clarity, ORR will revise the proposed definition to state that the case file includes ''correspondence regarding the child's case.''

Comment: One commenter did not support the statement within the proposed definition of case file that ''[t]he records of unaccompanied children are the property of ORR.'' The commenter acknowledged the importance of strong, universal standards governing children's records in order to consistently protect the confidentiality of their Personally Identifiable Information (PII) but stated that the ownership of children's records is a more complicated issue. The commenter stated, as an example, that when a child brings documents such as a birth certificate into custody, the Federal Government holds that document, but does not own it. The commenter stated that the birth certificate belongs to the child and the child's parent and legal guardian, and the document and its content can be shared with the child's or parent's consent.

Response: ORR notes that, consistent with UC Program's System of Records Notice (SORN), unaccompanied children have access to, and are entitled to copies of, their own case file records, consistent with the provisions of the Privacy Act, codified at 5 U.S.C. 552a.[64] An unaccompanied child's attorney of record also has the ability to request the child's full case file at any time. With respect to original documents such as a child's birth certificate, ORR notes that it is amending the definition of ''case file'' to note that it includes ''copies of'' birth and marriage certificates.

Final Rule Action: ORR is revising the proposed definition to add that case file materials include ''but are not limited to'' the materials listed in the definition. ORR is also adding the phrase ''regarding the child's case'' after ''correspondence.'' ORR is also adding ''copies of'' before birth and marriage certificates. Additionally, in order to be consistent with finalized § 410.1303(h)(2), ORR is adding ''except for program administration purposes'' at the end of the definition. ORR is otherwise finalizing the definition as proposed.

Close Relative

Final Rule Action: As discussed in § 410.1205, ORR is finalizing the definition of ''close relative'' as a type of potential sponsor, as follows: ''*Close relative* means a brother, sister, grandparent, aunt, uncle, first cousin, or other immediate biological relative, or immediate relative through legal marriage or adoption, and half-sibling.''

Community-Based-Care

Comment: One commenter did not support the proposed definition of community-based care, believing that it is overly broad. The commenter recommended retaining ''traditional foster care'' instead.

Response: ORR thanks the commenter for their comment. ORR notes that it is planning to transition to a community-based care model that will restructure ORR's existing transitional foster care and long-term foster care programs to operate within a continuum of care including basic and therapeutic foster family settings as well as supervised independent living group home settings, to more effectively place and support children in non-congregate settings. However, ORR plans to describe this transition in future policymaking, and therefore is not finalizing the term ''community-based care'' in this rule. ORR will consider this commenter's feedback as it continues transitioning to this model. Additional details and responses to public comments on community-based care are described in subpart B.

Final Rule Action: ORR is not finalizing codification of the definition for the term ''community-based care,'' though ORR has sought to provide further details relating to the broad standards applicable to the term in subpart B.

Disposition

Comment: One commenter stated that the proposed rule uses the term ''disposition'' as a term of art but does not define what disposition signifies, includes, or excludes.

Response: The term ''disposition'' appears three times in the regulation, twice as ''case disposition'' and once as the ''disposition of any actions in which the unaccompanied child is the subject.'' ORR believes that the meaning of disposition is clear in context and so the term does not necessitate a definition.

Final Rule Action: ORR is not finalizing a definition for ''disposition.''

Executive Office for Immigration Review (EOIR) Accredited Representative

Comment: One commenter recommended that ORR change the term ''EOIR accredited representative'' to ''DOJ accredited representative,'' stating that the term is commonly referred to as ''DOJ accredited representative'' and that adopting a different term in these proposed regulations will cause unnecessary confusion and be inconsistent with how representatives are referred to elsewhere.

Response: ORR thanks the commenter and agrees to revise the term to ''DOJ Accredited Representative.'' ORR is updating this term throughout the rest of this final rule, even where summarizing NPRM language which used the term ''EOIR accredited representative.''

Final Rule Action: ORR is revising the term to ''DOJ Accredited Representative'' and otherwise finalizing the definition of such term as proposed.

Emergency

Comment: Some commenters did not support the proposed definition of ''emergency,'' believing that it relaxes standards and changes a commonly understood term.

Response: The FSA defines emergency, for purposes of paragraph 12 of the FSA, as ''an act or event that prevents the placement of minors pursuant to paragraph 19 within the timeframe provided.'' In turn, paragraph 19 of the FSA describes the requirement to place unaccompanied children in licensed programs until they can be released to a sponsor—''provided, however, that in the event of an emergency a licensed program may transfer temporary physical custody of a minor prior to securing permission from the INS but shall notify the INS of the transfer as soon as is practicable thereafter, but in all cases within 8 hours.'' The FSA states at paragraph 12B that emergencies include ''natural disasters (*e.g.,* earthquakes, hurricanes, etc.), facility fires, civil disturbances and medical emergencies (*e.g.,* a chicken pox epidemic among a group of minors).'' In the NPRM, ORR proposed to define ''emergency'' as ''an act or event (including, but not limited to, a natural disaster, facility fire, civil disturbance, or medical or public health concerns at one or more facilities) that prevents timely transport or placement of unaccompanied children, or impacts other conditions provided by this part (88 FR 68979). ORR is therefore codifying the term emergency as used in the FSA.

Final Rule Action: ORR is finalizing the term ''emergency'' as proposed.

Emergency or Influx Facility (EIF)

Comment: One commenter expressed concern that the proposed rule defined emergency or influx facility as ''a type of care provider facility that opens temporarily to provide shelter and services for unaccompanied children'' but does not define temporary. Another commenter urged ORR to incorporate additional language that unlicensed placements, such as emergency and influx sites, should only be utilized as a last resort.

Response: As stated in the NPRM, ORR has a strong preference to house unaccompanied children in standard programs (88 FR 68955). However, ORR notes that in times of emergency or influx, additional facilities may be needed on short notice to house unaccompanied children. Consistent with current policy, ORR intends that under this rule it will cease placements at EIFs if net bed capacity of ORR's standard programs that is occupied or held for placement of unaccompanied children drops below 85 percent for a period of at least seven consecutive days.

Final Rule Action: For consistency and clarity, ORR is replacing the proposed second sentence of the definition, which read ''These facilities are not otherwise categorized as a standard or secure facility in this part'' with ''An EIF is not defined as a standard program, shelter, or secure facility under this part.'' ORR is also replacing the phrase ''they may not be licensed'' with ''they may be unlicensed'' to remove any possible implication that they are not allowed to be licensed. ORR is otherwise finalizing the term ''emergency or influx facility (EIF)'' as proposed.

Family Planning Services

Comment: A few commenters suggested that ORR amend the list of family planning services to include abortion, arguing that abortion should be included in the definition of family planning services to avoid stigmatizing abortion.

Response: ORR thanks the commenters for their comments. ORR notes that its proposed definition of ''family planning services'' is consistent with other HHS regulations and publications.[65] As noted in the NPRM, ORR has included abortion in the definition of medical services requiring heightened ORR involvement (88 FR 68979). One commenter suggested revising the definition by updating ''pregnancy testing and counseling'' in the list of family planning services to ''pregnancy testing and non-directive pregnancy counseling.'' ORR accepts the recommendation to update ''counseling'' to ''non-directive options counseling'' in the definition of Family Planning Services in the regulatory text, as it aligns with ORR's intended meaning and aligns with corresponding language in Field Guidance #21.

Final Rule Action: ORR is adding the phrase ''non-directive options'' before ''counseling'' and otherwise, finalizing the term ''Family Planning Services'' as proposed.

Heightened Supervision Facility

Comment: One commenter supported the inclusion in the term's definition that ''heightened supervision facilities'' ''provide supports'' to children with higher needs. The commenter encouraged ORR to eliminate the definition's focus on security and replace text with reference to additional personalized and intensive service provision.

Response: ORR thanks the commenter for their comment. ORR notes that the definition merely defines the facility and how it differs from a shelter facility. Heightened supervision facilities are required to meet the minimum standards for standard programs. ORR notes that it is important to describe the level of restriction at these facilities because certain requirements need to be met for children to be placed in heightened supervision facilities under subpart B and children have a right to review placement in these facilities under subpart J.

Final Rule Action: As further discussed at the preamble text for § 410.1302, ORR is adding the phrase ''or that meets the requirements of State licensing that would otherwise be applicable if it is in a State that does not allow state licensing of programs providing care and services to unaccompanied children,'' after ''licensed by an appropriate State agency.''

Influx

Comment: Many commenters supported the proposed definition of ''influx,'' noting that the updated definition is more realistic in light of recent immigration trends and would reduce the placement of unaccompanied children in emergency facilities. One commenter recommended that the definition be amended to account for the trajectory of incoming unaccompanied children to reach or exceed 85 percent of bed capacity within 30 days in order to trigger EIFs from cold to warm status.

Response: ORR thanks the commenters. ORR intends through this final rule to update the FSA definition of influx to account for current circumstances at the southern border. However, because migration patterns are unpredictable, ORR believes it is appropriate to maintain subregulatory procedures with respect to preparing for the use of EIFs, based on the definition of influx codified in this rule.

Comment: One commenter supported ORR's proposal to adopt a definition of ''influx'' that differs from the FSA, agreeing that the FSA standard set forth in 1997 does not reflect the realities of unaccompanied children awaiting placement that have been experienced in the last decade. However, the commenter expressed their view that ORR has consistently underutilized available licensed beds in its network and placed unaccompanied children in active influx care facilities when licensed facilities were available. The commenter stated further their concern that the proposed definition would have an influx hinge entirely on ORR's network capacity, as opposed to the actual numbers of unaccompanied children entering the agency's care. Another commenter requested clarification regarding the safeguards referenced in the definition of influx.

Response: ORR thanks the commenters. ORR appreciates the commenter's concern about basing the definition of influx on the net bed capacity of standard programs, however basing it on numbers of unaccompanied children proved insufficient as migration numbers greatly increased and the static number became outdated. The original intent of the FSA definition was to identify circumstances in which there is a sudden need to expand capacity and not sufficient time to use the ordinary supply-building process. Looking at referrals in relation to current net bed capacity of ORR's standard programs that is occupied or held for placement of unaccompanied children is a better way to reflect that need and sets the definition of influx at a level vastly higher than what would have been required had ORR maintained the FSA definition. ORR also notes that standard capacity beds may be unavailable for a variety of reasons including staffing shortages; licensing restrictions on age, gender, or ratios; or building issues (*e.g.,* water leaks) that prevent the safe placement of children. These causes of unavailability are not controlled by ORR, but are examples of issues that may restrict ORR's access to standard beds in its network of care on a given day. ORR will continue to monitor the numbers of unaccompanied children and the number of available standard placements to determine if further updates are needed in the future.

Final Rule Action: ORR is replacing the term ''for purposes of this part'' with ''for purposes of HHS operations'' and otherwise finalizing the definition of ''influx'' as proposed.

Least Restrictive Placement

Comment: One commenter expressed concern that ''least restrictive placement'' is not defined, and that it may be inferred that the least restrictive placement is by default, anything that is

not a ''restrictive placement,'' which is defined. The commenter expressed concern that the proposed regulations do not recognize the commenter's belief that some non-restrictive placements are more restrictive than other non-restrictive placements.

Response: ORR notes that it intends the term ''least restrictive placement'' be read consistent with the TVPRA requirement that unaccompanied children in the custody of HHS be ''promptly placed in the least restrictive setting that is in the best interest of the child,'' and that in making such placements HHS ''may consider danger to self, danger to the community, and risk of flight,'' among other requirements. 8 U.S.C. 1232(c)(2)(A).

Final Rule Action: ORR is not adopting a definition of ''least restrictive placement.''

LGBTQI+

Comment: A few commenters recommended expanding the definition of LGBTQI+, which the NPRM defined as meaning ''lesbian, gay, bisexual, transgender, queer or questioning, intersex,'' to include an explanation of the ''+'' symbol. The commenters stated their belief that expanding the definition would make the definition more complete and would better encompass the many other identities that make up the LGBTQI+ community.

Response: ORR thanks the commenters. ORR appreciates that the term LGBTQI+ is an umbrella term that is broader than the term LGBTQI, and accordingly has revised the regulatory definition to say that the term ''includes'' lesbian, gay, bisexual, transgender, questioning or intersex, as defined at 45 CFR 411.5. This change helps to make clear that the term LGBTQI+ includes additional identities such as non-binary.

Final Rule Action: ORR is revising the definition to replace ''means'' with ''includes'' and is otherwise finalizing the definition of LGBTQI+ as proposed.

Mechanical Restraints

Final Rule Action: For the reasons discussed in the preamble discussion of § 410.1304(e)(1), ORR is clarifying the definition of mechanical restraints by adding a second sentence to the definition, as follows: ''For purposes of the Unaccompanied Children Program, mechanical restraints are prohibited across all care provider types except in secure facilities, where they are permitted only as consistent with State licensure requirements.'' ORR is otherwise finalizing the definition as proposed.

Medical Services Requiring Heightened ORR Involvement

Comment: A few commenters recommended that ORR revise the definition of medical services requiring heightened ORR involvement to clarify that the heightened involvement is only to ensure quick transportation or transfer for abortion, as needed, and not to create obstacles to impede access to abortion.

Response: ORR acknowledges the importance of not creating obstacles to needed medical services, including but not limited to abortion, but does not believe that the definition of medical services requiring heightened ORR involvement needs to be modified in order to make this point clear. ORR is revising § 410.1307 to further clarify that ORR will not prevent unaccompanied children in ORR care from accessing healthcare services, including medical services requiring heightened ORR involvement and family planning services, and ORR must make reasonable efforts to facilitate access to those services if requested by the unaccompanied child.

Final Rule Action: ORR is finalizing the definition of ''medical services requiring heightened ORR involvement'' as proposed.

ORR Long-Term Home Care

Comment: One commenter stated they had no objection to the proposed change from ''long-term foster care'' to ''long-term home care.'' Another commenter suggested that the definition of ''ORR long-term home care'' be clarified to indicate whether children need to have viable legal cases in the particular State to be placed in that program versus the ''legal proceedings'' that all children in ORR care are in.

Response: ORR thanks the commenters. Part of the proposed definition reads that ''[a]n unaccompanied child may be placed in long-term home care if ORR is unable to identify an appropriate sponsor with whom to place the unaccompanied child during the pendency of their legal proceedings.'' ORR clarifies that the legal proceedings referenced are immigration legal proceedings and is amending the definition accordingly.

Final Rule Action: ORR is adding the word ''immigration'' before ''legal proceedings'' and is otherwise finalizing the definition of ''ORR long-term home care'' as proposed.

Out of Network (OON) Placement

Comment: Some commenters expressed concern that OON facilities were excluded from the definition of care provider facility and that the definition of OON placements does not require they are State licensed or follow the requirements of a standard program. Commenters requested clarification regarding standards applicable to OON placements. One commenter recommended that the definition of OON placement be revised to state that during an OON placement, the responsibility for reporting incidents related to the child, assessments, and ongoing case management would remain with the care provider facility.

Response: In response to the comments, ORR is adding to the definition of OON placement that OON placements are ''licensed by an appropriate State agency.'' ORR will vet the program to ensure that the program is in good standing with State licensing and is complying with all applicable State child welfare laws and regulations and all State and local building, fire, health, and safety codes. ORR further reiterates that an unaccompanied child may only be placed at an OON placement when such placement would be in the unaccompanied child's best interest. As stated in the NPRM, consistent with existing policies, in these circumstances, even though an unaccompanied child would be physically located at an OON placement, the unaccompanied child would remain in ORR legal custody (88 FR 68924). ORR also clarifies that an OON placement is not defined as a standard program under this part. However, as provided under ORR policy, the unaccompanied child's case manager would monitor the unaccompanied child's progress and ensure the unaccompanied child is receiving services.

Final Rule Action: ORR is adding the phrase ''that is licensed by an appropriate State agency'' after ''means a facility'' to the definition of out of network placement. ORR is also stating that such a placement is not defined as a standard program under this part. ORR is otherwise finalizing the definition as proposed.

Placement Review Panel

Comment: One commenter suggested revising the definition of ''placement review panel (PRP)'' to include additional information regarding timeframes for decision and specificity regarding the term ''ORR Senior Level Career Staff'' by including the job title or designation.

Response: ORR thanks the commenter for their feedback. Requirements for the PRP are addressed by ORR under § 410.1902, rather than in the definition of the PRP. ORR clarifies that ''ORR

Senior Level Career Staff'' means ORR staff at a senior level or above that is not politically appointed.

Final Rule Action: ORR is finalizing the definition of ''placement review panel'' as proposed.

Qualified Interpreter

Comment: One commenter suggested that the definition of a ''qualified interpreter'' for an individual with a disability be modified to include adherence to generally accepted ethics principles, including client confidentiality, to make it clear that individuals with disabilities are entitled to the same confidentiality and ethical protections as limited English proficient individuals.

Response: ORR thanks the commenter for catching a drafting error. ORR will restructure the proposed paragraph, moving former subparagraph (2)(iii) to become new paragraph (3), so that the ethical protections provision applies to the overall definition of ''qualified interpreter.''

Comment: One commenter suggested that the definition of ''qualified interpreter'' requires that interpreters are not only proficient in the language but also culturally competent.

Response: ORR thanks the commenter but notes that the definition of qualified interpreter for a limited English proficient individual includes a requirement that the interpreter be able to interpret ''effectively, accurately, and impartially to and from such language(s) and English, using any necessary specialized vocabulary or terms without changes, omissions, or additions and while preserving the tone, sentiment, and emotional level of the original oral statement.'' This definition is consistent with another HHS regulation [66] and captures a requirement that the interpreter understand the cultural nuances of the language.

Final Rule Action: ORR is revising the proposed definition to move former subparagraph (2)(iii) to become new paragraph (3) such that the requirement to adhere to generally accepted interpreter ethics principles, including client confidentiality applies to both qualified interpreters for an individual with a disability and for a limited English proficient individual. ORR is finalizing the rest of the definition as proposed.

Runaway Risk

Comment: One commenter supported the proposed definition of ''runaway risk,'' noting that it is consistent with the FSA. The commenter also supported the proposed rule's clarification that this determination must consider the totality of the circumstances. Another commenter also supported replacing the term ''escape risk'' with a term such as ''child at risk of running away,'' stating that other terms are used in criminal or enforcement settings and are not appropriate to use in a child welfare setting.

Response: ORR thanks the commenters for their support for not using the term ''escape risk'' and instead using a term that relates to runaway risk, given that escape risk is relevant to a criminal setting. ORR notes that the definition of runaway risk requires a finding that it is ''highly probable or reasonably certain'' that a child will attempt to abscond from ORR care, whereas the FSA defines ''escape risk'' as meaning there is a ''serious risk'' that a minor will attempt to escape from custody. Per § 410.1105(b)(2)(ii) of this final rule, one of the factors ORR may consider for placement of children in heightened supervision facilities is whether a child is a runaway risk. Because a determination that a child is a runaway risk can result in their placement into a restrictive placement, ORR intends through this updated language to establish a clearer and higher standard than required by the FSA to determine such risk.

Comment: One commenter did not support the proposal to replace the term ''escape risk'' with ''runaway risk'' stating their belief that it was not consistent with the FSA because the FSA requires that a prior escape from custody lead to a more restrictive placement, while the proposed rule allows ORR to disregard that factor in determining whether an unaccompanied child is a runaway risk.

Response: ORR disagrees with the commenter that the proposal is inconsistent with the FSA. Section 410.1003(f) states that ORR will consider runaway risk in making placement determinations. The definition of runaway risk states that a prior attempt to run away cannot be the sole consideration but does not require ORR to disregard this factor in determining runaway risk. As finalized at § 410.1107(b), ORR considers whether a child has previously absconded or attempted to abscond from State or Federal custody when determining, in view of the totality of the circumstances, whether a child is a runaway risk for purposes of placement decisions.

Final Rule Action: ORR is finalizing the term ''runaway risk'' as proposed.

Seclusion

Comment: A few commenters asked for additional clarity in the definition of ''seclusion'' concerning what seclusion involves and how it works in practice.

Response: ORR emphasizes, as established at § 410.1304(c), that seclusion is prohibited at standard programs and RTCs, and as established at § 410.1304(e)(1), that seclusion is permitted at non-RTC secure facilities only in emergency safety situations. Further, ORR notes that, consistent with current policies, seclusion is permitted only after all other de-escalation strategies and less restrictive approaches have been attempted and failed; must involve continued monitoring or supervision by staff throughout the seclusion period; must never be used as a means of coercion, discipline, convenience, or retaliation; must be performed in a manner that is safe, proportionate, and appropriate to the severity of the underlying emergency risk to the safety of others necessitating the seclusion; must be appropriate and proportionate to the child's chronological and developmental age, size, gender, as well as physical, medical, and psychiatric condition, and personal history; must be utilized in the most child-friendly, trauma-informed way possible; and must only be utilized for the short amount of time needed to ameliorate the underlying emergency risk to the safety of others.

Final Rule Action: ORR is updating the definition of ''seclusion'' by adding ''is instructed not to leave or'' before ''is physically prevented from leaving'' while otherwise finalizing the definition as proposed.

Secure Facility

Comment: Some commenters did not support that the definition of ''secure facility'' states that secure facilities do not need to comply with the requirements for minimum standards of care and services applicable to all other standard programs under § 410.1302. The commenters stated their belief that exempting children in secure facilities from the right to receive the minimum standards of care afforded to children in all other placement types is unwarranted and would formalize differential treatment of children as to their basic needs. Some commenters encouraged ORR to eliminate the use of secure detention, with one commenter stating their belief that placement in secure facilities is out of step with ORR's mandate and inappropriate for any child not placed there under the authority of a juvenile court judge. That commenter recommended that ORR be explicit in the definition of and criteria for placement in secure facilities.

Response: ORR is revising its proposed regulation text to remove the

statement that a secure facility ''does not need to meet the requirements of § 410.1302.'' As discussed in the responses to comments in §§ 410.1301 and 410.1302, ORR is finalizing § 410.1302 such that the requirements of that section apply to secure facilities. ORR notes that this is consistent with current and historic practice, whereby ORR has required secure facilities to comply with FSA Exhibit 1 requirements even though the FSA itself does not require that. And as a practical matter, ORR currently has no secure facilities in its network of care provider facilities. As a result, ORR does not anticipate that this revision will implicate any reliance interests. Additionally, in response to commenters' concerns about the use of secure detention facilities, ORR is revising the definition to remove the explicit mention of ''a secure ORR detention facility, or a State or county juvenile detention facility''.

Final Rule Action: ORR is revising the definition of ''secure facility'' to remove the phrases ''a secure ORR detention facility, or a State or county juvenile detention facility'' and ''does not need to meet the requirements of § 410.1302.'' ORR is otherwise finalizing the definition as proposed.

Significant Incidents

Comment: One commenter stated that significant changes were made to reporting of significant incidents in policy updates in 2022 and 2023 and suggested that these changes should be incorporated into the final rule.

Response: ORR thanks the commenter. In the NPRM, ORR incorrectly included ''pregnancy'' in the list of significant incidents. Pregnancy is no longer reported as a significant incident but is instead documented in the Health Tab of the UC Portal. Accordingly, ORR is updating the definition of ''significant incidents'' to remove pregnancy. With regard to other policy updates, ORR reiterates that it is not codifying all of its policies and choosing for some policies to remain subregulatory such that they can be more easily updated as needed.

Final Rule Action: After consideration of public comments, ORR is removing pregnancy from the definition of significant incidents, but otherwise finalizing the term as proposed.

Special Needs Unaccompanied Child

Comment: Many commenters supported the proposal to not define or use the term ''special needs unaccompanied child'' and instead refer to children's individualized needs. Commenters agreed that the term is disfavored and is seen as degrading. One commenter stated the term individualized needs is more specific to the child rather than confusing that the child might have a disability. Some commenters further supported the proposal to remove ''facilities for children with special needs'' from the definition of standard program. Some commenters stated support for changing the term disability to special needs unaccompanied child.

Response: ORR is finalizing the use of ''individualized needs'' in many places in the regulations in lieu of the outdated term ''special needs.''

Final Rule Action: ORR is removing the term ''special needs unaccompanied child'' from the regulation.

Standard Program

Comment: One commenter was concerned that the definition of ''standard program'' in the NPRM requires all homes and facilities to be ''non-secure,'' whereas paragraph 6 of the FSA requires them to be ''non-secure as required by State law.'' The commenter expressed concerns that ORR could adopt a definition of non-secure that permits much more restrictive conditions than are currently permissible. The commenter contended further that, for the same reasons, if ORR chooses to retain the reference to ''a facility for special needs unaccompanied children'' in the definition of ''standard program'' it would be impermissible to replace the FSA's paragraph 6 reference to the ''level of security permitted under State law'' with undefined ''requirements specified by ORR if licensure is unavailable in the State.''

Response: ORR thanks the commenter and notes that it is revising the definition of ''standard program'' to include ''non-secure as required by State law.'' ORR is also revising the definition of ''standard program'' to not reference ''facilities for special needs unaccompanied children'' given the term ''special needs'' has become stigmatized. Instead, the definition of ''standard program'' includes ''facilities for unaccompanied children with specific individualized needs.''

Final Rule Action: ORR is revising the proposed definition of ''standard program'' by replacing the proposed phrase ''or that meets other requirements specified by ORR if licensure is unavailable in the State'' with ''or that meets the requirements of State licensing that would otherwise be applicable if it is in a State that does not allow State licensing,'' and by moving this language to the end of the relevant sentence. ORR is also revising the proposed definition so that the final rule states that all standard programs shall be ''non-secure as required under State law.'' ORR is also revising the proposed definition so that the final rule does not include the language ''facility for special needs unaccompanied children'' and instead includes the language ''facility for unaccompanied children with specific individualized needs.'' ORR is also revising the definition such that a facility for unaccompanied children with specific individualized needs may maintain that level of security permitted under state law and deleting the phrase ''or under the requirements specified by ORR if licensure is unavailable in the State.'' ORR is otherwise finalizing the term as proposed.

Transfer

Comment: Regarding the proposed definition of ''transfer,'' a few commenters had differing opinions on the statement in the NPRM that a transfer from a community-based placement to a shelter is not a step-up. The proposed rule stated that such transfer does not constitute a step-up because neither a community-based placement nor a shelter would be considered a secure placement. One commenter did not support the statement, stating that it fails to recognize that a large shelter facility is more restrictive than a foster care setting. However, another commenter supported the statement, but requested the addition of clarifying language that if the least restrictive placement for an unaccompanied child has been determined to be a shelter level of care, a community-based care facility shall also be considered an appropriate placement, without the need for a child in a restrictive placement to be first ''stepped down'' to a shelter level of care.

Response: As stated in the definition of ''transfer'' at § 410.1001, ORR uses the terms ''step-up'' and ''step-down'' to describe transfers of unaccompanied children to or from restrictive placements. All standard programs are non-restrictive settings. Because standard programs are non-restrictive settings, a transfer between those settings is not by definition a ''step-up'' or ''step-down.''

Final Rule Action: ORR is finalizing the definition of ''transfer'' as proposed.

Trauma-Informed

Comment: Some commenters supported ORR's inclusion of a trauma-informed approach, citing the importance of taking such an approach with the unaccompanied children population. A few commenters

recommended this approach be culturally and linguistically appropriate to better accommodate unaccompanied children's diverse experiences and to ensure continued connection to their language, culture, traditions, and community. However, one commenter warned that a trauma-informed approach is not accomplished through any single particular technique or checklist and requires ongoing organizational change and assessment.

Response: ORR thanks the commenters for their support. This rule establishes a definition of ''trauma-informed'' that ORR believes can accommodate the commenters' concerns, and ORR will consider their feedback as it develops additional guidance implementing a trauma-informed approach in relevant circumstances.

Final Rule Action: ORR is finalizing the term ''trauma-informed'' as proposed.

Unaccompanied Child/Children

Comment: Some commenters requested clarification of aspects of the definition of ''unaccompanied child,'' such as what constitutes an ''available'' parent or legal guardian, or whether children in particular circumstances meet the definition of ''unaccompanied child.''

Response: ORR notes that this final rule applies the statutory definition of ''unaccompanied alien child'' as provided in the HSA for purposes relevant to ORR. Other federal agencies also apply the HSA definition as relevant for their purposes. The statutory definition has three prongs: the child must have no lawful immigration status in the United States; the child must be under 18 years old; and the child must have no parent or legal guardian in the United States, or no parent or legal guardian in the United States available to provide care and physical custody. The rule itself tracked the statutory definition and did not purport to interpret it, and accordingly, discussions of application of the statutory definition in particular circumstances are beyond the scope of the rule. ORR notes that it is not an immigration enforcement authority and would not go out into the community to take custody of any child. Rather, unaccompanied children enter ORR custody upon transfer of custody from another Federal department or agency. As discussed at the portion of the NPRM's preamble addressing § 410.1101, ORR may seek clarification about the information provided by the referring agency as needed to determine appropriate placement and how the referred individual meets the statutory definition of unaccompanied child (88 FR 68917). In such instances, ORR shall notify the referring agency and work with the referring agency, including by requesting additional information, in accordance with statutory time frames for transferring unaccompanied children to ORR.

Comment: One commenter recommended not using the term ''unaccompanied alien child,'' arguing that the word ''alien'' is dehumanizing.

Response: ORR agrees with the commenter and did not use the term ''alien'' in the proposed rule unless directly quoting the HSA or TVPRA. Similarly, in the final rule, ORR has updated the defined term ''unaccompanied alien child,'' as used in the HSA and TVPRA, to ''unaccompanied child.''

Final Rule Action: After consideration of public comments, ORR is finalizing the definition of ''unaccompanied child/children'' as proposed.

Section 410.1002 ORR Care and Placement of Unaccompanied Children

ORR proposed in the NPRM, at § 410.1002, a description of ORR's authority to coordinate and implement the care and placement of unaccompanied children who are in ORR custody by reason of their immigration status (88 FR 68916). ORR notes that this substantive requirement is aligned with the requirement established in the 2019 Final Rule at 45 CFR 410.102(a), concerning the scope of authority of ORR regarding the care and placement of unaccompanied children. That section of the 2019 Final Rule was not found to be inconsistent with the FSA by the 9th Circuit in *Flores* v. *Rosen,* but as discussed in section III.B.3 of this final rule, the 2019 Final Rule in its entirety is currently enjoined and will be superseded by the standards implemented in this final rule. Changes throughout this subpart to the standards set by the 2019 Final Rule are explained where relevant.

Comment: One commenter recommended that ORR include additional language to § 410.1002 to mention particular attention and respect for human rights for extremely high-risk populations and explicitly stating that ORR takes into consideration the child's Indigenous identity, membership, and or citizenship of a Native Nation.

Response: ORR thanks the commenter. Under § 410.1003(a), ORR requires that within all placements, unaccompanied children shall be treated with dignity, respect, and special concern for their particular vulnerability, which would include any considerations which would make the child high-risk. Additionally, under the definition of ''best interest,'' ORR is required to consider the unaccompanied child's cultural background, which would include membership or citizenship of a Native Nation.

Final Rule Action: After consideration of public comments, ORR is finalizing § 410.1002 as proposed.

Section 410.1003 General Principles That Apply to the Care and Placement of Unaccompanied Children

ORR proposed in the NPRM, at § 410.1003, to describe principles that would apply to the care and placement for unaccompanied children in its custody (88 FR 68916 through 68917). These principles are based on ORR's statutory duties to provide care and custody for unaccompanied children in a manner that is consistent with their best interests.[67]

ORR proposed in the NPRM at § 410.1003(a), that for all placements, unaccompanied children shall be treated with dignity, respect, and special concern for their particular vulnerability as unaccompanied children. In addition to ORR's statutory authorities, finalizing this proposal is consistent with the substantive criteria set forth at paragraph 11 of the FSA, and current ORR policies.

ORR proposed in the NPRM at § 410.1003(b), that ORR shall hold unaccompanied children in facilities that are safe and sanitary and that are consistent with ORR's concern for the particular vulnerability of unaccompanied children. Finalizing this proposal is consistent with the substantive requirement from paragraph 12A of the FSA that ''[f]ollowing arrest, the INS shall hold minors in facilities that are safe and sanitary and that are consistent with the INS's concern for the particular vulnerability of minors.'' ORR noted that although this provision applies to the arrest and detention of unaccompanied children prior to their placement in an ORR care provider facility, and not to unaccompanied children after they are placed in ORR's care, ORR proposed in the NPRM to adopt this standard for its facilities and custody of unaccompanied children as well. ORR also noted that it proposed in the NPRM the phrasing ''the particular vulnerability of unaccompanied children'' as opposed to ''the particular vulnerability of minors,'' as it believed that the specific vulnerability of the population of unaccompanied children should be considered when providing them with safe and sanitary conditions.

ORR proposed in the NPRM, at § 410.1003(c), that it would be required

to plan and provide care and services based on the individual needs of and focusing on the strengths of the unaccompanied child. As a complementary provision, ORR proposed in the NPRM, at § 410.1003(d), to encourage unaccompanied children, as developmentally appropriate and in their best interests, to be active participants in ORR's decision-making process relating to their care and placement. ORR believes that these collaborative approaches to care provision allow for the recognition of each child's specific needs and strengths while providing opportunities for unaccompanied children to become more empowered, resilient, and self-efficacious.

ORR proposed in the NPRM, at § 410.1003(e), to codify a requirement that care of unaccompanied children be tailored to the individualized needs of each unaccompanied child in ORR custody, ensuring the interests of the child are considered, and that unaccompanied children are protected from traffickers and other persons seeking to victimize or otherwise engage them in criminal, harmful, or exploitative activity,[68] both while in ORR custody and upon release from the UC Program. ORR recognizes the utmost importance of protecting unaccompanied children from traffickers and other persons seeking to victimize or otherwise engage in harmful activities, including unscrupulous employers. ORR believes the provisions that were proposed at § 410.1003(e) reinforce ORR's commitment to ensuring the best interests of unaccompanied children are considered and actions are taken to safeguard them from harm. ORR also believes that codifying the requirement to consider each unaccompanied child's individualized needs reinforces that unaccompanied children will be assessed by ORR to determine whether they may require particular services and treatment while in the UC Program, such as to address the ramifications of a history of severe neglect or abuse, as provided for in paragraph 7 of the FSA.

Consistent with the substantive criteria set forth in the TVPRA, 8 U.S.C. 1232(c)(2)(A), ORR proposed in the NPRM at § 410.1003(f) to require that unaccompanied children be promptly placed in the least restrictive setting that is in the best interest of the child, with placement considerations including danger to self; danger to the community; and runaway risk, as defined in § 410.1001. In addition to ORR's statutory authorities, finalizing the proposal is consistent with the substantive criteria set forth at paragraph 11 of the FSA, and current ORR policies.

ORR proposed in the NPRM, at § 410.1003(g), to require consultation with parents, legal guardians, child advocates, and attorneys of record or DOJ Accredited Representatives as needed when requesting information or consent from all unaccompanied children.

Comment: One commenter generally supported § 410.1003, stating that the provisions are tailored to the individualized needs of unaccompanied children and ensure protection from individuals who seek to exploit or victimize unaccompanied children like human traffickers and employers.

Response: ORR thanks the commenter for their comment.

Comment: A few commenters noted that the proposed rule alternated between stating what ORR ''shall'' do and state what ORR does in the present tense. Those commenters noted in § 410.1003, paragraph (a) states that ''unaccompanied children shall be treated with dignity, respect, and special concern'' while paragraph (f) states ''ORR places each unaccompanied child in the least restrictive setting that is in the best interests of the child.'' The commenters recommended that the Final Rule should consistently use ''shall'' rather than the present tense.

Response: ORR thanks the commenters for their comment. Although ORR intends for statements in the present tense in the regulation to be mandatory, for the sake of clarity, ORR will revise § 410.1003(f) to include the mandatory language ''shall.'' This revision makes the language consistent with § 410.1103(a). ORR further notes that it has made this revision throughout the finalized regulation text for consistency, clarity, and explicit alignment with ORR's statutory authorities and the FSA.

Comment: One commenter requested more clarity as to what standards are applicable to what types of programs, stating that in some sections the document is specific that principles are for standard and restrictive placements, inferring they are not applicable to emergency intake sites (EIS) and influx care facilities (ICF) but that in other sections the document is silent as to types of programs, leaving areas of ambiguity.

Response: As stated in finalized § 410.1301, the standards in subpart D apply to standard programs and secure facilities, and to other care provider facilities and PRS providers where specified. The standards for EIFs are in subpart I. If a requirement or standard states that it is for ''all care provider facilities,'' then that includes standard programs, restrictive placements, and EIFs. Additionally, the principles articulated in § 410.1003 refer to ''all placements,'' and therefore apply to all ORR placements without regard to the type of facility.

Comment: One commenter recommended that ORR add language to make clear that requirements for ORR to treat children with dignity, respect and special concern for their vulnerability under paragraph (a), applies to ORR staff, the staff of ORR subcontracted facilities, and any other stakeholder or interested person who interacts with the child while the child remains in the custody of ORR, or during the child's transport to or from an ORR care provider.

Response: ORR appreciates the commenter's comment. ORR notes, however, that these are general provisions that relate to ORR. Specifics about the requirements of care provider facilities, transportation, and other interested parties are in other parts of the regulation, such as §§ 410.1302, 410.1304, 410.1401, 410.1801. Those specific requirements are to ensure that unaccompanied children are treated with dignity, respect, and special concern for their particular vulnerability.

Comment: One commenter expressed concern that the proposed rule did not provide clear guidance on how to determine the best interests of the child in various situations, such as when there are conflicting preferences or claims from different sponsors, when there are concerns about the safety or suitability of a sponsor, or when there are special needs or circumstances of the child. The commenter expressed concerns that this would lead to confusion and inconsistency in decision-making, and potentially compromise the rights and well-being of the child. The commenter recommended that the final rule provide clear and comprehensive guidance on how to determine and apply the best interests of the child principle in various situations, taking into account the views and preferences of the child, the characteristics and circumstances of the sponsor, and the relevant legal and policy frameworks. The commenter also stated that the rule should provide for independent review and oversight of best interests determinations by qualified professionals.

Response: The definition of best interest includes a non-exhaustive list of factors to consider, as appropriate, when evaluating a child's best interests. The list is necessarily non-exhaustive because each child is unique and has

individual needs, background, and circumstances but the rule is explicit in emphasizing the importance of making decisions in the child's best interest.

Regarding the recommendation for independent review and oversight of determinations of best interest, ORR notes that it may appoint child advocates for victims of trafficking and other vulnerable children who are independent, qualified professionals who provide best interests determinations (BIDs). ORR considers such BIDs when making decisions regarding the care, placement, and release of unaccompanied children. Additionally, the rule provides for review of placement decisions, in subpart J, and an independent Office of the Ombuds, in subpart K.

Comment: Several commenters recommended that ORR include language affirmatively stating ORR's obligations to protect unaccompanied children in its care from discriminatory treatment and abuse, expressing concern over States adopting legislation that dismantles anti-discrimination protections for LGBTQI+ people.

Response: ORR agrees with the need to protect LGBTQI+ individuals from discrimination and believes that the language finalized at § 410.1003(a) protects unaccompanied children in its care from discriminatory treatment and abuse because it establishes the general principle that unaccompanied children shall be treated with dignity, respect, and special concern for their particular vulnerability. Further, as provided in current policy, ORR requires care provider facilities to operate their programs following certain guiding principles, including ensuring that LGBTQI+ children are treated with dignity and respect, receive recognition of their sexual orientation and/or gender identity, are not discriminated against or harassed based on actual or perceived sexual orientation or gender identity, and are cared for in an inclusive and respectful environment.

Comment: Some commenters expressed support for the proposal in paragraph (d) that unaccompanied children be active participants in ORR's decision-making process related to their care and placement.

Response: ORR thanks the commenters for their support.

Comment: One commenter recommended that ORR require that Indigenous cultural and language experts be required in the consultation process for Indigenous children to provide their free, prior, and informed consent.

Response: ORR thanks the commenter but notes that the suggestion is not required by statute or the FSA. ORR notes that it is finalizing language access requirements in § 410.1306.

Comment: One commenter recommended that ORR collaborate with non-governmental organizations and advocacy groups that are actively working in the field of child protection as they often have valuable insights and resources that can contribute significantly to the cause.

Response: ORR thanks the commenter and notes that it currently collaborates with and seeks input from advocacy groups and service providers, and that it intends to continue that practice under this final rule.

Comment: One commenter recommended that ORR prioritize identifying and adding facilities throughout the United States in more populous areas to ensure adequate access for children to legal, medical, and other services and to ease the burden on community organizations.

Response: ORR appreciates the commenter's recommendation and does consider whether the area is populous and the availability of services among many other factors when adding facilities through the United States. ORR notes, however, that it is limited by the grant and contract applications it receives and the locations in which qualifying proposals are located. ORR further notes that this rule does not address site selection for care provider facilities, and therefore it does not believe a change to the rule text concerning site selection is appropriate.

Comment: A few commenters recommended ORR have local law enforcement, county oversight, and State oversight regarding the nature of their operations in respective jurisdictions.

Response: ORR notes that local law enforcement and county and State Governments do have oversight into aspects of the care of unaccompanied children. For example, local law enforcement agencies investigate and prosecute State crimes, and State and local Governments license and investigate care provider facilities with respect to licensing requirements and allegations of child abuse and neglect. ORR notes that the role of local law enforcement and child protective services and licensing entities in the context of the UC Program is also discussed in the preamble to the Interim Final Rule, Standards to Prevent, Detect, and Respond to Sexual Abuse and Sexual Harassment Involving Unaccompanied Children, codified at 45 CFR part 411.[69] Accordingly, ORR does not believe a revision to the rule is needed to specifically describe the role of State and local Governments as suggested.

Final Rule Action: After consideration of public comments, ORR is revising paragraph (f) to read ''In making placement determinations, ORR shall place each unaccompanied child in the least restrictive setting that is in the best interests of the child, giving consideration to the child's danger to self, danger to others, and runaway risk.'' All other paragraphs will be finalized as proposed.

Section 410.1004 ORR Custody of Unaccompanied Children

ORR proposed in the NPRM at § 410.1004 to describe the scope of ORR's custody of unaccompanied children (88 FR 68917). Consistent with its statutory authorities and the FSA, the provision specifies that all unaccompanied children placed by ORR in care provider facilities remain in the legal custody of ORR and may be transferred or released only with ORR approval.[70] The provision also provides that in the event of an emergency, a care provider facility may transfer temporary physical custody of an unaccompanied child prior to securing approval from ORR but shall notify ORR of the transfer as soon as is practicable thereafter, and in all cases within 8 hours.[71]

Comment: One commenter expressed concern that § 410.1004 uses the term ''legal custody'' without defining it. The commenter noted that custody can include actual, constructive, or legal custody and argued that if ORR claims legal custody over unaccompanied children, not just actual or constructive custody, it should outline all legal responsibilities owed or held over the child whether pursuant to Federal or State law.

Response: ORR interprets the term ''legal custody'' consistent with its statutory authorities and with its usage in the FSA. The TVPRA makes HHS responsible, consistent with the HSA, for the ''care and custody'' of unaccompanied children.[72] The HSA makes ORR responsible for ''coordinating and implementing the care and placement of unaccompanied alien children who are in Federal custody by reason of their immigration status.'' [73] The FSA uses the term ''legal custody'' to define the scope of the agreement and of specific provisions.[74] ORR notes that in these contexts, it is assumed that ORR has the ability to provide care and supervision for children. So, consistent with a prior ruling interpreting the FSA, ORR understands the term ''legal custody'' to signify ''the right and responsibility to

care for the well-being of the child and make decisions on the child's behalf.'' [75]

Final Rule Action: After consideration of public comments, ORR is finalizing § 410.1004 as proposed.

Subpart B—Determining the Placement of an Unaccompanied Child at a Care Provider Facility

In the NPRM, ORR proposed in subpart B to codify the criteria and requirements that apply to the placement of unaccompanied children at particular types of care provider facilities (88 FR 68917 through 68927). The HSA makes ORR responsible for, among other things, ''coordinating and implementing the care and placement of unaccompanied alien children who are in Federal custody by reason of their immigration status,'' ''making placement determinations for all unaccompanied alien children who are in Federal custody by reason of their immigration status,'' ''implementing the placement determinations,'' and ''implementing policies with respect to the care and placement of unaccompanied alien children.'' [76] In addition, ORR stated in the NPRM that proposed subpart B clarifies and strengthens placement criteria to better ensure appropriate placement based on each unaccompanied child's individual background, characteristics, and needs. ORR stated that it believes that these provisions can help to protect the interests of unaccompanied children in ORR care by supporting safe and appropriate placement in the least restrictive setting appropriate to the child's age and individualized needs, consistent with existing legal requirements and child welfare best practices.

Section 410.1100 Purpose of This Subpart

ORR proposed in the NPRM at § 410.1100 that the purpose of subpart B is to set forth the process by which ORR receives referrals from other Federal agencies and the factors ORR considers when placing an unaccompanied child in a particular care provider facility (88 FR 68917). In addition, ORR proposed in the NPRM at § 410.1100 to clarify that, as used in this subpart, ''placement determinations'' or ''placements'' refers to placements in ORR-approved care provider facilities during the time an unaccompanied child is in ORR care, and not to the location of an unaccompanied child once the child is released in accordance with provisions in subpart C.

ORR did not receive any comments on proposed § 410.1100.

Final Rule Action: ORR is finalizing this section as proposed.

Section 410.1101 Process for the Placement of an Unaccompanied Child After Referral From Another Federal Agency

ORR proposed in the NPRM, at § 410.1101, to codify the process for accepting referrals of unaccompanied children from another Federal agency and for placement of an unaccompanied child in a care provider facility upon such referral (88 FR 68917 through 68919). The TVPRA at 8 U.S.C. 1232(b)(3) requires any department or agency of the Federal Government that has an unaccompanied child in its custody to transfer the custody of such unaccompanied child to HHS no later than 72 hours after determining that the child is an unaccompanied child (unless there are exceptional circumstances).[77] ORR proposed in the NPRM at § 410.1101(a) to accept referrals of unaccompanied children transferred to its custody pursuant to the TVPRA (88 FR 68917). Further, consistent with existing policy and in cooperation with referring agencies, ORR proposed in the NPRM that it would accept such referrals at any time of day, every day of the year. In addition, ORR stated in the preamble to the NPRM that it may seek clarification about the information provided by the referring agency. ORR notes that it may seek such clarification as needed to determine appropriate placement and how the referred individual meets the statutory definition of unaccompanied child. ORR stated that in such instances, it shall notify the referring agency and work with the referring agency, including by requesting additional information, in accordance with statutory timeframes for transferring unaccompanied children to ORR.

ORR proposed in the NPRM at § 410.1101(b) and (c), timeframes for identifying and notifying a referring Federal agency of ORR's identification of an appropriate placement for an unaccompanied child, and for accepting transfer of custody of an unaccompanied child after the determination that the child is an unaccompanied child who should be transferred to ORR (88 FR 68917 through 68918). ORR proposed in the NPRM at § 410.1101(b) to codify its current policy that upon notification from any department or agency of the Federal Government that a child is an unaccompanied child and therefore must be transferred to ORR custody, ORR must identify an appropriate placement for the unaccompanied child and notify the referring Federal agency within 24 hours of receiving the referring agency's notification whenever possible, and no later than 48 hours of receiving the referring agency's notification, barring exceptional circumstances (see paragraph below). ORR stated in the NPRM that it believes that setting a maximum timeframe of 48 hours for ORR to identify a placement and notify a referring Federal agency of ORR's identification of a placement would help to expedite transfer of unaccompanied children from the referring Federal agency to ORR care, but also that certain exceptions to this timeframe may be necessary in certain circumstances, as discussed in the following paragraph. ORR further proposed in § 410.1101(c) that it would be required to work with the referring Federal department or agency to accept transfer of custody of the unaccompanied child, consistent with the statutory requirements at 8 U.S.C. 1232(b)(3).

As noted above, the TVPRA provides that referring Federal departments and agencies must transfer custody of unaccompanied children to HHS within 72 hours of determining the child is an unaccompanied child unless there are exceptional circumstances. In order to help facilitate this requirement in coordination with referring departments and agencies, ORR proposed in the NPRM at § 410.1101(b) and (c) internal timeframes for ORR to identify and notify referring Federal departments and agencies of placements and to accept transfer of custody from referring departments and agencies (88 FR 68917 through 68918). ORR also noted that it may, in certain ''exceptional circumstances,'' be unable to timely identify placements for and help facilitate other departments' and agencies' timely transfers of unaccompanied children to its custody. For purposes of § 410.1101(b) and (c), ORR proposed in the NPRM at § 410.1101(d) circumstances which would prevent ORR from timely identifying a placement for an unaccompanied child or accepting transfer of custody. At proposed § 410.1101(d), ORR described these exceptional circumstances consistent with those described in paragraph 12A of the FSA, even though, as ORR further explains below, it believes that paragraph 12A primarily concerns responsibilities of the former INS that now apply to immigration enforcement authorities and not ORR. Some of these circumstances were also incorporated into the 2019 Final Rule at § 410.202. The proposed ''exceptional circumstances,'' for ORR's purposes,

included the following: (1) any court decree or court-approved settlement that requires otherwise; (2) an influx, as defined in proposed § 410.1001; (3) an emergency, including a natural disaster, such as an earthquake or hurricane, and other events, such as facility fires or civil disturbances; (4) a medical emergency, such as a viral epidemic or pandemic among a group of unaccompanied children; (5) the apprehension of an unaccompanied child in a remote location; and (6) the apprehension of an unaccompanied child whom the referring agency indicates (i) poses a danger to self or others; or (ii) has been charged with or convicted of a crime, or is the subject of delinquency proceedings, a delinquency charge, or has been adjudicated delinquent, and additional information is essential in order to determine an appropriate ORR placement. Notably, ORR stated in the preamble to the proposed rule that the unavailability of documents will not necessarily prevent the prompt transfer of a child to ORR. In addition, ORR proposed in the NPRM that ''exceptional circumstances,'' for ORR's purposes, would include an act or event that could not be reasonably foreseen that prevents the placement or accepting transfer of custody of an unaccompanied child within the proposed timeframes. Given the mandate under the TVPRA, 8 U.S.C. 1232(c)(2), that ORR place an unaccompanied child in the least restrictive setting that is in the best interests of the unaccompanied child, subject to consideration of danger to self, danger to the community/others, and risk of flight, additional time may be needed in some circumstances to determine the most appropriate and safe placement that comports with the best interests of the unaccompanied child. Thus, ORR stated that it believes that this general exception for acts or events that could not be reasonably foreseen is appropriate to afford additional time to assess these considerations, though ORR is mindful of avoiding prolonged placements in DHS facilities that are not designed for the long-term care of children. As discussed previously, ORR proposed in the NPRM that these exceptional circumstances would modify the timeframes applicable to ORR under proposed § 410.1101(b) and (c).

In the NPRM, ORR noted that the FSA also includes an exception to these timeframe requirements for unaccompanied children who do not speak English and for whom an interpreter is unavailable. However, ORR did not propose to include this as an exceptional circumstance for purposes of § 410.1101(b) and (c). ORR stated that because ORR is able to serve unaccompanied children regardless of their primary language through the use of interpreters, ORR did not view this as an insurmountable impediment to the prompt placement of unaccompanied children. In addition, ORR noted that the FSA includes an exception in which a reasonable person would conclude that an individual is an adult despite the individual's claim to be an unaccompanied child. However, ORR did not propose to include this as an exceptional circumstance for purposes of § 410.1101(b) and (c) because ORR did not believe that such a situation poses the type of urgency inherent in exceptional circumstances as described above. For further information on ORR's proposed policies regarding age determinations, ORR referred readers to its discussion of subpart H.

In the NPRM, ORR stated that it seeks to accept transfer of unaccompanied children as quickly as possible after a placement has been identified within this timeframe (88 FR 68918). In identifying placements for unaccompanied children, ORR balances the need for expeditious identification of placement with the need to ensure safe and appropriate placement in the best interests of the unaccompanied child, which necessitates a comprehensive review of information regarding an unaccompanied child's background and needs before placement. ORR stated in the NPRM that, under existing policy, to determine the appropriate placement for an unaccompanied child, ORR requests and assesses extensive background information on the unaccompanied child from the referring department or agency, including the following: (1) how the referring agency made the determination that the child is an unaccompanied child; (2) health related information; (3) whether the unaccompanied child has any medication or prescription information, including how many days' supply of the medication will be provided with the unaccompanied child when the child is transferred into ORR custody; (4) biographical and biometric information, such as name, gender, alien number, date of birth, country of birth and nationality, date(s) of entry and apprehension, place of entry and apprehension, manner of entry, and the unaccompanied child's current location; (5) any information concerning whether the unaccompanied child is a victim of trafficking or other crimes; (6) whether the unaccompanied child was apprehended with a sibling or other relative; (7) identifying information and contact information for a parent, legal guardian, or other related adult providing care for the unaccompanied child prior to apprehension, if known, and information regarding whether the unaccompanied child was separated from a parent, legal guardian, or adult relative after apprehension, and the reason for separation; (8) if the unaccompanied child was apprehended in transit to a final destination, what the final destination was and who the unaccompanied child planned to meet or live with at that destination, if known; (9) whether the unaccompanied child is a runaway risk, and if so, the runaway risk indicators; (10) any information on a history of violence, juvenile or criminal background, or gang involvement known or suspected, risk of danger to self or others, State court proceedings, or probation; (11) if the unaccompanied child is being returned to ORR custody after arrest on alleged gang affiliation or involvement, ORR requests all documentation confirming whether the unaccompanied child is a *Saravia* class member and information on the *Saravia* hearing, including the date and time; [78] and (12) any particular needs or other information that would affect the care and placement of the unaccompanied child, including, as applicable, information about services, supports, or program modifications provided to the child on the basis of disability (88 FR 68918 through 68919).

Furthermore, the TVPRA places the responsibility for the transfer of custody on referring Federal agencies.[79] ORR custody begins when it assumes physical custody from the referring agency. ORR proposed in the NPRM at § 410.1101(e) to codify this practice, which is also consistent with current policies (88 FR 68919).

Note, ORR typically assumes physical custody when the unaccompanied child arrives at an ORR care provider facility (usually via transport by DHS). However, as described in current policies,[80] under certain extenuating and exceptional circumstances, ORR may assume physical custody of an unaccompanied child, and thereby legal custody, to facilitate release to a vetted sponsor without first placing the child at an ORR care provider facility. In these cases, federal partner agencies may notify ORR that a child will likely be determined to be unaccompanied. ORR may request additional information from the referring agency, or third-party partners, regarding any potential sponsors for the child, to begin the sponsor vetting process.[81]

Comment: A few commenters generally expressed support for the timeframes at proposed § 410.1101(b) and (c). These commenters supported the proposed timeframes for ORR to work with the referring department or agency to accept custody of unaccompanied children (within the 72 hour requirement applicable to the transferring agency under the TVPRA) and identify an initial placement (no later than 48 hours) because the proposed timeframes ensure that unaccompanied children are not held in detention in a restrictive setting at DHS or other referring agencies and recognize that children are best cared for by social welfare officers and not by immigration officials.

Response: ORR thanks commenters for their support of the proposed timeframes at § 410.1101(b) and (c). ORR notes that it is making a clarifying edit to add the phrase ''in its custody'' to the first sentence of paragraph (b) to clarify that, consistent with the TVPRA, a referring Federal department or agency must transfer unaccompanied children ''in its custody'' to ORR. This sentence now states, ''Upon notification from any department or agency of the Federal Government that a child in its custody is an unaccompanied child and therefore must be transferred to ORR custody . . .''.

Comment: Two commenters made recommendations regarding the notification and transfer process. One commenter recommended ''vigorous'' collaboration between ORR and other agencies and a clear description of responsibilities of these agencies to ensure effective implementation. Another commenter suggested that ORR consider codifying potential border unifications of children. The commenter noted that cases have recently been started while children are still in CBP custody, and that co-location of ORR providers with CBP could allow many parent and legal guardian sponsors to reunify with unaccompanied children without transferring the child to an ORR shelter. The commenter further stated this could also allow non-parent family members who are traveling with the child (grandparents, aunts, etc.) to submit the necessary documents to sponsor the child without ever needing to be separated.

Response: ORR thanks the commenters for their recommendations. With regard to the recommendation that there be ''vigorous'' collaboration between ORR and other agencies and a clear description of responsibilities to ensure effective implementation, ORR notes that ORR does in fact collaborate closely with referring agencies, including CBP, during the referral of unaccompanied children to ORR custody. For example, as specifically set forth at § 410.1101(c), as finalized in this rule, ORR works with the referring department or agency to accept transfer of custody of the unaccompanied child, consistent with the timeframe set forth in the TVPRA.[82] Furthermore, under existing policy, and as reflected in the NPRM, to determine the appropriate placement for an unaccompanied child, ORR requests and assesses extensive background information on the unaccompanied child from the referring agency, which ORR takes into consideration in placing a child in an ORR care provider facility. In addition, as ORR stated in the preamble to the NPRM, it may seek clarification about the information provided by the referring agency as needed to determine appropriate placement and how the referred individual meets the statutory definition of unaccompanied child (88 FR 68917). In such instances, ORR shall notify the referring agency and work with the referring agency, including by requesting additional information, in accordance with statutory time frames for transferring unaccompanied children to ORR. ORR has added language to the regulatory text at § 410.1101 to make more explicit the nature of this coordination.

Moreover, DHS and ORR are continuing to work together to improve information sharing and will collaborate on improved procedures for making age determinations, as required by the TVPRA, and other standards for determining whether an individual meets the statutory definition of unaccompanied child. The Departments will update existing memoranda of agreement, as appropriate. Seeking clarification will not preclude transfer of individuals determined by the referring agency to be unaccompanied children in accordance with statutory time frames, except in exceptional circumstances.

In regard to the suggestion to codify potential border unifications of unaccompanied children, ORR notes that this final rule codifies existing interagency practices regarding notification and transfer of unaccompanied children to ORR custody from other Federal agencies, consistent with requirements set out in the TVPRA. ORR is also currently operating an initiative to facilitate unification of unaccompanied children with their sponsors while minimizing the child's time in ORR custody. Because the standards codified in this final rule accord with current practices and are consistent with the statutory framework established by the HSA and TVPRA, ORR will finalize the current sections as proposed. But ORR notes that it may in the future consider alternative approaches, including approaches like the one raised in the comment.

Comment: Two commenters made recommendations or raised questions to clarify the language at proposed § 410.1101(d), which addresses exceptions to the timeframes at proposed § 410.1101(b) and (c). One commenter stated that proposed § 410.1101(d) is ambiguous, noting that while ''exceptional circumstances'' may be valid explanations for slower-than-required placements, an exceptional circumstance should not give license for ORR to place a child in care more slowly after a referral. The commenter stated that ORR should move with all due haste to place children in safe placements even in ''exceptional circumstances'' and recommended that ORR refine the rule to clarify that it always attempts to identify an appropriate placement within 48 hours but that such a timeframe may not be possible to achieve during exceptional circumstances. This commenter also noted that the proposed rule preamble states that ''the unavailability of documents will not necessarily prevent the prompt transfer of a child to ORR.'' The commenter recommended that this assurance be binding on ORR as it is minimally burdensome and suggested that ORR add language to this effect to any final rule.

One commenter asked whether § 410.1101(d)(6) means that secure and staff secure placements do not have to fall within the 48-hour placement timeline.

Response: ORR notes that § 410.1101(b) already provides that ORR shall identify an appropriate placement for the unaccompanied child and notify the referring Federal agency within 24 hours of receiving the referring agency's notification ''whenever possible,'' and ''no later than within 48 hours of receiving notification, barring exceptional circumstances'' (88 FR 68918). As a result, the rule already contemplates that ORR seeks to identify a placement as quickly as reasonably possible upon notification from a referring department or agency that a child is an unaccompanied child, including in situations where exceptional circumstances may apply. ORR does not view the proposed exceptional circumstances as a license to act more slowly in identifying an appropriate placement, but only as reasonable explanations for why it may not be possible to meet the proposed

timeframes despite ORR's efforts to do so in those exceptional cases.

In addition, as one commenter noted, the proposed rule preamble states, with respect to proposed § 410.1101(d)(6), that ''the unavailability of documents will not necessarily prevent the prompt transfer of a child to ORR.'' In proposed § 410.1101(d)(6)(ii), ORR added language at the end of the provision to qualify when the exceptional circumstance in paragraph (d)(6)(ii) would apply—that is, when ''additional information is essential in order to determine an appropriate ORR placement'' (88 FR 68918). To further clarify and qualify the application of this exception, ORR noted in the NPRM preamble that ''the unavailability of documents will not necessarily prevent the prompt transfer of a child to ORR.'' This language was intended to recognize the fact that in some cases, lack of appropriate information or documentation may not prevent ORR from timely identifying a placement or facilitating transfer of custody, and in those cases, ORR must comply with the proposed timeframes at § 410.1101(b) and (c). Thus, this language was intended to make clear ORR's limited use of this exception. As ORR believes the intent is sufficiently clear from the preamble text, ORR does not believe it is necessary to add language to this effect to the final rule.

Given these clarifications, ORR emphasizes that proposed § 410.1101(d)(6) does not mean that secure and heightened supervision placements do not have to meet the timeframes established in this section. First, as discussed above, this exception is not a license to act more slowly in situations that may fall within this proposed exception—ORR must still act expeditiously to identify placement within 48 hours to the extent possible. Second, not all secure or heightened supervision placements may meet the criteria set forth in proposed § 410.1101(d)(6)—for example, since as noted above and in the proposed regulation, in order to qualify for the exception at § 410.1101(d)(6)(ii), additional information must be essential in order to determine an appropriate ORR placement, and where it is not essential, as discussed above, the unavailability of documents will not necessarily prevent the prompt identification of a placement.

Comment: A few commenters expressed concern about the proposed timeframes at § 410.1101(b) and (c), stating that speed should never take priority over the safety and well-being of the children. One commenter also expressed concern with ORR's ability to meet the proposed timeframes.

Response: ORR does not agree that the proposed timeframes at § 410.1101(b) and (c) will result in expediency taking priority over the safety and well-being of unaccompanied children. As an initial matter, ORR notes that the timelines described in this section are consistent with statutory timelines provided in the TVPRA.[83] In addition, ORR believes that the proposed timeframes are reasonable and achievable while transferring custody and identifying placements in the best interests of the unaccompanied child. ORR notes that, in fiscal year 2023, ORR placed 99 percent of unaccompanied children in standard programs within 24 hours of receiving notification of their referrals. As noted in the NPRM, ORR balances the need for expeditious identification of placement with the need to ensure safe and appropriate placement in the best interests of the unaccompanied child, which involves a comprehensive review of information regarding an unaccompanied child's background and needs before placement. As further discussed in the NPRM, additional time may be needed in some circumstances to determine the most appropriate and safe placement that comports with the best interests of the unaccompanied child. Thus, ORR proposed in the NPRM to codify at § 410.1101(d) certain ''exceptional circumstances'' where it may be unable to timely identify placements for or facilitate other agencies' timely transfers of unaccompanied children to its custody in accordance with proposed § 410.1101(b) and (c) (88 FR 68918). ORR believes that codification of these exceptional circumstances will provide ORR the flexibility necessary to ensure the safety and well-being of each child are fully taken into account before a child is placed with a care provider facility.

Comment: Many commenters expressed concerns regarding specific exceptional circumstances set forth at proposed § 410.1101(d).

One commenter stated that ORR inappropriately defined influx as an ''exceptional circumstance'' at proposed § 410.1101(d)(2) that allows ORR to relieve itself of the duty to receive a child from other Federal agencies within 72 hours. The commenter stated that promulgating this proposal would allow ORR to absolve itself of the responsibility to comply with the terms of the FSA when it presents challenges to the agency, directly risking the safety of unaccompanied children. The commenter believed that ORR should be held to higher scrutiny, not less, when its facilities are overwhelmed because it is at these times that unaccompanied children are at heightened risk for exploitation, abuse, and mismanagement. The commenter requested that HHS make data available to the public regarding how frequently ''emergency'' or ''influx'' conditions are present.

A few commenters opposed the proposed exception at § 410.1101(d)(3) because it includes language that is beyond what is enumerated in the FSA. Specifically, the commenters noted that proposed § 410.1101(d)(3) states that an emergency would include ''a natural disaster, such as an earthquake or hurricane, and other events, such as facility fires or civil disturbances.'' The commenters believed that the addition of ''and other events'' would create a catch-all for anything ORR chooses to deem an emergency in the future and that expanding the term would result in situations that are detrimental to the health, safety and well-being of unaccompanied children.

Many commenters recommended deleting the exception at § 410.1101(d)(6), stating that the ORR Policy Guide permits no exception to the prompt transfer of children required by the TVPRA and that this marks a weakening of ORR's current policy, under which, if exceptional circumstances prevent the referring Federal agency from providing complete documentation, the care provider is not permitted to deny or delay admitting the child. These commenters also noted that this exception is absent from the FSA list of exceptions, including paragraph 12A. Commenters said that incomplete documentation about a child should never permit ORR to leave children in DHS custody beyond 72 hours, given the clear dangers to children's health and safety.

A few commenters expressed concern with the exception provided under proposed § 410.1101(d)(7), which described an exception for acts or events ''that could not be reasonably foreseen that prevents the placement of or accepting transfer of custody of an unaccompanied child within the timeframes in paragraph (b) or (c) of this section.'' The commenter said that this language was overly broad and would allow ORR to make placement decisions that would be inconsistent with the FSA and noted that the proposed rule did not identify any specific circumstances not already covered by the FSA's current exceptions that required a delay in placement in the past.

Response: As discussed in the NPRM, ORR proposed in the NPRM at § 410.1101(b) and (c) internal

timeframes for ORR to identify and notify referring Federal agencies of placements and to accept transfer of custody from referring agencies, but noted that in certain ''exceptional circumstances'' additional time may be needed to identify safe and appropriate placements that comport with the best interests of the unaccompanied child or to help facilitate other agencies' transfers of unaccompanied children to ORR custody (88 FR 68917 through 68918). Thus, for purposes of § 410.1101(b) and (c), ORR proposed in the NPRM at § 410.1101(d) circumstances which may prevent ORR from timely identifying a placement for an unaccompanied child or accepting transfer of custody (88 FR 68918). ORR intended that all of the exceptional circumstances at proposed § 410.1101(d) serve the purpose of protecting the health and safety of unaccompanied children, as the application of such exceptions will provide ORR the time, if necessary, in certain circumstances to ensure appropriate and safe placement.

With respect to the comment that the proposed exception at § 410.1101(d)(2) would allow ORR to absolve itself of the responsibility to comply with the terms of the FSA when it presents challenges to the agency, risking the safety of unaccompanied children, ORR notes that paragraph 12A of the FSA specifically provides an exception to the timeframe for placement in a licensed program in the event of an influx of unaccompanied children into the United States, stating that in those situations, children must be placed into such programs as expeditiously as possible. Thus, ORR believes that the exception at proposed § 410.1101(d)(2) is consistent with the FSA. Moreover, as noted at subpart I, the definition of influx in this rule sets a substantially higher threshold for when circumstances can be considered an influx than is required under the FSA. ORR emphasizes that in every case, ORR seeks to identify a placement and accept transfer of custody of an unaccompanied child as quickly as possible upon notification from a referring Federal department or agency that a child is an unaccompanied child, including in situations where exceptional circumstances may apply. As discussed previously, the proposed exceptional circumstances were not intended as a license to act more slowly in identifying an appropriate placement, but rather as circumstances in which it may not be possible to meet the proposed timeframes despite ORR's best efforts to do so. Further, because the exception at § 410.1102(d)(2) would provide ORR with additional time, if necessary, to determine a safe and appropriate placement for an unaccompanied child, ORR believes that this exception helps to protect and serve the best interests of such children rather than risk their safety. ORR notes that it makes data available to the public regarding the use of EIFs.[84]

Furthermore, ORR disagrees with the comment that the proposed exception at § 410.1101(d)(3), specifically the addition of the phrase ''and other events,'' would create a catch-all for anything ORR chooses to deem an emergency in the future and expand the term in ways that are detrimental to the health, safety, and well-being of unaccompanied children. First, ORR believes that the definition of ''emergency'' is consistent with the FSA. ORR notes that the definition of ''emergency'' in the FSA is in fact broad, defining ''emergency'' as ''any act or event that prevents the placement of minors pursuant to paragraph 19 within the timeframe provided.'' While the FSA states that ''[s]uch emergencies include natural disasters . . ., facility fires, civil disturbances, and medical emergencies,'' ORR views these as *examples* of what would qualify as an ''emergency'' under the broad definition that precedes this list. As noted previously, because the purpose of this exception is to provide ORR with additional time, if necessary, to determine a safe and appropriate placement for an unaccompanied child, we believe that this exception would help to protect and serve the best interests of such children rather than risk their safety. To address commenters' concern with reference to ''other events'' and further clarify that the events listed are examples of the types of emergencies that would qualify as exceptional circumstances, ORR is finalizing revisions to § 410.1101(d)(3) to list relevant examples and delete reference to ''and other events.''

ORR also disagrees with the commenters that recommended deleting the exception at § 410.1101(d)(6) and stated that it is inconsistent with the FSA and the ORR Policy Guide. ORR notes that the FSA includes an exception to the placement timeframes at paragraph 12A for situations where a child meets the criteria for placement in a secure facility under paragraph 21. The exception at proposed § 410.1101(d)(6) does not delineate all five of the potential situations set forth at paragraph 21 of the FSA (*i.e.,* the unaccompanied child (A) ''has been charged with, is chargeable, or has been convicted of a crime, or is the subject of delinquency proceedings, has been adjudicated delinquent, or is chargeable with a delinquent act''—subject to certain exceptions; (B) ''has committed, or has made credible threats to commit, a violent or malicious act (whether directed at himself or others) while in INS legal custody or while in the presence of an INS officer;'' (C) ''has engaged, while in a licensed program, in conduct that has proven to be unacceptably disruptive of the normal functioning of the licensed program in which he or she has been placed and removal is necessary to ensure the welfare of the minor or others, as determined by the staff of the licensed program (Examples: drug or alcohol abuse, stealing, fighting, intimidation of others, etc. This list is not exhaustive.);'' (D) is an escape risk; or (E) ''must be held in a secure facility for his or her own safety, such as when the INS has reason to believe that a smuggler would abduct or coerce a particular minor to secure payment of smuggling fees.'').[85] But ORR believes the five potential situations described at paragraph 21 are described by sub-paragraphs (d)(i) and (d)(ii)—*i.e.,* all the potential circumstances listed in FSA paragraph 21 essentially concern whether a child poses a danger to self or others, or has been charged with or convicted of a crime or is the subject of delinquency charges or proceedings. But further, by omitting some of the situations set forth in paragraph 21 of the FSA that justify secure placement and by adding the requirement at proposed § 410.1101(d)(6)(ii) that ''additional information'' must be ''essential in order to determine an appropriate placement,'' ORR is narrowing the application of this exception in a manner it believes adequately implements FSA paragraph 21. In addition, ORR stated in the NPRM preamble that ''the unavailability of documents will not necessarily prevent the prompt transfer of a child to ORR'' (88 FR 68918). This language was intended to recognize that lack of appropriate information or documentation may not always be an appropriate justification for delaying timely identification of placement or acceptance of transfer of custody. As such, ORR further limited the exception at proposed § 410.1101(d)(6)(ii) to those situations where additional documentation is absolutely necessary to appropriately place an unaccompanied child, acknowledging that timely transfer and placement would still take place whenever possible even in the absence of certain information or documentation. Given these additional restrictions on the use

of proposed § 410.1101(d)(6) as an exceptional circumstance, we believe this provision reasonably ensures ORR's timely acceptance of transfer and identification of placement of unaccompanied children whenever possible, even in the absence of documentation.

In addition, ORR disagrees with the comment that proposed § 410.1101(d)(6) should be deleted because it is inconsistent with and weakens current ORR policies under which a care provider may not deny or delay admitting the unaccompanied child if exceptional circumstances prevent the referring Federal agency from providing complete documentation. ORR notes that this provision of the ORR Policy Guide does not relate to the required timeframes applicable to ORR at § 410.1101(b) and (c) or the exceptions to such timeframes described at § 410.1101(d)(6). Paragraphs (b) and (c) of § 410.1101 set forth the timeframes within which ORR must identify and notify the referring Federal agency of appropriate placement and work with the referring Federal agency to accept transfer of custody, and § 410.1101(d) provides exceptions applicable to ORR's obligation to meet these timeframes (88 FR 68917 through 68918). By contrast, the policy identified by the commenter sets forth obligations applicable to the care provider facility—specifically, restrictions on the care provider facility's ability to deny or delay admitting a child after transfer of custody to ORR has occurred and the care provider facility has been identified as an appropriate placement. The ''exceptional circumstances'' referred to in that provision apply to the referring Federal agency and relate to its ability to provide complete documentation; this term does not refer to the exceptional circumstances that apply to ORR's ability to meet timeframes under § 410.1101(b) and (c).

With respect to § 410.1101(d)(7), after consideration of comments received on this provision, ORR is removing this exception from the regulation text in this final rule. To date, ORR has not identified any specific circumstances not already covered by § 410.1101(d)(1) through (d)(6) that have required a delay in placement, and thus ORR believes it is not necessary to include this exception at this time.

Comment: A few commenters recommended that the final rule reintroduce a State licensing requirement in every provision of the proposed rule where the FSA, specifically at paragraph 19, requires State-licensed placement.

Response: ORR refers the commenters to its discussion of State licensing at the preamble text for § 410.1302. The definition of ''standard program'' in this final rule is broader in scope than the FSA definition of ''licensed placement'' to account for changed circumstances since the FSA went into effect, where certain States have made licensure unavailable to ORR care provider facilities because they care for unaccompanied children. Having said that, at § 410.1302(a) of this final rule, if a standard program is in a State that does not license care provider facilities because they serve unaccompanied children, the standard program must still meet the State licensing requirements that would apply if the State allowed for licensure. Similarly, ORR is revising § 410.1302(b) to expressly provide that all standard programs, whether or not licensed, must comply with all State child welfare laws and regulations and all State and local building, fire, health, and safety codes even if licensure is unavailable in their State to care provider facilities providing care and services to unaccompanied children. Similarly, in this final rule, ORR has revised § 410.1101(b) to state that ORR will identify a standard program placement for an unaccompanied child, unless one of the listed exceptions in § 410.1101 applies.

Final Rule Action: After consideration of public comments, ORR is finalizing § 410.1101 with the following modifications: first, to revise § 410.1101(b) to (1) add the phrase ''in its custody'' to the first sentence of paragraph (b) to clarify that, under the TVPRA, a referring Federal department or agency must transfer unaccompanied children *in its custody* to ORR, and (2) state that ORR will identify a standard program placement for an unaccompanied child, unless one of the listed exceptions in § 410.1104 applies; second, to make a clarifying revision to the § 410.1101(d) introductory text to add the word ''timely'' before ''accept'' so that the word ''timely'' is read to modify both ''identify a placement'' and ''accept transfer of custody''; third, to amend § 410.1101(d)(3) to state, ''An emergency, including a natural disaster such as an earthquake or hurricane, a facility fire, or a civil disturbance;'' fourth, to remove the exceptional circumstance at § 410.1101(d)(7); and fifth, to add an additional sentence to § 410.1101(b) stating, ''ORR may seek clarification about the information provided by the referring agency as needed. In such instances, ORR shall notify the referring agency and work with the referring agency, including by requesting additional information, in accordance with statutory time frames.''

Section 410.1102 Care Provider Facility Types

Under § 410.1102, ORR described the types of care provider facilities in which unaccompanied children may be placed (88 FR 68919 through 68920). The basis for this section is ORR's statutory authority to make placement determinations for unaccompanied children in its care, as well as other responsibilities such as implementing policies with respect to their care and overseeing the infrastructure and personnel of facilities in which unaccompanied children reside.[86] Specifically, this section proposed that ORR may place an unaccompanied child in a care provider facility as defined at § 410.1001, including but not limited to shelters, group homes, individual family homes, heightened supervision facilities, or secure facilities, including RTCs. ORR proposed in the NPRM that it may also place unaccompanied children in OON placements under certain, limited circumstances. OON placements may include an OON RTC (which would need to meet the standards that apply to RTCs that are ORR care provider facilities), or a temporary stay at hospital (for example, for surgery). For purposes of this final rule, ORR notes as a general matter that it may place an unaccompanied child in an OON placement if it determines that a child has a specific need that cannot be met within ORR's network of facilities, where no in-network care provider equipped to meet the child's needs has the capacity to accept a new placement, or where transfer to a less restrictive facility is warranted and ORR is unable to place the child in a less restrictive in-network facility. ORR proposed in the NPRM to make such placements taking into account the considerations and criteria set forth in §§ 410.1103 through 410.1109 and § 410.1901, as further discussed below. In addition, in times of influx or emergency, as further discussed in subpart I (Emergency and Influx Operations), ORR proposed in the NPRM that it may place unaccompanied children in facilities that may not meet the standards of a standard program, but rather meet the standards in subpart I. ORR believes that this provision is consistent with the FSA requirement that unaccompanied children be placed in licensed programs until such time as release can be effected or until immigration proceedings are concluded, except that in the event of an emergency or influx of children into the United

States, ORR must place unaccompanied children into licensed programs as expeditiously as possible.[87]

Consistent with proposed § 410.1102, ORR stated in the preamble to the NPRM that it would place unaccompanied children in group homes or individual family homes, including long-term and transitional home care settings, as appropriate, based on the unaccompanied child's age and individualized needs and circumstances (88 FR 68919). Definitions of ''ORR long-term home care'' and ''ORR transitional home care'' were proposed in § 410.1001, which ORR stated would replace the terms ''long-term foster care'' and ''transitional foster care'' as those terms are used in the definition of ''traditional foster care'' provided at 45 CFR 411.5. ORR stated in the preamble of the NPRM that where possible, it believes that based on an unaccompanied child's age, individualized needs, and circumstances, as well as a care provider facility's capacity, it should favor placing unaccompanied children in transitional and long-term home care settings while they are awaiting release to sponsors. Having said that, ORR noted that efforts to place more unaccompanied children out of congregate care shelters that house more than 25 children together is a long-term aspiration, given the large number of children in its custody and the number of additional programs that would be required to care for them in home care settings or small-scale shelters of 25 children or less. ORR stated that given this reality, care provider facilities structured and licensed to accommodate more than 25 children continue to serve a vital role in meeting this need.

Finally, as discussed in the preamble to the proposed rule, ORR was considering replacing its current long-term and transitional home care placement approach with a community-based care model that would expand upon the current types of care provider facilities that may care for unaccompanied children in community-based settings (88 FR 68919 through 68920). ORR stated that this is in line with a vision of moving towards a framework of community-based care as described in the NPRM and in the following paragraphs. ORR stated that it believes such a framework would be consistent with the language of the proposed rule and that ORR would be able to implement it in a manner consistent with the proposed rule.

ORR stated in the preamble to the NPRM that if it were to finalize the community-based care model, references to ORR long-term home care and ORR transitional home care would be replaced with the term community-based care, and ORR would define ''community-based care'' in § 410.1001 as an ORR-funded and administered family or group home placement in a community-based setting, whether for a short-term or a long-term placement (88 FR 68919). ORR stated that the definition of ''community-based care'' encompasses the term ''traditional foster care'' that is codified at existing § 411.5.

For a more detailed discussion of ORR's proposed community-based care model, ORR refers readers to the NPRM preamble (88 FR 68919 through 68920). ORR welcomed public comment on its vision of community-based care, its inclusion as a care provider facility type in place of ORR's current long-term and transitional home care placement approach, and any other concerns relevant to this change based on existing language in the NPRM.

Comment: Many commenters supported the proposed development and implementation of a community-based care model. A number of commenters stated that they supported including the community-based care model in the final rule because such a model aligns with Federal and State child welfare policies, which recognize the importance of allowing unaccompanied children to experience normal childhood freedoms and opportunities to the greatest extent possible. Some commenters specifically expressed support for the implementation of the Reasonable and Prudent Parent standard, the provision of ''a continuum of care,'' and the integration of unaccompanied children with their local communities and schools. Some commenters also noted that expanding care to include small community-based group homes and semi-independent living for older children will allow ORR to reduce reliance on congregate care settings, help unaccompanied children develop life skills, and offer both potential cost-savings and improvements in the quality-of-care children receive. Many commenters offered recommendations related to the development and implementation of a community-based care model. For example, commenters recommended that ORR develop timelines and a transition plan as well as additional operational details; ensure placements are smaller, home-like settings that allow children to have private spaces and input into their own schedules and participation in community; prioritize developing family-based and/or community-based placements that can accommodate the needs of children with disabilities; and ensure that community-based care programs have the proper amount of resources and support to provide adequate care for unaccompanied children and to facilitate their integration into the community.

Response: ORR thanks commenters for the many comments and recommendations regarding ORR's planned efforts toward the development of a community-based care model and agrees with the many potential benefits of such a model cited by commenters. So that ORR may more fully consider the comments and recommendations it received, ORR is not finalizing the community-based care model in this final rule but will consider all comments and recommendations received as it continues to transition to such a model.

Comment: A few commenters expressed concerns with the use of large congregate care facilities, recommending that that congregate care facilities be limited to 25 or fewer beds and that ORR prioritize placements in the least restrictive settings possible, including family or small community-based settings. One of these commenters also recommended limiting placement in congregate facilities unless the unaccompanied child has specific therapeutic needs where treatment cannot be provided in a home or community-based environment. This commenter also recommended that if family-based placement is unavailable and congregate placement is necessary, ORR should cease placing unaccompanied children in unlicensed facilities.

Response: ORR believes that where possible, based on an unaccompanied child's age, individualized needs, and circumstances, as well as a care provider facility's capacity, it should prioritize placing unaccompanied children in transitional and long-term home care settings while they are awaiting release to sponsors, so as to limit the time spent in large congregate care facilities. Currently, under existing policy, a child is a candidate for long-term home care if the child is expected to have a protracted stay in ORR and is under the age of 17 and 6 months at the time of placement, unless waived by both the referring and receiving Federal Field Specialist (FFS), who will take into account the best interests of the child.

As ORR explained in the NPRM, however, efforts to place more unaccompanied children out of congregate care shelters that house more than 25 children together is a long-term aspiration, given the large number of children in its custody and the number

of additional programs that would be required to care for them in home care settings or small-scale shelters of 25 children or less (88 FR 68919). As ORR noted in the NPRM, given this reality, care provider facilities that accommodate more than 25 children continue to serve a vital role in meeting this need. ORR notes that such facilities are required to be State-licensed, or if they are located in States that will not license care provider facilities housing unaccompanied children under this rule, ORR still requires them to follow State licensing requirements. In addition, all ORR standard programs must follow the minimum standards and provide the required services established at subpart D.

In response to the request that ORR cease placing unaccompanied children in unlicensed facilities, ORR notes that pursuant to § 410.1001, as finalized in this rule, standard programs must be licensed by an appropriate State agency, or meet the requirements of State licensing if they are in a State that does not allow State licensing of programs that provide services to unaccompanied children. As provided in § 410.1104, ORR will place unaccompanied children in standard programs that are not restrictive placements, except where a child meets criteria for restrictive placement, or in the event of an influx or emergency in which case ORR must make all reasonable efforts to place children in standard programs as expeditiously as possible. As provided in § 410.1102, in times of influx or emergency, ORR may place unaccompanied children in emergency or influx facilities that may not meet the standards of a standard program. In situations where unaccompanied children are placed in programs that are not standard programs, ORR implements other safeguards to protect their safety and well-being. Specifically, ORR imposes minimum standards for such emergency and influx facilities at subpart I (as finalized in this rule) to ensure the safety and well-being of children placed in such facilities. In the case of secure facilities, which are not standard programs, under this final rule, secure facilities are required to meet the minimum standards under § 410.1302.

Comment: Many commenters expressed concern that the NPRM does not specify the circumstances in which unaccompanied children would be placed in OON placements and requested additional clarification. These commenters stated that while proposed § 410.1105(c)(2) provides criteria for OON RTC placements, the proposed rule does not provide criteria for other OON placements. One commenter specifically cautioned against overreliance on OON placements, including OON RTCs or OON placements that would meet the definition of heightened supervision facilities as defined in proposed § 410.1001. This commenter noted that children placed in OON placements tend to face more challenges than children placed in-network that negatively impact their well-being and legal case. For instance, according to the commenter, staff at OON placements usually lack experience serving migrant populations or unaccompanied children, and children in OON placements frequently face additional language access barriers, which can delay their access to critical information and services. Additionally, the commenter stated that OON placements are diffusely located, often far from any legal service provider, making children's access to in-person legal meetings infrequent or entirely infeasible. In addition, some commenters noted that in the past, some unaccompanied children placed out-of-network have not received minimum required services, such as educational services and outdoor recreation, and that care and treatment provided by OON placements can vary widely. These commenters emphasized that thorough vetting and independent oversight of OON placements is critical and appreciated the proposed rule's reference to consulting with non-governmental stakeholders such as protection and advocacy (P&A) agencies to assess OON placements. They welcomed further discussion with ORR about policies and procedures to monitor OON placements. One commenter expressed the view that it is not feasible for ORR to sufficiently vet OON RTCs for placement due to the overwhelming number of unaccompanied children.

Commenters also made several recommendations for the final rule. First, commenters recommended that, to ensure unaccompanied children placed in OON placements have the same rights and protections as other unaccompanied children, the final rule should state that children may be placed in an OON placement only if it is the least restrictive, most integrated placement appropriate, that OON placements must be State-licensed to care for dependent children, and that children in OON placements must receive all the minimum services for standard programs, including those specified in proposed § 410.1302. Commenters further recommended that a child not be transferred to a restrictive OON placement unless they meet the criteria for transfer to the same level of restrictive placement within the ORR network. In addition, a few commenters recommended that the final rule state that any secure OON placement must satisfy the secure placement criteria in paragraph 21 of the FSA. Finally, one commenter, while understanding that it would not be feasible for all OON placements to be State-licensed, recommended that ORR include in the final rule that OON placements meet the other requirements for licensed facilities outlined in the FSA.

Response: Section 410.1102, as finalized in this rule, provides that ORR may place unaccompanied children in OON placements under certain, limited circumstances. Consistent with current policies, such circumstances include where ORR determines that a child has a specific need that cannot be met within the ORR network of care provider facilities, where no in-network care provider facility equipped to meet the child's needs has the capacity to accept a new placement, or where transfer to a less restrictive facility is warranted and ORR is unable to place the child in a less restrictive in-network care provider facility. With respect to OON RTCs in particular, as proposed, under § 410.1105(c)(2) ORR will place an unaccompanied child at an OON RTC when a licensed clinical psychologist or psychiatrist consulted by ORR or a care provider facility has determined that the unaccompanied child requires a level of care only found in an OON RTC (either because the unaccompanied child has identified needs that cannot be met within the ORR network of RTCs or no placements are available within ORR's network of RTCs), or that an OON RTC would best meet the unaccompanied child's identified needs. Consistent with § 410.1103, ORR will only place unaccompanied children in an OON placement if it is the least restrictive placement (consistent with the FSA) and in the child's best interest (consistent with the TVPRA), and ORR is revising § 410.1102 to clarify this.

To clarify its intent under this final rule, ORR notes that it makes every effort to place children within the ORR-funded care provider facility network. However, there may be instances when ORR determines there is no in-network care provider facility available to provide specialized services to meet an unaccompanied child's identified needs, or no in-network care provider facility equipped to meet those needs with the capacity to accept a new placement. In those cases, ORR will consider an OON placement.

ORR disagrees with one commenter's assertion that it is not feasible to appropriately vet OON RTCs or any OON placement. Under current policies, which ORR has incorporated in the final rule at § 410.1001, OON providers must be licensed by State licensing authorities and vetted prior to placement to ensure the provider is in good standing and is complying with all applicable State welfare laws and regulations and all State and local building, fire, health, and safety codes. Further, as noted in the NPRM, ORR may confer with other Federal agencies and non-governmental stakeholders, such as the P&A systems, when vetting OON RTCs (88 FR 68925). In addition, an ORR FFS and the FFS Supervisor must approve any OON placement as the least restrictive setting appropriate for the child's needs.

In response to commenters' concerns regarding the additional challenges faced by children placed in OON programs, and that unaccompanied children placed in OON facilities receive appropriate services to meet their needs, ORR notes that the case manager who is assigned to a child placed in an OON facility [88] will administer the case management services and maintain weekly contact with the child and the child's OON provider to ensure that both the case manager and ORR FFS are receiving weekly updates on the child's progress. Thus, the case manager would monitor the unaccompanied child's care and ensure the unaccompanied child is receiving services. The case manager also provides updates to the child's attorney of record.

ORR concurs with the commenters that any OON secure placement would need to satisfy the secure placement criteria in paragraph 21 of the FSA, which are implemented at § 410.1105. In addition, ORR concurs that children may not be placed in an OON restrictive facility unless they meet the criteria for placement or transfer to the same level of restrictive placement within ORR's network. ORR notes that § 410.1105(c)(2) already states that the criteria for placement in or transfer to RTCs within the ORR network apply to placement or transfer to OON RTCs. ORR refers readers to the section of this final rule addressing § 410.1105 for further information regarding criteria for placement in restrictive facilities.

As clarified in the preamble section discussing § 410.1000, part 410 will not govern or describe the entire program. Where the regulations contain less detail, subregulatory guidance such as the ORR Policy Guide, Field Guidance, manuals describing compliance with ORR policies and procedures, and other communications from ORR to care provider facilities will provide specific guidance on relevant requirements in a manner consistent with this final rule. ORR is not proposing to codify all of its existing requirements regarding OON placements in this final rule due to the complexity and quantity of those existing requirements, and because of its intention to iteratively refine and update those requirements in keeping with best practices and allow continued responsiveness to the needs of unaccompanied children and care provider facilities.

Comment: A few commenters expressed concern with use of foster care or group homes. These commenters stated that the foster system in the United States is significantly fragmented, contributing to a prevalence of trafficking activities. One commenter noted that addressing this issue is crucial for enhancing the effectiveness and safety of the foster care system and should be addressed before placing unaccompanied children there. Another commenter expressed concern that ORR's proposed placement provisions would allow unaccompanied children to be placed into foster care facilities that may not meet the standards of a standard program.

Response: ORR notes that ORR only uses licensed foster care programs, which must meet the requirements applicable to a standard program under this final rule, including those specified under subpart D. Thus, ORR has in place standards and requirements to protect the children's safety and well-being.

Comment: A few commenters stated that the final rule must specify that until an unaccompanied child is placed in a program licensed by the State to provide services for dependent children, the child ''shall be separated from delinquent offenders'' (except as provided in paragraph 21 of the FSA). The commenters noted that paragraph 12A of the FSA provides that ''minors shall be separated from delinquent offenders,'' but that this protection does not appear in the NPRM. Commenters disagreed with ORR's statement in the NPRM (88 FR 68922) that this provision is not applicable because it relates to the initial apprehension of unaccompanied children (before ORR involvement) and stated that paragraph 12A of the FSA is not limited to initial apprehension. Rather, according to the commenters, paragraph 12A covers situations where ''there is no one to whom the INS may release the minor pursuant to paragraph 14, and no appropriate licensed program is ''immediately available for placement pursuant to paragraph 19.'' Commenters noted that the definition of licensed program in paragraph 6 of the FSA specifies that a licensed program must be ''licensed by an appropriate State agency to provide residential, group, or foster care services for dependent children'' and that these two paragraphs of the FSA work together: prior to licensed placement, unaccompanied children must be separated from minors adjudicated delinquent; after licensed placement, children must be placed in a facility licensed by the State to serve dependent (rather than delinquent) children. The commenters expressed concern that the proposed rule permits children to be placed in ''standard programs'' that lack State licensure as well as in unlicensed emergency and influx facilities, yet it offers no assurances that unaccompanied children in these placements will be treated as dependent minors. The commenter further noted that the proposed rule did not specify any required standards for OON facilities or any placement criteria for OON non-RTCs and stated that this would permit ORR to place children in OON facilities that are licensed for minors adjudicated delinquent, in violation of the FSA.

Response: As an initial matter, ORR has revised the final rule at § 410.1001 to require that OON placements be licensed by an appropriate State agency. OON placements are vetted prior to ORR placing a child there to ensure the program is in good standing with State licensing authorities and is complying with all applicable State welfare laws and regulations and State and local building, fire, health, and safety codes. For further discussion of standards and placement criteria for OON placements, ORR refers readers to a response addressing OON placements in this preamble section. ORR also revised the final rule at § 410.1302 to require that standard programs be State licensed by an appropriate State agency to provide residential, group, or transitional or long-term home care services for dependent children or meet the requirements of State licensing that would otherwise be applicable if it is in a State that does not allow State licensing of programs providing care and services to unaccompanied children. An extensive discussion of those revisions is provided in the preamble related to § 410.1302.

ORR further notes that, as discussed in the NPRM, the plain language of paragraph 12A of the FSA applies to DHS placements, not ORR placements. Paragraph 12A states that ''[f]ollowing arrest'' of an unaccompanied child if there is ''no appropriate licensed

program . . . immediately available'' the INS may place an unaccompanied child in an ''INS detention facility, or other INS-contracted facility, having separate accommodations for minors, or a State or county juvenile detention facility,'' however unaccompanied children ''shall be separated from delinquent offenders'' in those facilities. Paragraph 12A then requires the INS to transfer unaccompanied children from those initial placements within three or five days, depending on the circumstances, to a licensed placement under paragraph 19 of the FSA. Therefore, the language of paragraph 12A regarding ''separation from delinquent offenders'' is most fairly read to apply to DHS's initial placements after arrest. This interpretation of the FSA is consistent with the current statutory framework, where the referring Federal department or Federal agency (usually DHS) is required to transfer an unaccompanied child in its custody to ORR within 72 hours of determining the child is an unaccompanied child, absent exceptional circumstances. Once a child is transferred to ORR's custody, ORR will place the child consistent with this part. In any event, practically speaking, unaccompanied children are not placed with ''delinquent offenders.'' FSA paragraph 12A refers to ''delinquent offenders'' as juveniles who are detained in a ''State or county juvenile detention facility,'' presumably following arrest or conviction of a crime. Because ORR provides care and custody only for unaccompanied children, the only possible scenario in which an unaccompanied child could be placed with ''delinquent offenders'' is possibly in the context of OON secure placements. Accordingly, ORR is updating § 410.1102 to state that unaccompanied children shall be separated from delinquent offenders in OON placements (except those unaccompanied children who meet the requirements for a secure placement pursuant to § 410.1105).

Final Rule Action: After consideration of public comments, ORR is finalizing § 410.1102 as proposed, with the following modifications. First, ORR is revising § 410.1102 to state that ORR may place unaccompanied children in OON placements if ORR determines that a child has a specific need that cannot be met within the ORR network of care provider facilities, where no in-network care provider facility equipped to meet the child's needs has the capacity to accept a new placement, or where transfer to a less restrictive facility is warranted and ORR is unable to place the child in a less restrictive in-network care provider facility. Second, ORR is revising § 410.1102 to state that ORR may place unaccompanied children in OON placements, subject to § 410.1103, to clarify that ORR will only place unaccompanied children in an OON placement if it is the least restrictive placement (consistent with the FSA) and in the child's best interest. Third, ORR is revising § 410.1102 to state that unaccompanied children shall be separated from delinquent offenders in OON placements (except those unaccompanied children who meet the requirements for a secure placement pursuant to § 410.1105). Finally, at this time, ORR is not finalizing a community-based care model as described in the NPRM in order to allow additional time to consider the comments and recommendations received on a possible future community-based care model.

Section 410.1103 Considerations Generally Applicable to the Placement of an Unaccompanied Child

ORR proposed in the NPRM at § 410.1103 considerations generally applicable to the placement of unaccompanied children consistent with the TVPRA, 8 U.S.C. 1232(c)(2)(A), and the FSA (88 FR 68920 through 68922). The TVPRA mandates that ORR place each unaccompanied child in the least restrictive setting that is in the best interest of the unaccompanied child and specifies that HHS may consider danger to self, danger to community, and risk of flight. Similarly, paragraph 11 of the FSA requires that each unaccompanied child be placed in the least restrictive setting appropriate to the child's age and ''special needs,'' provided that such setting is consistent with the interest in ensuring the unaccompanied child's timely appearance before DHS and the immigration courts and protecting the unaccompanied child's well-being and that of others. Consistent with the statutory mandate and the FSA provision, as well as existing policy, ORR proposed in the NPRM at § 410.1103(a) that it would place each unaccompanied child in the least restrictive setting that is in the best interest of the unaccompanied child and appropriate to the unaccompanied child's age and individualized needs, provided that such setting is consistent with the interest in ensuring the unaccompanied child's timely appearance before DHS and the immigration courts and protecting the unaccompanied child's well-being and that of others.

As discussed in the NPRM, ORR considers the following factors when evaluating an unaccompanied child's best interest: the unaccompanied child's expressed interests, in accordance with the unaccompanied child's age and maturity; the unaccompanied child's mental and physical health; the wishes of the unaccompanied child's parents or legal guardians; the intimacy of relationship(s) between the unaccompanied child and the child's family, including the interactions and interrelationship of the unaccompanied child with the child's parents, siblings, and any other person who may significantly affect the unaccompanied child's well-being; the unaccompanied child's adjustment to the community; the unaccompanied child's cultural background and primary language; length or lack of time the unaccompanied child has lived in a stable environment; individualized needs, including any needs related to the unaccompanied child's disability; and the unaccompanied child's development and identity (88 FR 68920). ORR also noted that its care provider facilities are usually congregate care settings. As a result, consistent with prioritizing the safety and well-being of all unaccompanied children when making a placement determination, ORR stated that it evaluates the best interests of both the individual unaccompanied child being placed and the best interests of the other unaccompanied children at the care provider facility where the individual unaccompanied child may be placed. ORR noted that the factors and considerations in § 410.1103(b) and § 410.1105 also are evaluated in determining the best interest of the child for purposes of placement.

ORR also proposed to use the term ''individualized needs,'' in § 410.1103(a), rather than ''special needs'' (as used in the FSA and regulations established in the 2019 Final Rule at 45 CFR 410.201(a)), because it believes the term ''special needs'' has created confusion. ORR explained that the term ''special needs'' may imply that, in determining placement, ORR considers only a limited range of needs that fall within a special category (88 FR 68920 through 68921). Instead, in assessing the appropriate placement of an unaccompanied child, ORR stated that it takes into account any need it becomes aware of that is specific to the individual being assessed, regardless of the nature of that need. In addition, ORR noted that the term ''special needs'' may imply that, in determining placement, ORR considers only those needs related to an unaccompanied child's disability, which as explained, is not the case. To avoid the suggestion

that, in determining placement of an unaccompanied child, ORR only takes into account a limited range of needs that fall within a special category, ORR proposed in the NPRM the broader term ''individualized needs'' for purposes of § 410.1103(a).

ORR further noted that as used in the FSA, including the considerations required at paragraph 11, ''special needs'' is not synonymous with disability or disability-related needs. As explained in the NPRM, the term ''special needs'' has no clear legal definition; of note, it is not used in section 504 or the HHS implementing regulations at 45 CFR part 85. Aside from its particular usage in the FSA, the term ''special needs'' is often understood to be a placeholder or euphemism for ''disability.'' As with the term ''handicapped,'' ORR was concerned about perpetuating language that many individuals now find stigmatizing. For these reasons, as discussed above at § 410.1001, ORR invited comments concerning the continued use of the terms ''special needs minor'' or ''special needs unaccompanied child'' but included these terms in the NPRM in order to ensure consistency with the FSA.

Under § 410.1103(b), consistent with existing policy and with certain requirements under the TVPRA,[89] ORR proposed in the NPRM that it would consider additional factors that may be relevant to the unaccompanied child's placement, to the extent such information is available, including but not limited to the following: danger to self and the community or others, runaway risk, trafficking in persons or other safety concerns, age, gender, LGBTQI+ status or identity,[90] disability, any specialized services or treatment required or requested by the unaccompanied child, criminal background, location of a potential sponsor and safe and timely release options, behavior, siblings in ORR custody, language access, whether the unaccompanied child is pregnant or parenting, location of the unaccompanied child's apprehension, and length of stay in ORR custody (88 FR 68921). ORR stated that it believes that this information, to the extent available, is necessary for a comprehensive review of an unaccompanied child's background and needs and for appropriate and safe placement of an unaccompanied child.

In addition, with respect to the consideration of whether any specialized services or treatments are required, ORR explained in the NPRM that it is aware of the importance of ascertaining an unaccompanied child's health status upon entering ORR care in order to ensure the most appropriate placement, which includes the following: the need for proximity to medical specialists; the child's reproductive health status, including information relating to pregnancy or post-partum status, use of birth control, any recent procedures, medications, or current needs related to pregnancy; and whether the child is a victim of a sex crime (*e.g.,* sexual assault, sex trafficking); and other healthcare needs (88 FR 68921). ORR relies on such information provided from referring Federal agencies to make appropriate placements. For further discussion of proposed policies related to access to medical care, ORR referred readers to § 410.1307(b). ORR stated that when it receives a referral of an unaccompanied child from another Federal agency, ORR documents and reviews the unaccompanied child's biographical and apprehension information, as submitted by the referring Federal agency in ORR's case management system, including any information about an unaccompanied child's health status, including their reproductive health status, and need for medical specialists.

Under § 410.1103(c), ORR proposed in the NPRM that it would be able to utilize information provided by the referring Federal agency, child assessment tools, interviews, and pertinent documentation to determine the placement of all unaccompanied children (88 FR 68921). In addition, ORR proposed in the NPRM that it may obtain any relevant records from local, State, and Federal agencies regarding an unaccompanied child to inform placement decisions. ORR explained that such information is vital in carrying out ORR's general duty to coordinate the care and placement of unaccompanied children, including determining whether a restrictive placement may be necessary.[91] ORR proposed in the NPRM to add these provisions to the regulations to clarify the broad range of information it may utilize in making placement determinations.

The TVPRA requires that the placement of an unaccompanied child in a secure facility be reviewed at a minimum on a monthly basis to determine if such placement remains warranted.[92] In the NPRM, ORR noted that it exceeds the statutory requirement here because under its current policies all restrictive placements, including secure placements, must be reviewed at least every 30 days (88 FR 68921). ORR proposed in the NPRM at § 410.1103(d) to codify the practice of reviewing restrictive placements at least every 30 days to determine if such placements remain warranted.

Additionally, ORR proposed in the NPRM at § 410.1103(e) to codify its existing policy that ORR make reasonable efforts to provide placements in those geographical areas where DHS encounters the majority of unaccompanied children (88 FR 68921). ORR stated that it believes this provision is justified in order to facilitate the orderly and expeditious transfer of children from DHS border facilities to ORR care provider facilities, which is in the child's best interest. ORR further stated that this requirement reflects the requirement at paragraph 6 of the FSA. ORR noted that in making any placement decision, it also would take into account the considerations set forth in § 410.1103(a) and (b).

Finally, ORR proposed in the NPRM at § 410.1103(f) to codify a requirement that care provider facilities accept all unaccompanied children placed by ORR at their facilities, except in limited circumstances (88 FR 68921 through 68922). ORR explained that such a requirement is consistent with ORR's authority to make and implement placement determinations, and to oversee its care provider facilities, as established at 6 U.S.C. 279(b)(1). Consistent with existing policy, ORR proposed in the NPRM under § 410.1103(f), that a care provider facility may only deny ORR's request for placement based on the following reasons: (1) lack of available bed space; (2) the placement of the unaccompanied child would conflict with the care provider facility's State or local licensing rules; (3) the initial placement involves an unaccompanied child with a significant physical or mental illness for which the referring Federal agency does not provide a medical clearance; or (4) in the case of the placement of an unaccompanied child with a disability, the care provider facility concludes it is unable to meet the child's disability-related needs without fundamentally altering its program, even by providing reasonable modifications and even with additional support from ORR. ORR proposed in the NPRM that if a care provider facility wishes to deny a placement, it must make a written request to ORR providing the individualized reasons for the denial. ORR proposed in the NPRM that any such request must be approved by ORR before the care provider facility may deny a placement. In addition, ORR proposed in the NPRM at § 410.1103(f) that it would be able to follow up with a care provider facility about a placement denial to find a solution to the reason for the denial.

ORR did not propose to codify in subpart B the provisions finalized in the 2019 Final Rule at § 410.201(b) or (e), which were based on requirements set forth in paragraph 12A of the FSA. The 2019 Final Rule at § 410.201(b) provided that ORR separates unaccompanied children from delinquent offenders. However, ORR noted in the NPRM that paragraph 12A of the FSA concerns detention of unaccompanied children following arrest by the former INS, and currently DHS, before transfer of custody to ORR. ORR explained that it is not involved in the apprehension or encounter of unaccompanied children or their immediate detention following apprehension or encounter and thus ORR proposed in the NPRM to omit this provision from this regulation. Having said that, ORR proposed in the NPRM that it will apply the facility standards described as paragraph 12A of the FSA to its care provider facilities, consistent with standards set forth in subpart D (Minimum Standards and Required Services) and subpart I (Emergency and Influx Operations) (88 FR 68922).

The 2019 Final Rule at § 410.201(e) provides that if there is no appropriate licensed program immediately available for placement, and no one to whom ORR may release an unaccompanied child, the unaccompanied child may be placed in an ORR-contracted facility having separate accommodations for children, or a State or county juvenile detention facility where such child shall be separated from delinquent offenders, and that every effort must be taken to ensure the safety and well-being of the unaccompanied child detained in these facilities. ORR proposed in the NPRM omitting this provision from these regulations (88 FR 68922). This provision was also based on paragraph 12A of the FSA, which concerns detention of unaccompanied children following arrest by the former INS, and currently following encounter by DHS, before transfer of custody to placement in an ORR care provider facility. Instead, consistent with existing policies, under § 410.1101(b), ORR proposed in the NPRM to identify an appropriate placement for the unaccompanied child at a care provider facility within 24 hours of receiving the referring agency's notification, whenever possible, and no later than 48 hours of receiving such notification, barring exceptional circumstances. Also, as further discussed in the next section (addressing § 410.1104), in the event of an emergency or influx of unaccompanied children into the United States, ORR proposed in the NPRM to place unaccompanied children as expeditiously as possible in accordance with subpart I (Emergency and Influx Operations).

Comment: Many commenters supported the requirement at proposed § 410.1103(a) that ORR place each unaccompanied child in the least restrictive setting that is in the best interest of the child and appropriate to the unaccompanied child's age and individualized needs. A few commenters specifically commended ORR for the proposal to codify the requirement that care for unaccompanied children be tailored to their individualized needs, emphasizing that this is a significant step that helps ensure the welfare and well-being of unaccompanied children, protects them from potential exploitation, and aligns with recognized child welfare best practices. These commenters applauded ORR for taking this crucial step to prioritize the best interests of the child.

Some of these commenters also provided recommendations to further strengthen or clarify the proposed provisions at § 410.1103(a). One commenter recommended that ORR strengthen language regarding the use of least restrictive settings by stating that unaccompanied children should be placed in the least restrictive setting that is appropriate for their needs and safety, which could include foster care, family homes, or other community-based settings, but that institutional settings should be the last possible option and not considered unless absolutely necessary. One commenter stated that if family-based placement is unavailable and congregate placement is necessary, ORR shelter facilities should require review by legal advocates (lawyers, judges, others) to ensure that the situation is the least restrictive and most appropriate available setting for the unaccompanied child.

A few commenters stated that the primary relevant factors to consider when determining a child's placement should be the best interests of the child, which they believed should be a mix of the factors laid out in both §§ 410.1001 and 410.1103. While the commenters agreed that ORR may consider additional factors, based on each child's individual circumstances to ensure that child's safety and to meet individualized needs, they believed that the prevailing factors for this determination, which should be reflected in the regulations, are the best interest factors. These commenters also recommended that ORR should separate the safety and immigration enforcement considerations, the latter of which are secondary to the best interests of the child and should be considered separately.

Response: ORR agrees that each unaccompanied child should be placed in the least restrictive setting that is in the best interest of the child and appropriate to the unaccompanied child's age and individualized needs, and that consideration of each child's individualized needs is a key component to ensuring their safety and welfare.

Consistent with 8 U.S.C. 1232(c)(2)(A), when determining placement of an unaccompanied child, ORR places the unaccompanied child in the least restrictive setting that it determines is in the best interest of the child. And, consistent with the FSA at paragraph 11, ORR places an unaccompanied child in the least restrictive setting appropriate to the child's age and special needs, provided that such setting is consistent with its interests to ensure the child's timely appearance before DHS and the immigration courts and to protect the child's well-being and that of others. ORR implements these requirements by assessing a broad range of factors and criteria as set forth at §§ 410.1103 and 410.1105.

In response to the commenter that recommended ORR strengthen the language regarding the use of least restrictive settings by providing that unaccompanied children should be placed in the least restrictive setting that is appropriate for their needs and safety, which could include foster care, family homes, or other community-based settings, but that institutional settings should be the last possible option and not considered unless absolutely necessary, ORR notes that the considerations recommended by the commenter are already part of the best interest assessment performed by ORR in determining an appropriate placement under § 410.1103. Under proposed § 410.1103(a) and (b), ORR would consider a child's individualized needs and safety through assessment of the various factors presented in those subsections. In addition, as discussed above and in the NPRM, where possible, ORR agrees that based on an unaccompanied child's age, individualized needs, and circumstances, as well as a care provider facility's capacity, it should favor placing unaccompanied children in transitional and long-term home care settings rather than institutional settings while they are awaiting release to sponsors (88 FR 68919). Having said that, as ORR has previously noted, efforts to place more unaccompanied children out of congregate care shelters

that house more than 25 children together is a long-term aspiration, given the number of children in its custody and the number of additional programs that would be required to care for them in home care settings or small-scale shelters of 25 children or less. Given this reality, care provider facilities structured and licensed to accommodate more than 25 children continue to serve a vital role in meeting this need.

In response to the comment asserting that if family-based placement is unavailable and congregate placement is necessary, ORR shelter facilities should require review by legal advocates (lawyers, judges, others) to ensure that the situation is the least restrictive and most appropriate available setting for the unaccompanied child, while the commenter did not make a specific recommendation for changes to the rule text, ORR notes that its current placement process, as codified in this final rule, is consistent with requirements under the statute and FSA. As noted previously, the statute [93] expressly makes ORR ''responsible for making and implementing placement determinations for all unaccompanied children who are in Federal custody by reason of their immigration status'' and does not contemplate external review by legal advocates. Furthermore, ORR believes that the commenter's suggestion is impracticable, especially if it refers to the initial transfer of unaccompanied children from other Federal agencies, given the 72 hour timeframe required by statute.[94] Finally, ORR notes that shelter facilities, as well as family-based placements, are not considered restrictive facilities, and that ORR has codified in this rule, at § 410.1901, procedures for review of restrictive placements such as heightened supervision and secure facilities.

Finally, given the language of the statute [95] and paragraph 11 of the FSA, ORR does not believe it would be appropriate to separate the safety and immigration considerations and consider them as secondary under proposed § 410.1103(a). Thus, ORR is finalizing § 410.1103 to require that ORR place unaccompanied children in the least restrictive setting that is in the best interest of the child and appropriate to the child's age and individualized needs, provided that this setting is consistent with ensuring the child's timely appearance before DHS and the immigration courts and protecting the unaccompanied child's well-being and that of others.

Comment: One commenter questioned whether there is any objective procedure that can be applied in determining ''the least restrictive setting that is in the best interests of the child, taking into consideration danger to self, danger to the community, and risk of flight'' (quoting from proposed rule preamble at section IV.A, 88 FR 68910). The commenter expressed concern that the evaluation of such topics with regard to an individual may be subjective and asked if there is an objective procedure to apply to these situations to ensure an unbiased placement.

Response: ORR notes that it was unclear what the commenter meant by an ''objective procedure'' to determine the least restrictive setting in the best interest of a child. Having said that, ORR notes that several of the potential factors for consideration described at § 410.1103(b) are based on concrete, objective measures (*e.g.,* age, siblings in ORR custody, location of the child's apprehension, length of stay in ORR custody). Nevertheless, to determine an appropriate placement that is in an unaccompanied child's best interest, ORR believes it must also consider other factors that reflect a child's individualized needs and circumstances, but which may not be as concrete as age or length of stay in ORR custody. Therefore, ORR believes the proposed framework of requiring consideration of a non-exhaustive list of factors is a reasonable method of assessing appropriate placements that are in a child's best interest. Under this rule, ORR will take into account a broad range of factors, as provided at § 410.1103 and the definition of ''best interest'' at § 410.1001. In particular, § 410.1103(b) provides a list of 17 factors that ORR considers as relevant to a child's placement, including, among others, the specific factors noted by the commenter (danger to self, danger to the community/others, and runaway risk). Furthermore, the definition of best interest at § 410.1001 sets forth specific factors that ORR will take into account in determining a child's best interest. The consideration of factors set forth at § 410.1103 and the definition of ''best interest'' at § 410.1001 necessarily will vary for each child and involve some judgment based on each child's unique, individualized needs and experiences and on information obtained by ORR from various sources as provided at § 410.1103(c), including the referring Federal agency, assessments performed of the child, interviews, pertinent documentation, and records from local, State, and Federal agencies regarding the child.

Comment: Many commenters opposed the language at proposed § 410.1103(a) requiring that the placement setting be ''consistent with the interest in ensuring the unaccompanied child's timely appearance before DHS and the immigration courts.'' These commenters stated that this language should be removed because it is inconsistent with ORR's child welfare mandate. These commenters further asserted that ORR does not operate as an immigration enforcement agency and compliance with immigration court obligations is not an appropriate consideration for ORR placement decisions; instead, these commenters believed that consideration of ''risk of flight'' as it relates to immigration proceedings (as opposed to flight from a custodial setting), lies squarely with DHS. These commenters stated that placement decisions should be guided by a determination that the placement is in the least restrictive setting in the best interest of the child.

Response: As discussed previously, the HSA [96] requires ORR to consult with DHS in making placement decisions to ensure that children are likely to appear for all hearings and proceedings in which they are involved. Similarly, paragraph 11 of the FSA requires that each unaccompanied child be placed in the least restrictive setting appropriate to the child's age and special needs, provided that such setting is consistent with the interest in ensuring the unaccompanied child's timely appearance before DHS and the immigration courts and protecting the unaccompanied child's well-being and that of others. Consistent with the statutory mandate and the FSA provision, ORR is finalizing the language at § 410.1103(a) as proposed, requiring that the placement setting be consistent with the interest in ensuring the unaccompanied child's timely appearance before DHS and the immigration courts.

Comment: Many commenters supported the proposed rule's requirement that gender and LGBTQI+ status or identity be considered when making placement decisions. A number of commenters, while supporting these requirements, also provided recommendations to strengthen the consideration of these factors to ensure LGBTQI+ children receive the support they need. These commenters noted that when LGBTQI+ children are discriminated against or mistreated, their mental and physical health suffers, whereas supportive placement options support their stability and mitigate safety risks. Commenters recommended that ORR add language to the final rule that requires care provider facilities to consult with LGBTQI+ children in making placement decisions, in order to ensure that ORR has an adequate

understanding of the child's wishes, needs, and concerns with respect to placement. One commenter specifically recommended that language be added to the rule to ensure that the privacy needs of LGBTQI+ children are accommodated.

Response: ORR agrees that the consideration of an unaccompanied child's gender and LGBTQI+ status or identity is important in determining a safe and appropriate placement for such children. To align with the revision to § 410.1210(c)(3), ORR is updating § 410.1103(b)(7) to ''LGBTQI+ status or identity'' and will refer instead to ''LGBTQI+ status or identity'' in the preamble of this final rule.

Regarding commenters' recommendations, ORR notes that consistent with current policy, under this rule, ORR will require care provider facilities to operate their programs following certain guiding principles, including ensuring that LGBTQI+ children are treated with dignity and respect, receive recognition of their sexual orientation and/or gender identity, are not discriminated against or harassed based on actual or perceived sexual orientation or gender identity, and are cared for in an inclusive and respectful environment.[97] ORR agrees that it is essential to ensure the safety and well-being of each child. Under § 410.1103(b)(7), ORR intends, consistent with current policies, that care provider facilities conduct an individualized assessment of each LGBTQI+ child's needs, and according to that assessment address each LGBTQI+ child's housing preferences and health and safety needs. If a child expresses safety or privacy concerns or the care provider facility otherwise becomes aware of such concerns, the care provider facility must take reasonable steps to address those concerns.

Further, as finalized at § 410.1001, ORR considers an unaccompanied child's expressed interests when evaluating what is in the child's best interests, in accordance with the child's age and maturity. Under § 410.1302(c), all standard programs and secure facilities are required to provide or arrange an individualized needs assessment for unaccompanied children, and provide regular individual and group counseling sessions. These requirements also apply to EIFs, as described at § 410.1801(b). Further, case managers are responsible for developing individual service plans for each unaccompanied child. ORR believes that these provisions will ensure that LGBTQI+ children are consulted in making placement determinations when appropriate and that ORR has an adequate understanding of the child's wishes, needs, and concerns with respect to placement.

ORR will continue to monitor the implementation of its existing policies to protect LGBTQI+ children with respect to placement determinations and consider the recommendations as needed in future policymaking. ORR notes that addressing these concerns through its policies allows ORR to make more frequent, iterative updates in keeping with best practices, to communicate its requirements in greater detail, and to be responsive to the needs of unaccompanied children and care provider facilities.

Comment: One commenter expressed concern that § 410.1103(b) allows for unacceptable discretion by listing the factors that ''may be relevant''; the commenter stated that gender and age are factors that should always be a consideration in any child's proper placement.

Response: At § 410.1103(b), ORR includes a non-exhaustive list of factors, some of which, including gender and age, will be relevant in most or all placements. ORR believes that a factor's relevance may vary depending on a child's unique needs and circumstances. For example, ORR acknowledges that consideration of a child's gender identity is of particular relevance in placement decisions. In addition, under current ORR policy, children who are under 13 years of age are given priority for transitional foster care placements; thus, in assessing foster care placements, age is an essential factor to consider.[98] To clarify ORR's intent that certain factors may be relevant in most or all placements, while other factors may not be relevant to every unaccompanied child's situation, depending on each child's individualized needs, ORR is revising § 410.1103(b) introductory language to replace the phrase ''that may be relevant'' with ''to the extent they are relevant.''

Comment: A number of commenters expressed concern with, or asked for further clarification regarding, ORR's proposal to consider gender and/or LGBTQI+ status or identity in determining placement. Two commenters expressed concern about the impact of these requirements on faith-based providers that provide such services to unaccompanied children. One commenter also asked for clarification regarding how the best interests of the child are evaluated in the context of the unaccompanied child's expressed interests and the unaccompanied child's development and identity. Another commenter believed that there is no legitimate reason for a child's self-identified gender or LGBTQI+ status or identity to be considered in placement, and expressed concern that the proposed regulation discriminates against religious ORR staff members, faith-based foster care providers and parents by forcing them to choose between their deeply held convictions and their desire to live out their faith by caring for unaccompanied children.

A few commenters expressed concern that the proposed rule did not explain how a child's LGBTQI+ status or identity should impact a placement. One of these commenters asked how, and at what age, ORR would ascertain a child's LGBTQI+ status or identity.

A few commenters also asked ORR to clarify whether ORR's definition of a suitable placement for an unaccompanied child would match the definition of a ''safe and appropriate placement'' for LGBTQI+ children in foster care as recently proposed by the HHS ACF Children's Bureau (88 FR 66752). These commenters opposed ORR adopting the standard proposed by the Children's Bureau.

Response: Although ORR is respectful of different views, it reiterates the importance of taking gender and LGBTQI+ status or identity into account as set out in this rule. In determining an appropriate placement, ORR takes into account a broad range of factors, not just gender and LGBTQI+ status or identity, as set forth at § 410.1103 and the definition of ''best interest'' at § 410.1001. Thus, when evaluating the child's best interest ORR considers the whole person including consideration of the unaccompanied child's expressed interests and the unaccompanied child's development and identity, depending on the child's age, maturity, and individualized needs, as well as information from a variety of sources as specified at § 410.1103(c). Because each child has unique needs and experiences, the consideration of the factors set forth at § 410.1103 and the definition of ''best interest'' at § 410.1001 necessarily will vary for each child.

ORR staff members, care provider facilities, and foster parents that serve and care for unaccompanied children in ORR custody agree to do so consistent with ORR's policies and requirements, including those that pertain to LGBTQI+ children. ORR wishes to make clear that it operates the UC Program in compliance with the requirements of federal religious freedom laws, including the Religious Freedom Restoration Act, and applicable Federal conscience protections, as well as all

other applicable Federal civil rights laws and applicable HHS regulations. HHS regulations state, for example: ''A faith-based organization that participates in HHS awarding-agency funded programs or services will retain its autonomy; right of expression; religious character; and independence from Federal, State, and local governments, and may continue to carry out its mission, including the definition, development, practice, and expression of its religious beliefs.'' [99] These regulations also make clear that HHS may make accommodations, including for religious exercise, with respect to one or more program requirements on a case-by-case basis in accordance with the Constitution and laws of the United States.[100] Regarding commenters' request for clarification on whether ORR is adopting the standard proposed by the Children's Bureau in the NPRM on safe and appropriate placement requirements under titles IV–E and IV–B of the Social Security Act for children in foster care who identify as LGBTQI+,[101] ORR notes that the Children's Bureau and ORR are distinct offices within ACF and the programs they administer are governed by distinct statutory authorities. As such, the rule proposed by the Children's Bureau would not govern the UC Program. ORR determines whether a placement is safe and suitable for an unaccompanied child in accordance with 8 U.S.C. 1232(c) and the provisions set forth in subpart B of this rule.

Comment: Some commenters opposed the proposed rule's reference to what they described as the ''non-scientific, undefined'' term ''gender'' rather than ''sex'' of the child. Two commenters expressed the view that the proposed placement criteria would result in placements that compromise the privacy and safety of girls in ORR custody.

Response: ORR notes that the terms ''gender'' and ''sex'' are not synonymous, and are separately defined in existing ORR regulations at 45 CFR 411.5. As such, ORR declines to list ''sex'' as a factor in lieu of ''gender.'' Further, under § 410.1103(a), as finalized in this rule, ORR considers a child's gender identity as one of many factors, when making placement determinations because ORR believes that such identity has significant implications for reaching placement decisions that protect the safety and well-being of unaccompanied children. ORR notes that § 410.1103(b) is a non-exhaustive list of the factors ORR considers, and thus ORR could also consider a child's sex, as relevant, for purpose of placement.

ORR disagrees that the consideration of gender in placement decisions will diminish privacy or safety. If a child expresses safety or privacy concerns, or the care provider facility otherwise becomes aware of such concerns, the care provider facility must take reasonable steps to address those concerns.

Comment: Many commenters stated that criminal background or history (proposed § 410.1103(b)(10)) should be removed as a factor because it is overbroad and permits the consideration of unsupported allegations and criminal charges that have not resulted in convictions. These commenters stated that, at most, ORR should only consider confirmed or verified criminal convictions for children charged as adults and only when it is necessary to appropriately care for the child or others. These commenters stated that ORR should not consider juvenile delinquency adjudications because criminal laws do not treat children the same as adults, and juvenile delinquency adjudications are not considered criminal convictions. These commenters also expressed the view that consideration of criminal history risks straying from ORR's role under the TVPRA and expressed concern that an incorrect assessment of a child's previous contact with the criminal or juvenile justice system can lead to a child's wrongful placement or transfer to a restrictive setting or prolonged stay in such placements. In addition, many commenters stated ORR should ensure that juvenile records remain confidential and are not used against children, particularly to place children in restrictive, punitive settings.

A few commenters believed that children escaping a nation in which forced gang recruitment is common should not be penalized for suspected gang affiliation and one commenter noted that ORR should assume all children who migrate here are traumatized, and thus should be placed in warm and supportive environments rather than secure placements.

Response: ORR appreciates commenters' concerns regarding the consideration of a child's criminal background and history in determining appropriate placement; however, ORR continues to believe that consideration of this factor is necessary and appropriate in determining placement that is in the best interest of both the unaccompanied child and other children at the care provider facility under consideration. ORR believes that is appropriate to consider all information that may pertain to a child's potential connections to criminal activity, including criminal charges, convictions, juvenile delinquency adjudications, and suspected gang involvement or affiliation, to get a complete picture of the child's experiences and individualized needs and any potential risk to the child or to others in a care provider facility in which a child may be placed. Also, it is important to note that no child is automatically placed in a restrictive facility; instead, the child's placement will depend on the nature of any criminal background and the consideration of other factors at § 410.1103(b), including whether there exists a danger to self or others, and whether the child meets the specific criteria at § 410.1105 for a restrictive placement. Thus, consistent with its role under the TVPRA, ORR assesses many factors and applies various criteria before making a placement. ORR recognizes that children escaping a nation in which gang-related violence is common may be traumatized and takes this into consideration as part of its best interests assessment (see, in particular, the definition of ''best interest'' in § 410.1101) along with the broad array of other information to determine appropriate placement.

Furthermore, in assessing criminal background, ORR closely considers information obtained from a variety of sources, as provided at § 410.1103(c), including the referring Federal agency, assessments performed of the child, interviews, pertinent documentation, and records from local, State, and Federal agencies regarding the child. Thus, ORR acquires and evaluates criminal background information in collaboration with other professionals and agencies with expertise in these matters, and disagrees with comments that this factor is overbroad, permits the consideration of unsupported allegations, or causes ORR to stray from ORR's role under the TVPRA. In fact, ORR's role under the TVPRA (8 U.S.C. 1232(c)(2)(A)) is to determine appropriate placement in the least restrictive setting that is in the best interest of the unaccompanied child, giving due consideration to danger to self, danger to the community, and risk of flight. In considering a child's criminal background as described above, ORR is fulfilling its statutory role.

Comment: Many commenters opposed the inclusion of behavior as a factor at proposed § 410.1103(b)(12), asserting that this factor is vague and overbroad. These commenters stated that ORR and its care provider facilities often rely heavily on ''Significant Incident Reports'' (SIRs) as evidence of ''bad

behavior'' in determining a child's level of placement, and expressed concern that the information in SIRs may not provide a full picture of the child or adequately note the significant trauma that may have contributed to a child's behavior, prompting a child to be inappropriately stepped up to an even more restrictive environment or delay a child's transfer to a long-term foster care placement.

In addition, many commenters stated that behavior should be deleted as a factor because it is duplicative of § 410.1103(b)(9), which requires an assessment of ''[a]ny specialized services or treatment required or requested by the unaccompanied child'' as a factor for consideration in placement. These commenters further noted that behavioral issues exhibited by children are often manifestations of stress, detention fatigue, and trauma, and typically indicate a child's need for additional support and services. Commenters further stated that, if ORR includes ''behavior'' as a factor for consideration in placement, the language at least should be amended to ''the child's need for behavioral supports and services.''

Response: ORR continues to believe that consideration of behavior is appropriate in determining placement that is in the best interest of the unaccompanied child and other children at the care provider facility under consideration. While the term ''behavior'' could entail a broad range of considerations, ORR believes this is necessary for ORR and its care provider facilities to obtain a complete picture of the child's individualized needs. In response to commenters' concerns, while ORR and its care provider facilities use SIRs as evidence of a child's behavior in determining a child's level of placement, under existing policy and under § 410.1103, ORR and its care provider facilities also take into account other factors to obtain a complete picture of the child and the broader context of the child's behavior before making this determination, including the child's mental and physical health and other individualized needs as set forth in the definition of ''best interest'' at § 410.1001.

ORR disagrees that listing ''behavior'' as a factor is duplicative and already captured under § 410.1103(b)(9) (specialized services or treatment required or requested). While ORR agrees that behavioral issues exhibited by children can be manifestations of stress, detention fatigue, and trauma, and may indicate a child's need for additional support and services, the causes of behavioral issues and whether they necessitate additional services or treatment may vary from child to child depending on each child's individual experiences and needs. Thus, ORR does not agree that this factor is already captured under § 410.1103(b)(9); instead, ORR believes that for purposes of clarity and to ensure that behavior is specifically included as part of a comprehensive consideration of a child's needs, it should be included as a separate factor at § 410.1103(b)(12).

ORR also does not believe it is necessary to amend the language at § 410.1103(b)(9) to state ''the child's need for behavioral supports and services'' as requested by commenters. ORR recognizes that a child's behavior is often connected to other needs, such as mental health needs, or that behavioral supports or services may be appropriate in certain cases but believes that the need for ''supports and services'' may vary from child to child in light of the child's stage of development and the circumstances the child is facing. ORR believes that reflecting the factor as ''behavior'' allows for a more comprehensive consideration of the behavioral manifestations that could impact placement. ORR will consider further addressing and clarifying the application of behavior in future policymaking.

Comment: Many commenters supported the consideration of a child's status as pregnant or parenting in § 410.1103(b)(15) and supported ORR's recognition in the preamble that pregnant and parenting youth are ''best served in family settings.'' These commenters recommended that ORR go further to protect these particularly vulnerable youth by codifying a new subsection (h) in § 410.1103 that explains pregnant and parenting unaccompanied children ''shall be given priority to community-based care placements'' or ''transitional and long-term home care,'' depending on the terminology for care provider types that ORR adopts. Commenters noted that this addition to the proposed rule would be consistent with section 1.2.2 of the UC Program Policy Guide, which provides, in part, that ''ORR gives priority for transitional foster care placements to . . . teens who are pregnant or are parenting.'' One commenter applauded ORR's recognition that unaccompanied children who are pregnant and/or parenting need particular kinds of placements and services, noting that data show that many teenage parents in foster care have experienced maltreatment, endured multiple placements, and been separated from parents and other important people, resulting in significant trauma. The commenter encouraged ORR to make specific recommendations to address the needs of pregnant and/or parenting youth who may come into the agency's care to ensure their safety, health, and well-being.

Response: As noted by commenters, under current ORR policy, teenagers who are pregnant or are parenting are a priority group for transitional foster care. ORR does not propose to adopt in the regulation text each of its existing policies regarding transitional foster care, including this provision, because of the sheer number of those requirements and because keeping those requirements in subregulatory guidance will allow ORR to make more appropriate, timely, and iterative updates in keeping with best practices and be continually responsive to the needs of unaccompanied children and care provider facilities. As clarified in § 410.1000, part 410 will not govern or describe the entire program. Where the regulations contain less detail, subregulatory guidance such as the ORR Policy Guide, Field Guidance, manuals describing compliance with ORR policies and procedures, and other communications from ORR to care provider facilities will provide specific guidance on requirements.

Comment: One commenter asked ORR to clarify (1) whether it believes that it is in the best interest of the child to place a pregnant child in States that have more permissive abortion laws or less permissive abortion laws; (2) to what extent do State laws on abortion factor into the ''best interests of the child,'' if at all; and (3) whether the availability of medical services for abortion takes precedence over placing an unaccompanied child with family or relatives who are located in a State where such services are not available.

Response: The factors outlined at § 410.1103 pertain to ORR's process for placing an unaccompanied child in a particular care provider facility. ORR makes decisions whether to release the unaccompanied child to family or relatives in accordance with subpart C of this part.

Consistent with the ''best interest'' definition and placement considerations at §§ 410.1001 and 410.1103, respectively, if a child expresses the need for medical services of any kind, access to medical services is one factor ORR considers in determining a placement that is in the best interest of the unaccompanied child and appropriate to the child's age and individualized needs. ORR further notes

that while access to medical services is an important factor in determining placement, it is not the sole factor assessed under § 410.1103(b). For example, ORR also considers release to family or relatives who are determined to be suitable sponsors under §§ 410.1201 through 410.1204. For every child in its custody ORR evaluates the best interest of the child taking into account each child's individual needs and circumstances. For further discussion of an unaccompanied child's access to medical care, ORR refers readers to the discussion of § 410.1307 of this final rule.

Comment: One commenter stated that the language and list of factors identified in § 410.1103(b) are not sufficiently comprehensive and conflate best interest considerations with immigration enforcement and safety considerations. The commenter provided suggested language that incorporates best interest factors included in the NPRM (88 FR 68920), factors under proposed § 410.1103, and factors used in best interest determinations in family and child welfare courts. Specifically, the commenter recommended revising the structure and content of § 410.1103(b) to first include the best interest factors set forth in the NPRM preamble (88 FR 68920), followed by certain factors in § 410.1103(b), and finally, certain new factors such as impact on the child of current ORR placement; size of proposed placement, whether a child placed in a particular jurisdiction is likely to obtain legal relief, and caretaker's ability to provide for the child's physical and mental well-being. A few other commenters also encouraged ORR to consider the impact of the placement on the child's legal case or potential legal relief when making placement decisions.

Finally, to distinguish best interest and least restrictive setting considerations from those regarding community safety or flight risk, the commenter recommended incorporating danger to community and flight risk in § 410.1103(b) to be considered separately in making placement decisions. The commenter stated that danger to community and flight risk would encompass assessment of behavior, criminal history, and trafficking risk making the listing of these three factors separately unnecessary.

Response: ORR appreciates the commenter's recommendations. As to the commenter's suggestion to incorporate the best interest standards set forth in the NPRM preamble (88 FR 68920) into § 410.1103(b), ORR believes that such standards are already adequately incorporated into § 410.1103 through the reference to ''best interest'' in § 410.1103(a) and thus it is not necessary to individually include such factors in § 410.1103(b). In regard to two of the new factors recommended by the commenter, impact of any previous placement and the size of the proposed placement, ORR notes that it does in fact consider these in determining the least restrictive placement that is in the best interest of the child and that is appropriate to the child's age and individualized needs, whether upon initial placement or transfer. In regard to the suggestion that ORR consider whether a child placed in a particular jurisdiction is likely to obtain legal relief, ORR notes that for most unaccompanied children in ORR custody, immigration proceedings begin after the child has been released to a sponsor. Immigration proceedings may commence for children who are in ORR custody for longer periods, in particular for those children placed in ORR long-term home care. ORR notes that under existing policy, in making a long-term home care referral and placement decision that is in the child's best interest, ORR considers the legal service provider's (LSP) recommendation of preferred locations for placement. ORR intends to continue this policy under this final rule. With respect to the commenter's suggestion to consider the caretaker's ability to provide for the child's physical and mental well-being (as required by the TVPRA, 8 U.S.C. 1232(c)(3)(A)), ORR notes that this factor applies when assessing release of a child, rather than placement in an ORR care provider facility, and is in fact taken into consideration under § 410.1202, as finalized in this rule.

Finally, ORR does not agree that danger to community and flight risk adequately encompass the separate considerations of behavior, criminal history, and trafficking risk. ORR further believes that including each of these five factors separately in § 410.1103(b) provides greater clarity as to the types of considerations that may be relevant in determining placement for an unaccompanied child. ORR believes that it is not necessary to distinguish best interest and least restrictive setting considerations from those regarding community safety or flight risk for purposes of § 410.1103(b) because all of these factors are potentially relevant to determining the least restrictive setting in the best interest of the child.

Comment: A few commenters encouraged ORR to consider access to counsel when making placement decisions.

Response: ORR notes that it provides unaccompanied children with access to legal services and information pursuant to § 410.1309, as finalized in this rule. Additionally, access to counsel is not limited by placement, and so it is not a factor considered in placement decisions. ORR refers readers to the discussion of § 410.1309 later in this final rule for further information.

Comment: One commenter noted that the proposed rule fails to take into account the impact of transfers on unaccompanied children when determining placement. This commenter recommended that for significant subpopulations of unaccompanied children (including tender-age children, children with identified autism-spectrum disorders, and children with impaired functioning in emotional domains related to the formation of stable attachments), ORR should have a strong preference for the use of a single placement and explicitly weigh the disruption of a transfer as part of any evaluation for transfer placement suitability. The commenter noted that transfers are inherently destabilizing for unaccompanied children and should be minimized.

Response: As part of its evaluation of whether a transfer is in the best interests of the child, ORR assesses various factors provided at § 410.1103 and in the definition of best interest at § 410.1001, as relevant, including the potential impacts of a transfer on a child given the child's age, maturity, mental and physical needs, and any other individualized needs, including needs related to the child's disability. Because it already intends such factors to be considered when making placement determinations, at this time, ORR does not believe it necessary to make the changes to the rule text as suggested by the commenter.

Comment: One commenter noted that the current rule gives ORR authority to consider the factors at § 410.1103(b) and questioned why ORR is proposing a new rule to authorize such consideration. This commenter asked ORR to explain why these factors are not already being considered.

Response: ORR thanks the commenter for its question. As discussed in the NPRM and this final rule regarding the scope of this rule regarding § 410.1000, ORR's current policies, including policies concerning considerations generally applicable to the placement of an unaccompanied child, are described in various policy documents, field guidance, manuals, and communications from ORR to care provider facilities (88 FR 68914). But ORR does not have a regulation that

comprehensively codifies such standards. Further, as discussed in section III.B.3 of the proposed rule and this final rule, the 2019 Final Rule is currently subject to an injunction. ORR is issuing this final rule to more broadly codify and address issues related to custody of unaccompanied children by HHS, consistent with ORR's statutory authorities and to implement relevant provisions of the FSA. This final rule codifies, at § 410.1103, the factors that ORR currently applies in determining appropriate placement.

Comment: Some commenters generally opposed application of factors at § 410.1103(b), expressing concern that the factors would be insufficient to enable ORR or its contractors to identify patterns of trafficking. One commenter believed the proposed rule does not give ORR employees evaluating children's placement sufficient guidance on what factors should be considered and how to protect children from traffickers or persons seeking to victimize unaccompanied children.

Response: ORR takes seriously its responsibility when making placement determinations to consider the best interests of unaccompanied children and specifically to protect them from trafficking risk.[102] Section 410.1103(b) helps to protect the safety and well-being of unaccompanied children under ORR care by explicitly listing factors that ORR considers in determining an appropriate placement in the best interest of an unaccompanied child, including trafficking and safety concerns, criminal background, danger to self, danger to community/others, and runaway risk. While relevant to placement decisions, the factors in § 410.1103(b) also allow ORR to potentially identify patterns in the information provided which can assist in efforts to protect the unaccompanied child's safety. This final rule details trafficking protection and prevention efforts related to sponsor vetting and post-release services, policies regarding trafficking concern referrals to other agencies, and access to child advocates and legal services providers. ORR will also consider providing additional guidance regarding application of these factors and how to protect children from traffickers or persons seeking to victimize them in future policymaking.

Comment: Many commenters recommended that ORR shorten frequency of restrictive placement reviews to ''at least every 14 days'' to ensure compliance with its legal obligation under the TVPRA to place children in the least restrictive setting in their best interest. These commenters noted that the TVPRA requires that ORR review the placement of children in secure facilities (the most restrictive level of placements) on a monthly basis ''at a minimum'' and that by extending the TVPRA's 30-day minimum standard from secure settings to all restrictive settings, the proposed language sets an unacceptably low expectation for ORR's mandate. The commenters believed that proposed § 410.1103(d) overlooks the opportunity to expect more prompt reviews as a norm and ignores statutory support and evidence that children require faster reviews while in restrictive settings.

Response: ORR appreciates the commenters' recommendations, but ORR continues to believe that requiring review of all restrictive placements at least every 30 days is a reasonable standard and consistent with the TVPRA.[103] The TVPRA requires that the placement of an unaccompanied child in a secure facility be reviewed, at a minimum, on a monthly basis, and sets no review frequency for heightened supervision facilities. Thus, as noted in the NPRM, ORR exceeds the statutory requirement by requiring at § 410.1103(d), consistent with its existing policy, that all restrictive placements be reviewed at least every 30 days to determine whether a new level of care is appropriate (88 FR 68998). Having said that, ORR does note that § 410.1103(d) states that restrictive placements must be reviewed ''at least'' every 30 days, allowing ORR and its care provider facilities the flexibility to assess placements more frequently as determined appropriate in any given case. Thus, we believe that the frequency of reviews required under § 410.1103(d) will reasonably allow ORR to determine whether a restrictive placement continues to be warranted in accord with its statutory responsibilities, but also in a way that gives it the ability to respond flexibly in cases warranting more frequent review.

Comment: A few commenters stated that they believe that proposed § 410.1103(e) not only violates the State licensing requirement of the FSA but could lead to unlicensed placements being favored over State-licensed placements. Commenters noted that paragraph 6 of the FSA provides that the Government ''shall make reasonable efforts to provide licensed placements in those geographic areas where the majority of minors are apprehended, such as southern California, southeast Texas, southern Florida and the northeast corridor.'' However, the commenters noted that proposed § 410.1103(e), by contrast, states that ''ORR shall make reasonable efforts to provide placements in those geographical areas where DHS encounters the majority of unaccompanied children.'' The commenters believed that by omitting the term ''licensed'' from this provision, the proposed rule violates the FSA State licensing requirement and could have the effect of prioritizing unlicensed placements in Texas over licensed placements in other geographic areas, undermining the purpose of paragraph 6 and the FSA as a whole.

Response: ORR notes that this final rule has revised § 410.1103(e) to state that ORR shall make reasonable efforts to provide ''licensed'' placements in those geographical areas where DHS encounters the majority of unaccompanied children. In addition, ORR refers the commenters to the discussion of State licensing in the preamble related to § 410.1302 of this final rule further below.

Comment: One commenter suggested that by focusing placement in limited geographic areas (near the Southwest Border) under proposed § 410.1103(e), ORR does not appear to consider whether unaccompanied children might require greater care. The commenter questioned why ORR would want to confine unaccompanied children to a small number of facilities in one area of the country and suggested that this forces ORR to construct new facilities to support them. One commenter emphasized that placement of children in geographic areas near prospective sponsors is also important, especially for children whose prospective sponsors are parents or legal guardians. The commenter described certain benefits when a child receives a placement near the prospective sponsor, including improved sponsor response to the sponsor application, decreased stress for the unaccompanied child, and improved efficiencies in legal representation.

Another commenter expressed concern that proposed § 410.1103(e) prioritizes speed when placing children instead of safety.

Response: Consistent with paragraph 6 of the FSA, § 410.1103(e) provides that ORR shall make reasonable efforts to provide licensed placements in those geographical areas where DHS encounters the majority of unaccompanied children. As discussed in the NPRM, ORR believes that this provision is justified in order to facilitate the orderly and expeditious transfer of children from DHS border facilities to ORR care provider facilities, which is in the child's best interest (88 FR 68921). ORR notes, however, that this provision does not require that ORR place unaccompanied children in these

geographic areas in every case, but instead requires that ORR make reasonable efforts to do so. ORR acknowledges that in some cases, placement in the specified areas may not be appropriate or possible, for example, when there is not sufficient capacity at certain types of care provider facilities to adequately meet the needs of a child. In addition, § 410.1103(e) does not displace the requirement at § 410.1103(a) that ORR must place each child in the least restrictive setting that is in the best interest of the child and appropriate to the child's age and individualized needs, or the requirement at § 410.1103(b) that ORR must consider numerous factors that may be relevant to such placements. Thus, after considering the relevant factors at § 410.1103, including the best interest considerations at § 410.1001, ORR could determine in some cases that it is in the best interest of the child to be placed in areas outside the geographic areas where DHS encounters the majority of unaccompanied children, including, in appropriate cases, geographic areas near prospective sponsors.

Finally, in response to the comment that § 410.1103(e) prioritizes speed over safety when placing children, ORR notes that this provision is written consistently with the FSA at paragraph 6, but also in accord with ORR's statutory responsibility to consider the best interests of unaccompanied children. While expeditious placement is important, because for example it minimizes the amount of time children spend in Border Patrol facilities that are not designed to care for children, ORR considers multiple factors, not time alone, in determining a placement that is in the best interest of an unaccompanied child to ensure that safety and well-being of the child and others.

Comment: Many commenters supported ORR's proposed restrictions at § 410.1103(f) on the circumstances in which care provider facilities may deny placements of unaccompanied children, stating that the issue of care provider facilities improperly denying placements to children has been a longstanding problem, especially for unaccompanied children with disabilities. In addition, these commenters supported proposed § 410.1103(g), stating that these provisions will provide greater transparency and accountability to ensure that care provider facilities do not deny placements to children on improper bases.

Response: ORR agrees with the commenters that § 410.1103(f) and (g) will help ensure that unaccompanied children, including those with disabilities, are not denied placement in appropriate care provider facilities.

Comment: Many commenters provided recommendations to strengthen § 410.1103(f) and (g). These commenters recommended that § 410.1103(f) specify that if a care provider facility denies placement to a child with a disability under any of the subparagraphs of § 410.1103(f), ORR will promptly find the child another placement in the most integrated setting appropriate. In addition, with respect to § 410.1103(g), commenters further recommended that ORR set a strict timeframe of 72 hours within which care provider facilities must respond to a placement request, stating that ORR should not permit care provider facilities to avoid their obligations by delaying or failing to respond to placement requests. These commenters further recommended that ORR set a strict timeframe within which ORR staff must respond to any written request by a care provider facility for authorization to deny placement, and that if ORR denies the care provider facility's request, the care provider facility should be required to arrange promptly for the child's transfer to its facility.

Commenters also stated that the regulations should provide for monitoring and oversight of provider compliance with respect to placement requests, given the findings of the May 2023 report issued by the HHS Office of Inspector General (OIG) [104] that ''ORR staff and care provider facility staff did not document information critical to the transfer of unaccompanied children'' and ''did not have a process in place to track denied transfers,'' and the longstanding issue of improper placement denials by providers. Specifically, these commenters stated that ORR should track care provider facilities' written requests for authorization to deny placements and ORR's responses to those requests and order corrective actions, such as re-training, for care provider facilities that have had their requests denied on multiple occasions. Furthermore, the commenters stated that for accountability and oversight, ORR should publish aggregate data regarding care provider facility compliance and provide data regarding corrective actions to the Ombudsperson for review.

Response: ORR notes that whenever a care provider facility denies placement of a child, with or without a disability, it makes every effort to promptly identify another placement in the least restrictive, most integrated setting that is in the child's best interest and appropriate to the child's needs. ORR has procedures in place to ensure that transfers happen within a reasonable timeframe which may vary depending on the facts of a particular case to ensure that placements are made in the child's best interest. Given this, ORR does not believe it is necessary or appropriate to codify a strict timeframe as requested by commenters.

With respect to the recommendation that, if ORR denies the care provider facility's request to deny placement, the care provider facility should be required to arrange promptly for the child's transfer to its facility, ORR notes that, in these cases, ORR expects the care provider facility to arrange promptly for the child's transfer. As provided at § 410.1103(g), ORR may also follow up with a care provider facility about a placement denial to find a solution to the reason for the denial. Given this, ORR expects that the reason for the requested denial may be resolved in many cases through such follow-up such that a child may be promptly transferred to such facility without issue. However, if the care provider facility nevertheless continues to deny placement of the child, ORR will impose corrective actions as appropriate. ORR also notes that it has established a Transfer Review Panel to help conduct oversight of care provider facility transfer decisions to track when denials occur and help resolve challenges to placement that might arise.

Finally, with respect to commenters' recommendations that the regulations provide for monitoring and oversight of care provider facility compliance with respect to placement requests and that ORR publish aggregate data regarding care provider facility compliance and provide data regarding corrective actions to the Ombudsperson for review, ORR will take them under consideration and may address them in future policymaking.

Comment: One commenter opposed proposed § 410.1103(f), stating that it eliminates the discretion Florida's childcare providers have when it comes to accepting placement of unaccompanied children. The commenter stated that care provider facilities must maintain autonomy to determine which children they are willing to accept for placement and may have reasons for denying a placement beyond those provided in § 410.1103(f). The commenter provided examples of other circumstances in which, in the commenter's view, a Florida care provider facility should have the independent discretion to deny placement, including where the care

provider facility determines that placement of the child would pose a risk to another child for whom the facility is already providing care (such as when a child has an emotional or behavioral disturbance that cannot be managed); where a care provider facility determines that placement would pose a risk to the child, such as placement of a young child in a group home that is currently caring for teenagers; or where the care provider facility determines that it does not have the resources to appropriately care for the child.

One commenter sought clarification about whether the intent of proposed § 410.1103(f) and (g) was to remove the care provider facility's autonomy to decide for itself whether it meets one of the criteria at proposed § 410.1103(f), noting that the two subsections seem to conflict with one another. In addition, the commenter stated that follow-up with the care provider facility after submitting a written placement denial request will likely take more time than the 48 hours allowed (as provided under § 410.1101(b)), and asked whether, in this case, the child would then be placed at the care provider facility regardless of whether ORR's decision process has been completed.

Response: As noted in the NPRM, the requirements at § 410.1103(f) and (g) are consistent with ORR's authority under the HSA [105] to make and implement placement determinations, and to oversee its care provider facilities. ORR further notes its care provider facilities agree, as a condition of their funding, to abide by ORR policies, which include policies regarding the placement of unaccompanied children. ORR believes that the provisions at § 410.1103(f) and (g) are reasonable and necessary to enable prompt placement of unaccompanied children, including children with disabilities, in the least restrictive, most integrated setting appropriate to their needs as mandated by the TVPRA and as is consistent with section 504, and to ensure that children do not remain unnecessarily in restrictive placements even after ORR and care provider facility staff have determined that they should be stepped down to a less restrictive placement. As provided at § 410.1103(g), care provider facilities must submit a written request to ORR for authorization to deny placement, which must be approved by ORR before the care provider facility may deny placement. Certain examples provided by the commenter of other circumstances in which a care provider facility should have the independent discretion to deny placement involve factors (danger to self and the community/others) considered by ORR under § 410.1103 prior to making a placement determination in the best interests of the child, and thus in most cases, at the time a placement determination is made, these should not be issues. However, as provided at § 410.1103(g), in any case, ORR may follow up with a care provider facility about a placement denial to find a solution to the reason for the denial.

Finally, ORR will make every effort to promptly approve or deny a care provider facility's written placement denial request, or work with the facility to resolve the issue raised in the request. If ORR believes it cannot make a determination on the request within the 48-hour timeframe set forth at § 410.1101(b), ORR will evaluate the circumstances and the best interests of the child in each individual case to determine how to proceed.

Final Rule Action: At § 410.1103(b) introductory language, ORR is replacing the phrase ''that may be relevant'' with ''to the extent they are relevant.'' In addition, at § 410.1103(b)(7), ORR is replacing ''LGBTQI+ status'' with ''LGBTQI status or identity.'' Also, at § 410.1103(e), ORR is revising ''placement'' to state ''licensed placement.'' Finally, at § 410.1103(f)(4), ORR is revising the phrase ''altering its program'' to ''altering the nature of its program'' consistent with references to this standard in other sections of this final rule. Otherwise, ORR is finalizing § 410.1103 as proposed in the NPRM.

Section 410.1104 Placement of an Unaccompanied Child in a Standard Program That Is Not Restrictive

ORR proposed in the NPRM at § 410.1104 to codify substantive criteria for placement of an unaccompanied child in a standard program that is not a restrictive placement (88 FR 68922). The TVPRA requires ORR to promptly place unaccompanied children ''in the least restrictive setting that is in the best interest of the child,'' and states that in making such placements ORR ''may consider danger to self, danger to the community, and risk of flight.'' [106] ORR also noted that under paragraph 19 of the FSA, with certain exceptions, an unaccompanied child must be placed temporarily in a licensed program until release can be effectuated or until immigration proceedings are concluded. Consistent with the TVPRA and existing policy, ORR proposed in the NPRM at § 410.1104, to place all unaccompanied children in a standard program that is not a restrictive placement (in other words, that is not a heightened supervision facility) after the unaccompanied child is transferred to ORR legal custody, except in the following circumstances: (a) the unaccompanied child meets the criteria for placement in a restrictive placement set forth at § 410.1105; or (b) in the event of an emergency or influx of unaccompanied children into the United States, in which case ORR shall place the unaccompanied child as expeditiously as possible in accordance with subpart I (Emergency and Influx Operations). These exceptions are consistent with placement considerations described in the TVPRA at 8 U.S.C. 1232(c)(2)(A) (noting, for example, that in making placements HHS ''may consider danger to self, danger to the community, and risk of flight''), and exceptions provided for in section paragraph 19 of the FSA.

ORR did not propose to codify certain other exceptions described in the FSA and included in the 2019 Final Rule at § 410.202(b) and (d). The 2019 Final Rule at § 410.202(b) provided that unaccompanied children do not have to be placed in a standard program as otherwise required by any court decree or court-approved settlement. ORR stated in the NPRM that it did not believe it was necessary to include this exception, as any court decree or settlement that would require ORR to implement placement criteria that differ from those at § 410.1104 would take effect pursuant to its own terms even without specifying these potential circumstances in the regulation. Section 410.202(d) provided that an unaccompanied child does not have to be placed in a standard program if a reasonable person would conclude that the unaccompanied child is an adult despite the individual's claims to be a child. ORR stated that it also did not believe it was necessary to include this exception in § 410.1104 because a person determined by ORR to be an adult (has attained 18 years of age) would be excluded from the definition of unaccompanied child and thus would not be placed in any ORR care provider facility (ORR referred readers to subpart H for discussion of age determinations).

Comment: One commenter stated that ORR should view congregate shelters as semi-restrictive in nature and stated that there is a continuum of restrictiveness among the placements categorized as non-restrictive. Specifically, this commenter recommended that ORR distinguish in § 410.1104 between non-restrictive placements based on the size and duration of stay of the children housed in those placements. The commenter noted that congregate shelters, particularly when they have a capacity over 25 children, impose significant restrictions on children (asserting, for example, that doors are

locked, children are required to be in certain locations at certain times and do not attend local schools, meal times have strict schedules, and recreation is limited), and thus should be classified as semi-restrictive and used sparingly. The commenter further stated that a presumption should be incorporated, consistent with child welfare standards, that no later than 2 weeks after ORR assumes custody, the child should be placed in a community-based or family placement. The commenter added that ORR should have the burden of justifying placement of children in large congregate shelters for longer than two weeks, and that family and small community-based placements are the least restrictive alternative to release and should be the norm for placing children. Another commenter similarly stated that while shelters operate at a lesser degree of restriction than heightened supervision facilities and secure facilities, larger shelters have an institutional nature where children are under constant supervision by staff and are not permitted to depart and return at will. This commenter also urged ORR to pay particular attention to situations where children remain in such shelter settings for prolonged periods because the restrictions in place and the separation of children from the local community can begin to manifest as more detention-like the longer a child remains there.

Response: As described at § 410.1102, ORR utilizes various types of non-restrictive placements, including shelters, group homes, and individual family homes. Such care provider facilities may vary in terms of the number of children they house (*e.g.,* based on their physical capacity and licensure requirements) but these are not restrictive placements. ORR recognizes that, as noted by commenters, larger shelters may generally be more institutional in nature than smaller, home-like settings. Consistent with these comments, ORR believes that where possible, based on an unaccompanied child's age, individualized needs, and circumstances, as well as a care provider facility's capacity, it should prioritize placing unaccompanied children in transitional and long-term home care settings while they are awaiting release to sponsors, so as to limit the time spent in large congregate care facilities. However, as discussed previously in this final rule preamble addressing comments under § 410.1102, efforts to place more unaccompanied children out of congregate care shelters that house more than 25 children together is a long-term aspiration, given the large number of children in its custody and the number of additional programs that would be required to care for them in home care settings or small-scale shelters of 25 children or less.

Comment: One commenter recommended that the proposed language at § 410.1104 (''ORR places all unaccompanied children in standard programs'') should state instead that ORR ''shall place'' all unaccompanied children in standard programs. In addition, the commenter stated that the TVPRA (8 U.S.C. 1232(c)(2)(A)) requires that children ''promptly'' be placed in such settings. Thus, the commenter further recommended that, consistent with the TVPRA, ORR revise the language to clarify that ORR is required to ''promptly'' place unaccompanied children in the least restrictive setting pursuant to an individualized determination of the child's best interest.

Response: ORR intended for the language at § 410.1104 to reflect a mandatory obligation, and thus as the commenter recommended, ORR is revising the introductory language at § 410.1104 to state that ORR ''shall place'' all accompanied children in standard programs. With respect to the recommendation that ORR add the word ''promptly,'' ORR believes that the timeframe for identifying placement under § 410.1101(b) satisfies the prompt placement requirement set forth in the TVPRA, and thus is not adding this word to § 410.1104. The purpose of § 410.1104 is to establish ORR's obligation to place unaccompanied children in standard programs as opposed to restrictive placements or emergency or influx facilities, except in the circumstances delineated in paragraphs (a) and (b)—rather than to establish a timeline for such placement. Finally, ORR notes that the ''least restrictive setting'' and ''best interest'' requirements are addressed in § 410.1103(a), and thus ORR does not believe it is necessary to add that language to § 410.1104 as recommended by the commenter.

Comment: A few commenters stated that proposed § 410.1104 is not consistent with the FSA because it does not include a requirement that all determinations to place a minor in a secure facility will be reviewed and approved by the regional juvenile coordinator, as required at paragraph 23 of the FSA. The commenters asserted that the Placement Review Panel cannot substitute for this safeguard.

Response: ORR notes that criteria for placing unaccompanied children in restrictive placements, including secure placements, are set forth at § 410.1105. Nevertheless, ORR agrees that paragraph 23 of FSA states that all determinations to place a minor in a secure facility will be reviewed and approved by the regional juvenile coordinator. This was a reference to a specific position that existed at the INS in 1997. To comply with this requirement, ORR Federal field staff, which is an equivalent position to the regional juvenile coordinator, will perform the function described in the FSA with respect to reviewing and approving such placement determinations. Accordingly, as provided in the next section of this preamble, ORR is revising § 410.1105(a)(1) to provide that all determinations to place an unaccompanied child in a secure facility (that is not an RTC) will be reviewed and approved by ORR Federal field staff.

Final Rule Action: After consideration of public comments, ORR is finalizing § 410.1104 as proposed with one modification. ORR is revising § 410.1104 to state that ORR ''shall place'' all unaccompanied children in standard programs in order to clarify the mandatory nature of its obligation under this section.

Section 410.1105 Criteria for Placing an Unaccompanied Child in a Restrictive Placement

ORR proposed in the NPRM at § 410.1105 to address the criteria for placing unaccompanied children in restrictive placements (88 FR 68922 through 68925). ORR proposed in the NPRM at § 410.1001 to define restrictive placements to include secure facilities, heightened supervision facilities, and RTCs. The criteria for placement in each of these facilities are further discussed below.

ORR proposed in the NPRM at § 410.1105(a) to address placement at secure facilities that are not RTCs. ORR proposed in the NPRM at § 410.1105(a)(1) that consistent with existing policies, it may place an unaccompanied child in a secure facility (that is not also an RTC) either upon referral from another agency or department of the Federal Government (*i.e.,* as an initial placement), or through a transfer to another care provider facility after the initial placement.

ORR proposed in the NPRM at § 410.1105(a)(2), that it would not place an unaccompanied child in a secure facility (that is not also an RTC) if less restrictive alternative placements are available. ORR noted that such placements must also be appropriate under the circumstances and in the best interests of the unaccompanied child. In

determining whether there is a less restrictive placement available to meet the individualized needs of an unaccompanied child with a disability, consistent with section 504, ORR explained that it must consider whether there are any reasonable modifications to the policies, practices, or procedures of an available less restrictive placement or any provision of auxiliary aids and services that would allow the unaccompanied child with a disability to be placed in that less restrictive facility. However, ORR stated that it is not required to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity. ORR noted that the proposed regulation text is consistent with 8 U.S.C. 1232(c)(2)(A). Also, ORR noted that this requirement is consistent with paragraph 23 of the FSA, which provides that ORR may not place an unaccompanied child in a secure facility if there are less restrictive alternatives that are available and appropriate in the circumstances. Under the FSA, less restrictive alternatives include transfer to (a) a medium security facility, which is equivalent to ''heightened supervision facility'' as defined at proposed § 410.1001, or (b) another licensed program, a term which ORR noted that, for purposes of the proposed rule, is superseded by ''standard program'' as defined at proposed § 410.1001. Consistent with the FSA, ORR further proposed in the NPRM at § 410.1105(a)(2) that it may place an unaccompanied child in a heightened supervision facility or other non-secure care provider facility as an alternative, provided that the unaccompanied child does not pose a danger to self or others. ORR stated that it believes that such alternative placements may not be appropriate for unaccompanied children who pose a danger to self or others, as less restrictive placements may not have the level of staff supervision and requisite security procedures to address the needs of such unaccompanied children.

ORR proposed in the NPRM to place unaccompanied children in secure facilities (that are not RTCs) in limited, enumerated circumstances set forth at § 410.1105(a)(3). Specifically, ORR proposed in the NPRM that it may place an unaccompanied child in a secure facility (that is not an RTC) only if the unaccompanied child meets one of three criteria. First, ORR proposed in the NPRM at § 410.1105(a)(3)(i) that it may place the unaccompanied child in a secure facility (that is not an RTC) if the unaccompanied child has been charged with, or convicted of, a crime, or is the subject of delinquency proceedings, a delinquency charge, or has been adjudicated delinquent, and where ORR deems that those circumstances demonstrate that the unaccompanied child poses a danger to self or others, not including: (1) an isolated offense that was not within a pattern or practice of criminal activity and did not involve violence against a person or the use or carrying of a weapon; or (2) a petty offense, which is not considered grounds for stricter means of detention in any case. ORR noted in the NPRM that these provisions were also included in the 2019 Final Rule at § 410.203(a)(1), except that as proposed, § 410.1105(a)(3) omits language from the FSA and previous § 410.203(a)(1) that allows an unaccompanied child to be placed in a secure facility if the unaccompanied child is ''chargeable with a delinquent act'' (which under the FSA, means that ORR has probable cause to believe that the unaccompanied child has committed a specified offense). ORR stated that it believes it is appropriate to omit such language because being ''chargeable'' with an offense is not a permissible reason for placement in a secure facility identified by the TVPRA.[107] Further, because it is not a law enforcement agency, unlike the former INS, ORR stated that it is not in a position to make determinations such as whether an unaccompanied child is ''chargeable'' with an offense. Even without this language, ORR stated that it believes finalizing this provision as proposed is consistent with the substantive criteria of the FSA. Furthermore, consistent with 8 U.S.C. 1232(c)(2)(A) (which does not list runaway risk as a permissible reason for placement in a secure facility), ORR did not propose runaway risk as a factor in determining placement in a secure facility, even though that is a permissible ground under the FSA for placement in a secure facility.

Second, ORR proposed in the NPRM at § 410.1105(a)(3)(ii) that it may place an unaccompanied child in a secure facility (that is not an RTC) if the unaccompanied child, while in DHS or ORR custody, or while in the presence of an immigration officer, ORR official, or ORR contracted staff, has committed, or has made credible threats to commit, a violent or malicious act (whether directed at the unaccompanied child or others). The 2019 Final Rule at § 410.203(a)(2) and paragraph 21B of the FSA contain a similar provision, except that in contrast to § 410.203(a)(2) and the FSA, finalizing this provision as proposed in the NPRM would include acts committed in the presence of an ''ORR official or ORR contracted staff.'' ORR stated that it believes the addition of this language is appropriate given that ORR officials and contracted staff would more often be in a position to observe an unaccompanied child's behavior and actions and to assess whether an unaccompanied child has committed, or made credible threats to commit, the acts referenced in this provision. Again, ORR stated it does not believe this change constitutes a substantive deviation from the requirements of the FSA.

Third, ORR proposed in the NPRM at § 410.1105(a)(3)(iii) that it may place an unaccompanied child in a secure facility (that is not an RTC) if the unaccompanied child has engaged, while in a restrictive placement, in conduct that has proven to be unacceptably disruptive of the normal functioning of the care provider facility, and removal from the facility is necessary to ensure the welfare of the unaccompanied child or others, as determined by the staff of the care provider facility (*e.g.,* substance or alcohol use, stealing, fighting, intimidation of others, or sexually predatory behavior), and ORR determines the unaccompanied child poses a danger to self or others based on such conduct. The 2019 Final Rule contained a similar provision at § 410.203(a)(3), which was based on paragraph 21C of the FSA. But in contrast to § 410.203(a)(3) of the 2019 Final Rule and the FSA, ORR noted that the proposed provision in the NPRM requires that the conduct at issue be engaged in while in a ''restrictive placement,'' rather than a ''licensed program.'' ORR stated that it believes such disruptive behavior should initially result in potential transfer to a heightened supervision facility before placement in a secure facility (that is not an RTC)—in other words, that disruptive behavior in a standard program that is not a restrictive placement should not result in immediate transfer, or ''step-up,'' to a secure facility. As discussed above, the 2019 Final Rule was intended to implement the provisions of the FSA that relate to HHS. However, ORR proposed in the NPRM this change in order to ensure that unaccompanied children in such circumstances are stepped up to a more structured program rather than being immediately placed in a secure facility. ORR stated in the NPRM that it believes this update is consistent with its authorities under the HSA and TVPRA[108] and does not believe it constitutes a substantive deviation from the requirements of the

FSA, which provides that unaccompanied children ''may'' be transferred to secure facilities based on unacceptably disruptive conduct where transfer is necessary to ensure the welfare of the unaccompanied child or others but does not require such transfer (88 FR 68923).[109]

ORR proposed in the NPRM at § 410.1105(b) to outline the policies and criteria that it would apply in placing unaccompanied children in heightened supervision facilities. ORR noted in the NPRM that the term ''heightened supervision facility'' as defined at § 410.1001 would be used in place of the term ''medium secure'' facility provided in the FSA and in place of the term ''staff secure facility'' currently used by ORR at 45 CFR part 411 and in its subregulatory guidance. ORR stated that it believes the term ''heightened supervision facility'' better reflects the nature and purpose of such facilities, which is to provide care to unaccompanied children who require close supervision but do not need placement at a secure facility, including an RTC. As reflected in the proposed definition, ORR stated that heightened supervision facilities maintain stricter security measures than a shelter such as intensive staff supervision in order to provide supports, manage problem behavior, and prevent an unaccompanied child from running away. ORR proposed in the NPRM at § 410.1105(b)(1) that it may place unaccompanied children in this type of facility either as an initial placement (upon referral from another agency or department of the Federal Government) or through a transfer from the initial placement. Furthermore, ORR proposed in the NPRM, at § 410.1105(b)(2), to codify factors it would consider in determining whether to place an unaccompanied child in a heightened supervision facility. Specifically, ORR stated it would consider if the unaccompanied child (1) has been unacceptably disruptive to the normal functioning of a shelter such that transfer is necessary to ensure the welfare of the unaccompanied child or others; (2) is a runaway risk, based on the criteria at proposed § 410.1107; (3) has displayed a pattern of severity of behavior, either prior to entering ORR custody or while in ORR care, that requires an increase in supervision by trained staff; (4) has a non-violent criminal or delinquent history not warranting placement in a secure facility, such as isolated or petty offenses as described previously; or (5) is assessed as ready for step-down from a secure facility, including an RTC. ORR stated that it believes each of these proposed criteria identifies pertinent background and behavioral concerns that may warrant heightened supervision, rather than placement in a secure facility, including an RTC, consistent with the purpose of heightened supervision facilities.

ORR proposed in the NPRM at § 410.1105(c) the criteria it would consider for placing an unaccompanied child in an RTC, as defined at proposed § 410.1001. ORR stated in the NPRM that it would place an unaccompanied child in an RTC only if it is the least restrictive setting that is in the best interest of the unaccompanied child and appropriate to the unaccompanied child's age and individualized needs, consistent with the TVPRA at 8 U.S.C. 1232(c)(2)(A) (''an unaccompanied alien child shall be promptly placed in the least restrictive setting that is in the best interest of the child.''). Similar to other secure facilities and heightened supervision facilities, ORR proposed in the NPRM that an unaccompanied child may be placed at an RTC both as an initial placement upon referral from another agency or department of the Federal Government, and upon transfer from another care provider facility. In addition, ORR proposed in the NPRM at § 410.1105(c)(1) that an unaccompanied child who has serious mental or behavioral health issues may be placed in an RTC only if the unaccompanied child is evaluated and determined to be a danger to self or others by a licensed psychologist or psychiatrist consulted by ORR or a care provider facility, which includes a determination by clear and convincing evidence documented in the unaccompanied child's case file or referral documentation by a licensed psychologist or psychiatrist that an RTC is appropriate. ORR stated that this requirement is consistent with the factors the Secretary of HHS may consider under the TVPRA at 8 U.S.C. 1232(c)(2)(A) in making placement determinations for unaccompanied children and was also included in the 2019 Final Rule at § 410.203(a)(4).[110] ORR also noted that when it determines whether placement in an RTC, or any care provider facility is appropriate, it considers the best interests not only of the unaccompanied child being placed, but also the best interests of other unaccompanied children who are housed at the proposed receiving care provider facility, including their safety and well-being. ORR stated that it believes it is authorized to consider these factors under the TVPRA.[111] ORR also noted that it considers the safety of care provider facility staff when making placement determinations for unaccompanied children, consistent with its duty to oversee the infrastructure and personnel of facilities in which unaccompanied children reside.[112] ORR further stated that for an unaccompanied child with one or more disabilities, consistent with section 504, the determination whether to place the unaccompanied child in an RTC would need to consider whether reasonable modifications to policies, practices, and procedures in the unaccompanied child's current placement or any provision of auxiliary aids or services, could sufficiently reduce the danger to the child or others. However, ORR noted that it is not required to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity. Finally, consistent with its existing policies, ORR proposed in the NPRM at § 410.1105(c)(1) that it would use the criteria for placement in a secure facility described at § 410.1105(a) to assess whether the unaccompanied child is a danger to self or others. ORR stated that it believes it is appropriate to apply these criteria in making this assessment in the context of RTC placement because all secure facilities (including RTCs) are intended for unaccompanied children who pose a danger to self and others (although RTCs are intended for unaccompanied children who also have a serious mental health or behavioral health issue that warrants placement in an RTC).

Consistent with existing policies, under § 410.1105(c)(2), ORR proposed in the NPRM that it would be able to place an unaccompanied child at an out-of-network (OON) RTC when a licensed clinical psychologist or psychiatrist consulted by ORR or a care provider facility has determined that the unaccompanied child requires a level of care only found in an OON RTC (either because the unaccompanied child has identified needs that cannot be met within the ORR network of RTCs or no placements are available within ORR's network of RTCs), or that an OON RTC would best meet the unaccompanied child's identified needs. Also consistent with existing policies, ORR noted that in these circumstances, even though an unaccompanied child would be physically located at the OON RTC, the unaccompanied child would remain in ORR's legal custody. ORR stated that it would monitor the unaccompanied child's progress and ensure the unaccompanied child is receiving required services. ORR explained that OON RTCs are vetted prior to placement to ensure that the program is in good standing and is complying with all

applicable State welfare laws and regulations and all State and local building, fire, health, and safety codes. ORR further explained that it also may confer with other Federal agencies and non-governmental stakeholders, such as the protection and advocacy (P&A) systems, when vetting OON RTCs to determine, in its discretion, the appropriateness of such OON RTCs for placement of unaccompanied children. ORR noted that it appreciates that P&As may have valuable information relating to the vetting process because they may have prior experience with certain facilities with respect to their past care and treatment of individuals with disabilities (*e.g.,* findings of abuse and neglect, compliance issues).

ORR proposed in the NPRM at § 410.1105(c)(3) that the criteria for placement in or transfer to an RTC would also apply to transfers to or placements in OON RTCs (that is, the clinical criteria considered in placing an unaccompanied child at an RTC level of care would not change regardless of whether the RTC is in ORR's network or OON). ORR proposed in the NPRM at § 410.1105(c)(3) to permit care provider facilities to request that ORR transfer certain unaccompanied children to RTCs. ORR noted that proposed § 410.1601(d) further addresses when a care provider facility may make such a request.

Comment: Several commenters expressed support for ORR's proposal to reduce the use of restrictive placements and establish clearer guidelines for when such placements are deemed appropriate, in accordance with the terms of the FSA. These commenters noted that restrictive placements can have a lasting impact on the well-being of unaccompanied children and should be considered a measure of last resort. Commenters stated that by undertaking measures to minimize their use and providing explicit guidelines for their application, as well as processes for contesting these placement decisions, ORR is taking a commendable step in safeguarding the rights and safety of these vulnerable children.

One commenter specifically agreed with the proposal to exclude language from § 410.1105(a)(3)(i) that would allow ORR to make determinations regarding secure facility placement based on whether an unaccompanied child is ''chargeable.''

Response: ORR notes that for the reasons set forth in the NPRM (88 FR 68923), ORR is finalizing proposed § 410.1105(a)(3)(i), which excludes language that would allow ORR to make determinations regarding secure facility placement based on whether an unaccompanied child is ''chargeable.''

Comment: One commenter urged ORR to prioritize locating restrictive programs in geographic locations where there exists a continuum of care that includes all levels of placement, including community-based care, stating that this would allow for children in restrictive care who are ready to transition to less restrictive settings (including community-based care) to be easily and quickly stepped-down. The commenter further noted that this would also enable co-located programs in the same region to share resources, build expertise in the needs of unaccompanied children, and gain greater familiarity with local programs in ways that can better support children's timely transfer to less restrictive care settings.

Response: ORR believes this suggestion is worthy of greater consideration and may consider it in future policymaking. ORR also notes that § 410.1103(f) and (g), as finalized in this rule, will help to ensure that children in restrictive placements who are assessed by ORR and the care provider facility as ready to step down to a less restrictive placement (including community-based care) are promptly transitioned to appropriate facilities consistent with their best interests. In each case, ORR takes into account the factors set forth at § 410.1103 to the extent relevant, as well as the factors set forth at § 410.1105 as appropriate, in determining and planning such transitions to ensure a safe and appropriate placement. In this manner, ORR facilitates prompt placement of unaccompanied children, including children with disabilities, in the least restrictive, most integrated setting appropriate to their needs as mandated by the TVPRA and as is consistent with section 504.

Comment: Many commenters expressed the view that proposed § 410.1105 uses undefined and vaguely worded provisions, including the terms ''unacceptably disruptive,'' ''severity of behavior,'' ''malicious,'' and other critical terms, and various assessments for agency decision points. One commenter specifically noted their concern that the reliance on subjective assessments and the absence of clear benchmarks allows for differing interpretations among staff, which could lead to inconsistencies in decision-making or manipulation of the rules which may put children at risk.

While many commenters appreciated that the NPRM at § 410.1105(a)(3)(iii) limited the ''unacceptably disruptive'' criteria for secure placement to behavior that occurs in a restrictive placement, such that for example unacceptably disruptive behavior in a shelter would not lead to immediate step-up to a secure facility, they expressed that the ''unacceptably disruptive'' criteria for placement in either a secure or heightened supervision facility was inappropriately vague and created a high risk that children would be punished through step-up to more restrictive facilities for behaviors that are a manifestation of their disabilities.

Several commenters stated that if a child with a disability is considered for step-up to a more restrictive facility based on their behavior, the rule should require a ''manifestation determination'' (which could be similar to the determination under the Individuals with Disabilities Education Act (IDEA)) to determine whether the child's behavior is linked to their disability and/or is the result of a failure to provide the child with reasonable modifications and services. These commenters stated that if a child's behavior is a manifestation of their disability, ORR must conduct a functional behavioral assessment and develop (or review) a behavior intervention plan for the child instead of changing their placement.

Some commenters noted that children in secure facilities often have unmet behavioral health needs or unaddressed mental health disabilities. Commenters also expressed that a child whose behavior is deemed disruptive should be assessed by trained professionals and given services and supports necessary to meet their individualized needs instead of being stepped up to a more restrictive setting. One commenter noted that ''disruptive'' behavior is often a child's way of communicating that they feel disrespected, unheard, or that their needs are not being met. Furthermore, the commenter noted that Black children and children from other marginalized groups are more likely to be considered ''disruptive'' due to systemic racism. The commenter noted that this bias can be compounded if there is a lack of cultural humility and competency on the part of ORR subcontracted staff.

One commenter expressed the view that criteria such as risk of flight, danger to self or others, or criminal history were broad and vague, stating that this would violate the children's right to liberty and placement in the least restrictive setting and expose them to harmful and traumatic conditions.

Many commenters expressed the view that § 410.1105(b)(2)(v) is ambiguous and greater guidance is needed. The commenters recommended the

development of specific behavioral criteria to indicate the need for a heightened supervision setting or a return to a standard shelter setting, which could include failure of an established behavior management plan, behavioral reports of threats of safety to self or others, or conversely the absence of such reports and completion of an established behavior plan.

Response: ORR believes that the ''unacceptably disruptive'' criterion, as it relates to both secure facilities (that are not RTCs) (at § 410.1105(a)(3)(iii)) and heightened supervision facilities (at § 410.1105(b)(2)(i)), is consistent with the TVPRA, under which the Secretary may consider danger to self and community in making placements, and reasonably reflects pertinent behavioral concerns that may warrant placement in such restrictive settings. Further, as noted in the NPRM, this ''unacceptably disruptive'' criterion for placement in secure facilities (that are not RTCs) is consistent with paragraph 21 of the FSA. ORR notes that § 410.1105(a)(3)(iii) provides specific requirements and guardrails with respect to the circumstances in which placement in a secure facility (that is not an RTC) may be warranted where a child's behavior, while in a restrictive placement (but not a shelter), has proven to be unacceptably disruptive of the normal functioning of a care provider facility. In order for an unaccompanied child's disruptive behavior to warrant placement in a secure facility (that is not an RTC), removal of the child from the less restrictive facility must be necessary to ensure the welfare of others, as determined by the staff of the care provider facility (*e.g.,* stealing, fighting, intimidation of others, or sexually predatory behavior), and ORR must determine that the child poses a danger to others. Similarly, § 410.1105(b)(2)(i), addressing heightened supervision facilities, provides additional guidance with respect to the application of this criterion, providing that a child must be unacceptably disruptive to the normal functioning of a shelter such that transfer to the heightened supervision facility is necessary to ensure the welfare of the child or others. Applying this criterion requires care provider facility staff and ORR to make determinations based on individual circumstances and in the best interests of both the child whose placement is at issue and the best interests of other children in the relevant facility. As a result, ORR believes it promotes necessary flexibility in application of this criterion to not include a definition of the term ''unacceptably disruptive.''

ORR notes that it has protections in place to ensure that children with identified or suspected disabilities are assessed by trained professionals and given services and supports necessary to meet their individualized needs. As provided by § 410.1106, ORR must assess each unaccompanied child in its care, including any child with a disability, to determine whether the unaccompanied child requires particular services and treatment by staff, or particular equipment to address their individualized needs. If so, ORR must place the unaccompanied child, whenever possible, in a standard program in which the unaccompanied child with individualized needs can interact with children without those individualized needs to the fullest extent possible, but which provides services and treatment, or equipment for such individualized needs. Additionally, pursuant to the new § 410.1105(d), and consistent with section 504 and § 410.1311(c), ORR's determination under § 410.1105 whether to place an unaccompanied child with one or more disabilities in a restrictive placement (or to transfer an unaccompanied child to such a placement) shall include consideration of whether there are any reasonable modifications to the policies, practices, or procedures of an available less restrictive placement (which could be the child's current placement) or any provision of auxiliary aids and services that would allow the unaccompanied child to be placed in that less restrictive facility. However, ORR is not required to take any action that it can demonstrate would fundamentally alter the nature of a program or activity.

In response to commenters' specific recommendation for a ''manifestation determination'' to determine whether the child's behavior is linked to their disability and/or is the result of a failure to provide the child with reasonable modifications and services, ORR notes that, while the IDEA does not govern the placement of children with disabilities in ORR custody, as is consistent with the new § 410.1105(d), ORR will assess whether a child's behavior is related to the child's disability or failure to receive the necessary reasonable modifications and services. ORR may consider commenters' recommendations concerning functional behavioral assessments and behavior intervention plans in future policymaking, which may be informed by the anticipated year-long comprehensive disability needs assessment that ORR will undertake working with experts, and the development of a disability plan. In addition, ORR refers readers to § 410.1304 for discussion of its requirements regarding behavioral management strategies and interventions.

In response to comments regarding the need to be sensitive to factors such as racial or cultural bias that could potentially influence whether a child is determined to be ''unacceptably disruptive,'' both the NPRM and this final rule include provisions to specifically require that within all placements, unaccompanied children are treated with dignity, respect, and special concern for their particular vulnerability; to ensure services are provided based on their individualized needs and best interests; and to ensure that care provider facilities deliver services in a manner that is sensitive to the age, culture, native language, and complex needs of unaccompanied children.[113]

With respect to the terms risk of flight, danger to self or others, or criminal history, which one commenter stated are vague or broad, consideration of these terms is consistent with the TVPRA, which provides that ORR may, in determining the least restrictive placement in a child's best interest, consider danger to self, danger to the community, and risk of flight in making placements and states that a child may not be placed in a secure facility absent a determination that the child poses a danger to self or others or has been charged with a criminal offense.[114]

With respect to the recommendation to provide greater guidance regarding § 410.1105(b)(2)(v) through the development of specific behavioral criteria to indicate the need for a heightened supervision setting or a return to a standard shelter setting, ORR will consider the commenters' recommendations and may provide further instruction in future policymaking.

Comment: Several commenters recommended that the clear and convincing standard of proof should be added to §§ 410.1105(a) and 410.1105(b), consistent with the standard in §§ 410.1901(a) and 410.1105(c)(1), to clarify that clear and convincing evidence is required not just in RTC placement determinations, but in all other restrictive placement determinations as well.

Response: As reflected in § 410.1901(a), in all cases involving placement in a restrictive setting, including placement in secure facilities (including RTCs) and heightened supervision facilities, ORR must determine, based on clear and

convincing evidence, that sufficient grounds exist for stepping up or continuing to hold an unaccompanied child in a restrictive placement. ORR agrees that for clarity and consistency, the clear and convincing evidence standard of proof should be added to § 410.1105(a) and (b). Thus, ORR is finalizing revisions to § 410.1105(a)(1) and (b)(1) to state that the placement determinations under paragraphs (a) and (b) must be made based on clear and convincing evidence documented in the unaccompanied child's case file.

Comment: Several commenters urged ORR to remove the use of secure facilities from its provider network and eliminate reference to such facilities in the final rule, because in their view children housed in secure facilities face disparate treatment and lasting harm. The commenters also stated that ORR is under no statutory or judicial obligation to create a regulatory scheme that places children in secure facilities (*e.g.,* under the TVPRA or the FSA). One commenter further stated that ORR provided no justification for failing to apply the standards delineated in § 410.1302 to secure facilities.

One commenter asserted that the continuing use of secure facilities under the proposed rule will place children at high risk of ongoing constitutional rights violations, expressing concern that unaccompanied children placed in such facilities lack appropriate mental health evaluations and services, and could be subjected to mechanical restraints or seclusion, as well as discriminatory verbal abuse.

A few commenters expressed concern that unaccompanied children are placed in secure facilities at the discretion of Federal officials, rather than by a judge's order in a proceeding where the child is represented, which one commenter noted is required for children placed in these kinds of restrictive facilities in other contexts.

Response: In response to commenters' requests that ORR discontinue the use of secure facilities, ORR notes that although neither the TVPRA nor the FSA require the placement of children in secure facilities, both 8 U.S.C. 1232(c)(2)(A) and paragraph 21 of the FSA nevertheless contemplate the placement of children in secure facilities in certain limited circumstances. ORR continues to believe that in certain rare situations it may be necessary to place children in such facilities to ensure the safety and well-being of the child or others. Thus, § 410.1105(a), as finalized in this rule, includes criteria, consistent with the TVPRA and the FSA, for placing an unaccompanied child in a secure facility (that is not an RTC). ORR notes that, consistent with the TVPRA, in all cases where an unaccompanied child is placed in a secure facility (including an RTC), such a setting must be the least restrictive setting that is in the best interests of the child and appropriate to the child's age and individualized needs, which is assessed taking into account numerous factors to the extent they are relevant to such a placement, including danger to self, danger to community/others, and criminal background.

ORR stresses that secure facilities will be required to meet the standards set forth at subpart D, including the minimum standards under § 410.1302. The standards at subpart D include many of the protections that commenters have requested, including significant ones addressing minimum standards applicable at standard and secure facilities, monitoring and quality control, behavior management, staff trainings, language access, child advocates, legal services, health care services, and children with disabilities.[115] For example, ORR notes that the final regulations prohibit the use or threatened use of corporal punishment (§ 410.1304(a)(1)), prohibit the use of prone physical restraints, chemical restraints, or peer restraints for any reason in any care provider facility setting (§ 410.1304(a)(3)), and allow secure facilities, that are not RTCs, to use personal restraints, mechanical restraints, and/or seclusion in emergency safety situations, and as consistent with State licensure requirements (§ 410.1304(e)(1)). ORR believes that restraints and seclusion should only be used after de-escalation strategies and less restrictive approaches have been attempted and failed. As discussed in the NPRM (88 FR 68942), in secure facilities, not including RTCs, there may be situations where an unaccompanied child becomes a danger to other unaccompanied children, care provider facility staff, or property. As a result, such secure facilities may need to employ more restrictive forms of behavior management than shelters or other types of care provider facilities in emergency safety situations or during transport to or at immigration court or asylum interviews when there are certain imminent safety concerns.

With respect to protecting children from verbal abuse, ORR notes that within all placements, unaccompanied children must be treated with dignity, respect, and special concern for their particular vulnerability (§§ 410.1003(a), 410.1300) and that the definition of ''significant incidents'' includes abuse or neglect (§ 410.1001). Additionally, if ORR determines that any such staff behavior is occurring, it has authority to take actions including stopping placement and actions pursuant to 45 CFR part 75 (*e.g.,* 45 CFR 75.371).

In response to the concern that unaccompanied children are placed in secure facilities by Federal officials rather than by a judge's order, ORR notes that the TVPRA provides for placement by the Secretary and does not require a judge's order. Specifically, the TVPRA requires the Secretary to place unaccompanied children in its custody in the least restrictive setting that is in the best interest of the child, and states that such placements may be in restrictive settings if certain conditions are met (that is, a child may not be placed in a secure facility absent a determination that the child poses a danger to self or others or has been charged with having committed a criminal offense).[116] Nevertheless, to guard against the inappropriate placement of a child in a secure facility, this final rule also provides for review of decisions to place unaccompanied children in restrictive placements.[117]

Comment: One commenter recommended removing § 410.1105 in its entirety, stating that ORR will violate section 504 and the Supreme Court's decision in *Olmstead* v. *L.C.,* 527 U.S. 581 (1999) by placing children, especially children with disabilities, in segregated, secure facilities (including RTCs). The commenter asserted that section 504's implementing regulations require that a public entity administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities with the ''most integrated setting'' being one that ''enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible.''

Furthermore, the commenter stated that placing unaccompanied children who are a danger to themselves in secure facilities means that children with mental health disabilities can be placed in more restrictive settings simply because of their disability, which the commenter asserted violates both the letter and the spirit of section 504. The commenter also noted that although proposed § 410.1105(c)(1) requires a dangerousness determination for children with ''serious'' mental or behavioral issues by licensed clinicians in the RTC context, there is no similar requirement for other secure facilities, or other restrictive placements. The commenter further expressed that there is no definition for what a ''serious'' mental or behavioral issue is versus a ''non-serious'' one, and there is no

information about who will make that determination prior to referring the child for evaluation to a licensed professional. Thus, the commenter stated that ORR's new rule would not protect children with disabilities from inappropriately remaining in overly restrictive settings, and that § 410.1105(a)(1) will put children with disabilities and those with the most need for community care in the most restrictive settings.

Finally, the commenter expressed the view that ORR does not conduct a sufficient individualized, fact-dependent inquiry in each case, or provide any information about how children may obtain such accommodations, nor what kind of accommodations can be provided that are rooted in community care.

Response: ORR does not agree that the final rule will violate section 504 or the Supreme Court's decision in *Olmstead* v. *L.C.,* 527 U.S. 581 (1999) by providing for placement of unaccompanied children, including children with mental health or other disabilities, in secure facilities (including RTCs), in the limited circumstances provided in § 410.1105. As noted above, ORR is adding new § 410.1105(d) to state that for an unaccompanied child with one or more disabilities, consistent with section 504 and § 410.1311(c), as revised in this rule, ORR's determination under § 410.1105 whether to place the unaccompanied child in a restrictive placement (or to transfer an unaccompanied child with one or more disabilities to such a placement) shall include consideration whether there are any reasonable modifications to the policies, practices, or procedures of an available less restrictive placement (which could be the child's current placement) or any provision of auxiliary aids and services that would allow the unaccompanied child to be placed in that less restrictive facility. However, ORR is not required to take any action that it can demonstrate would fundamentally alter the nature of a program or activity. Furthermore, pursuant to § 410.1311(a), ORR shall provide notice to the unaccompanied child of the protections against discrimination under section 504 and HHS implementing regulations at 45 CFR part 85 assured to children with disabilities and notice of available procedures for seeking reasonable modifications or making a complaint about alleged discrimination. Thus, the final rule includes provisions to prevent children with disabilities, including those with mental health needs, from being placed in the most restrictive placements simply by virtue of needing specialized care, and to facilitate placement in the least restrictive, most integrated setting consistent with their best interests and appropriate to their age and individualized needs. ORR will consider providing additional guidance regarding the placement of children with disabilities, including information regarding what kind of accommodations can be provided that are rooted in community care, as requested by commenters, in future policymaking which may be informed by the findings of the anticipated year-long comprehensive disability needs assessment and the development of the disability plan as discussed at Section III.B.4.

Moreover, the final rule includes certain guardrails such as the clear and convincing evidence standard at § 410.1901, that serve to protect children from being inappropriately placed in restrictive facilities (both as an initial matter, and upon review at least every 30 days). For a child with a serious mental or behavioral issue in particular, § 410.1105(c)(1) specifies that the child may be placed in an RTC only if the child is evaluated and determined to be a danger to self or others by a licensed clinical psychologist or psychiatrist, which includes a determination by clear and convincing evidence that RTC placement is appropriate. Thus, a trained mental health professional will make the determination regarding whether RTC placement is appropriate. In regard to the clear and convincing evidence standard applicable to placement in RTCs under § 410.1105(c)(1), ORR clarifies that its intent is that there must be a determination of clear and convincing evidence before placing any child in an RTC. To clarify this requirement, ORR is finalizing revisions to § 410.1105(c)(1) to provide that the child must be evaluated and determined to be a danger to self or others by a licensed psychologist or psychiatrist consulted by ORR or a care provider facility, which includes a determination by clear and convincing evidence documented in the unaccompanied child's case file, *including* documentation by a licensed psychologist or psychiatrist that placement in an RTC is appropriate.

Comment: One commenter opposed the use of both secure facilities and heightened supervision facilities, stating that the use of secure facilities, and heightened supervision facilities where there is not an individualized assessment indicating how the child's best interests are best served there, are impermissible restrictions on liberty and dangerous and detrimental to the well-being of unaccompanied children. The commenter recommended that, in accordance with international standards (*e.g.,* the United Nations Convention on the Rights of the Child; United Nations High Commissioner for Refugees (UNHCR), Refugee Children: Guidelines on Protection and Care; UNHCR Position Regarding the Detention of Refugee and Migrant Children in the Migration Context), ORR should end the use of all secure facilities and limit the use of heightened supervision facilities to programs that provide specialized therapeutic care to children for whom it is determined to be in their best interests. The commenter encouraged ORR to develop additional alternatives to detention, such as specialized post-release services and specialized transitional homes designed to support children to return to community living. The commenter also recommended that, rather than placing unaccompanied children with behavioral problems in restrictive settings, ORR should adopt a psychosocial/social work approach based on best interests assessments to help them improve behavior.

In addition, the commenter recommended strengthening the assessment of the child's best interest in cases involving prolonged detention/family separation, using an individualized assessment rather than generalized criteria or factors, and reviewing the practices utilized for assessing and weighing community risk. The commenter also recommended that while use of secure and heightened supervision continues to exist, ORR should take all necessary steps to place children in the least restrictive setting for the shortest period of time and prioritize appointment of child advocates and legal representation for all children in secure and heightened supervision facilities.

Response: ORR appreciates the commenter's concerns, but for the same reasons explained in previous responses to comments related to secure facilities, ORR does not believe the use of secure or heightened supervision facilities in the limited circumstances set forth at § 410.1105 will constitute an impermissible restriction on liberty or will be dangerous and detrimental to the well-being of unaccompanied children. As discussed further in subpart D of this final rule, both secure facilities and heightened supervision facilities will be required to meet the standards set forth at subpart D, including the minimum standards under § 410.1302. ORR continues to believe that in certain situations it may be necessary to place children in such facilities to ensure the safety and well-being of the child or

others. ORR notes that, consistent with the TVPRA and § 410.1103, in all cases, such settings must be the least restrictive setting that is in the best interests of the child and appropriate to the child's age and individualized needs, which are assessed on an individual basis for each child considering numerous factors to the extent they are relevant to such a placement, including danger to self, danger to community/others, and criminal background.

Comment: A few commenters recommended that ORR remove the clause, ''provided that the unaccompanied child does not pose a danger to self or others'' from § 410.1105(a)(2). The commenters asserted that because ''danger to self or others'' is already a requirement for secure placement (at §§ 410.1105(a)(3), (c)), this additional clause (''provided that the unaccompanied child does not pose a danger to self or others'') renders § 410.1105(a)(2) meaningless. The commenters further stated that this additional language is unnecessary because paragraph 23 of the FSA and § 410.1105(a)(2) of the NPRM already limit alternative placements to those that are ''available and appropriate under the circumstances,'' noting that ORR is not required to make an unsafe placement because such a placement would not be ''appropriate.'' The commenters also cautioned that a child who poses a danger to self or others at one point in time can sometimes be safely and appropriately placed in a less restrictive setting with reasonable modifications that mitigate danger. These commenters also recommended that ORR remove this clause from § 410.1105(a)(2) because it suggests ORR considers a staff-secure facility an alternative to a secure facility. However, the commenters noted that a child who is not a danger to self or others does not qualify to be placed in an RTC or secure facility, therefore staff secure is not an alternative to placement in a secure facility. The commenters stated that the final rule should mirror the language of paragraph 23 of the FSA and eliminate this clause, ''provided that the unaccompanied child does not pose a danger to self or others.'' Some commenters also recommended that ORR update language throughout § 410.1105 by removing ''danger to self'' as a criterion for placement in a secure facility (that is not an RTC), noting that ORR policy and practice has typically been to place children who pose a danger to self in an RTC or staff secure setting rather than a secure facility that is not an RTC.

Response: ORR appreciates the commenter's recommendations and agrees that a child who poses a danger to self or others at one point in time can be stepped down to a less restrictive facility at a later time. ORR also acknowledges that a child's danger to self should not be the sole basis for placement in a secure facility (that is not an RTC). Therefore, in this final rule, ORR is amending § 410.1105(a)(2) to state that it shall place an unaccompanied child in a heightened supervision facility or other non-secure facility as an alternative to a secure facility (that is not an RTC), provided that the unaccompanied child does not ''currently'' pose a danger to others and does not need placement in an RTC pursuant to § 410.1105(c). ORR agrees to make a clarifying edit in the regulatory text by striking reference to ''danger to self'' in § 410.1105(a)(2) and § 410.1105(a)(3)(i), (ii), and (iii), as well as adding an affirmative statement in § 410.1105(a)(1) that a finding that a child poses a danger to self shall not be the sole basis for a child's placement in a secure facility (that is not an RTC). In addition, because ORR is striking ''danger to self'' in § 410.1105(a)(3)(iii), ORR is deleting ''substance or alcohol use'' from the examples of ''unacceptably disruptive'' conduct addressed in that paragraph. Finally, because the criteria for assessing dangerousness under § 410.1105(a) and (c) now differ, ORR is revising § 410.1105(c)(1) to remove the last sentence (''In assessing danger to self or others, ORR shall use the criteria for placement in a secure facility at paragraph (a) of this section). To help ensure that a child in a restrictive placement is promptly stepped down to a less restrictive placement if appropriate and in the child's best interest, ORR notes that at § 410.1901(d), ORR is required to ensure the following automatic administrative reviews: (1) at minimum, a 30-day administrative review for all restrictive placements; and (2) a more intensive 90-day review by ORR supervisory staff for unaccompanied children in secure facilities.

Comment: Many commenters provided other recommendations with respect to language in proposed § 410.1105(a)(2). While many commenters supported ORR's proposal that, consistent with section 504, ORR would consider whether there are any reasonable modifications to the policies, practices, or procedures of an available less restrictive placement or any provision of auxiliary aids and services that would allow an unaccompanied child with a disability to be placed in that less restrictive facility, some commenters stated that the proposed rule should mandate an analysis of reasonable modifications and auxiliary aids and services to permit a child to be placed in a less restrictive facility. These commenters stated that to adequately protect children's rights, the consideration of reasonable modifications and auxiliary aids and services to facilitate less restrictive placement must be explicitly incorporated into the regulation text and apply both to an initial transfer decision and to a child's 30-day restrictive placement case review under proposed §§ 410.1105, 410.1601, and 410.1901.

A few commenters stated that, consistent with DOJ's position on section 504's integration mandate, the final rule should also specify that the consideration of less restrictive alternatives will include consideration of community-based placement options such as individual foster homes, noting that children who struggle in congregate care placements often do much better in a community placement.

Finally, one commenter noted that in proposed § 410.1105(a)(2), secure placements must be appropriate under the circumstances and in the best interests of the child, but stated that this is contradictory, as secure placements will almost never be in the best interest of the child, especially when they have a disability and that no accommodation in secure detention could adequately meet the needs of children with disabilities. The commenter stated that these children require professional care by licensed providers in the community.

Response: ORR agrees that the consideration of reasonable modifications and auxiliary aids and services to facilitate less restrictive placement should be explicitly incorporated into the regulation text and apply both to an initial transfer decision and to a child's 30-day restrictive placement case review under proposed §§ 410.1105, 410.1601, and 410.1901. Accordingly, as noted, ORR is adding new § 410.1105(d) to state that for an unaccompanied child with one or more disabilities, consistent with section 504, ORR's determination under § 410.1105 whether to place the unaccompanied child in a restrictive placement shall include consideration whether there are any reasonable modifications to the policies, practices, or procedures of an available less restrictive placement or any provision of auxiliary aids and services that would allow the unaccompanied child to be placed in that less restrictive facility. Section 410.1105(d) further states that ORR's

consideration of reasonable modifications and auxiliary aids and services to facilitate less restrictive placement shall also apply to transfer decisions under § 410.1601 and will be incorporated into restrictive placement case reviews under § 410.1901. In addition, § 410.1105(d) clarifies that ORR is not required to take any action that it can demonstrate would fundamentally alter the nature of a program or activity.

In response to the recommendation that the final rule also specify that the consideration of less restrictive alternatives will include consideration of community-based placement options, ORR agrees that the consideration of less restrictive alternatives under § 410.1105(a)(2) would include consideration of non-restrictive community-based alternatives, such as individual foster homes, as available and appropriate under the circumstances. However, ORR does not believe it is necessary to include this provision in the regulation text at § 410.1105(a)(2). ORR believes that under § 410.1102, it is sufficiently clear that community-based placements such as individual family homes and groups homes, are among the types of less restrictive placement alternatives available for unaccompanied children based on an assessment of a child's best interest, age, and individualized needs, as well as the best interests of others. ORR also agrees that there are many advantages to community-based care, and as discussed previously in the preamble to this final rule, ORR is currently studying and developing a community-based care model for future implementation.

ORR emphasizes its preference to not place unaccompanied children in secure placements except in limited circumstances where the safety and well-being of the child or other unaccompanied children in care requires it, and refers the commenter to its response to the comments above concerning secure and heightened supervision placements, and the placement of children with disabilities in such settings. ORR is committed to placing children in the least restrictive setting in their best interests and ensuring that such placements are able to meet the individualized needs of children with disabilities.

Comment: Several commenters recommended that ORR eliminate the use of secure facilities, but in the alternative recommended that ORR make certain revisions to the criteria at § 410.1105(a)(3) to implement substantial additional safeguards.

First, commenters recommended that ORR revise § 410.1105(a)(3)(i) to delete ''or is the subject of delinquency proceedings, delinquency charge, or has been adjudicated delinquent,'' stating that the TVPRA and Supreme Court precedent provide justification for not considering delinquency records (whether in the form of charges or adjudications) in placing children in restrictive settings. Commenters noted that Congress omitted any reference to juvenile delinquency adjudications in the TVPRA, instead requiring that ORR refrain from placing children in secure settings absent dangerousness or a criminal charge which indicated that Congress did not view delinquency charges or adjudications as pertinent to restrictive placements. Further, the commenters cited *Roper* v. *Simmons,* 543 U.S. 551, 569–70 (2005), to assert that the Supreme Court has recognized that children lack maturity and responsibility and as a result engage in impulsive actions and are more susceptible to negative influences. Commenters concluded that, as such, children's criminal or delinquent history should have little, if any, bearing on placement decisions, and that ORR must not draw conclusions about a child's character based on violations of the law, even in in the context of criminal convictions.

Second, commenters recommended that ORR amend the end of § 410.1105(a)(3)(i) to state ''and where ORR determines by clear and convincing evidence that those circumstances demonstrate that the unaccompanied child poses a danger to self or others,'' stating that this would better align with the proposed rule's goal to codify the use of placement review panels under proposed § 410.1901(a). Commenters further stated that ORR must make a measured, supported assessment to ensure that no child is harmed by an improper transfer.

Third, commenters stated that ORR should delete § 410.1105(a)(3)(ii), because its consideration is already captured under the dangerousness assessment under § 410.1105(a)(3)(i) and the evaluation of maliciousness goes beyond ORR's expertise and is best suited for law enforcement agencies.

Fourth, commenters recommended that ORR delete § 410.1105(a)(3)(iii), which they stated is similarly redundant of the dangerousness assessment ORR performs in each case and in the view of these commenters, has led to improper placement of children in restrictive settings.

Response: ORR declines to make commenters' recommended revisions to § 410.1105(a)(3).

First, inclusion of the phrase at § 410.1105(a)(3)(i), ''or is the subject of delinquency proceedings, delinquency charge, or has been adjudicated delinquent,'' is consistent with the TVPRA and the FSA at paragraph 21. The TVPRA provides that a child ''shall not be placed in a secure facility absent a determination that the child poses a danger to self or others or has been charged with having committed a criminal offense . . .''.[118] ORR believes this language encompasses consideration of whether the unaccompanied child is the subject of delinquency proceedings, a delinquency charge, or has been adjudicated delinquent. In addition, delinquency proceedings, charges, or adjudications may be relevant to determining whether a child ''poses a danger to self or others.'' [119] Furthermore, ORR notes that the language identified by the commenters is consistent with paragraph 21 of the FSA.[120] ORR continues to believe that it is imperative to consider a child's criminal background, including delinquency proceedings, delinquency charges, or delinquency adjudications, in order to determine the least restrictive placement in the best interests of the child, as appropriate to the child's age and individualized needs and to protect the safety and well-being of other children in ORR's care and custody.

Second, in response to the recommendation that ORR amend § 410.1105(a)(3)(i), ORR is adding an explicit reference to the clear and convincing evidence standard to § 410.1105(a)(1) and thus it is not necessary to revise § 410.1105(a)(3)(i) as requested by the commenters.

Third, ORR does not agree that § 410.1105(a)(3)(ii) should be deleted. The language at § 410.1105(a)(3)(ii) is intended to capture circumstances that are not covered under paragraph (a)(3)(i)—that is, where a child has not been charged with or convicted of a crime, and is not the subject of delinquency proceedings, does not have a delinquency charge, and has not been adjudicated delinquent, but has engaged in behavior that would justify placement in a secure facility (that is not an RTC) based on danger to others. With respect to the concern regarding the term ''malicious,'' due to the individualized nature of placement determinations, including placements in restrictive settings, ORR believes it is necessary to allow for flexibility in its interpretation and application of this term for purposes of § 410.1105(a), to allow for a complete assessment of each case and to accommodate the different circumstances in which such behavior

may occur. ORR also notes that while § 410.1105(a)(3) describes the circumstances under which an unaccompanied child may be placed in a secure facility (that is not an RTC), any placement determination must be consistent with the TVPRA requirement that it be in the least restrictive setting that is in the best interest of the child. As a result, ORR reviews multiple relevant factors when placing a child in a secure facility (that is not an RTC), not only the factors described at § 410.1105(a)(3).

Fourth, in response to the commenters' recommendation to delete § 410.1105(a)(3)(iii), ORR believes that paragraph (a)(3)(iii) is necessary to encompass additional situations that may not be covered under paragraphs (a)(3)(i) and (a)(3)(ii), that may warrant a determination that placement in a secure facility (that is not an RTC) is necessary because of danger to others, such as stealing, fighting, intimidation of others, or sexually predatory behavior. In response to the commenters concern that the language at § 410.1105(a)(3)(iii) has led to improper placement of children in restrictive settings, ORR refers readers to responses to similar comments in this section addressing the use of the term ''unacceptably disruptive.''

Comment: Several commenters asserted that a dangerousness determination for placement of a child with a disability in a secure facility should be consistent with section 504. Commenters stated that the proposed rule should therefore specify that a child with a disability will not be deemed to pose a danger to self or others unless they pose a ''direct threat'' which cannot be eliminated by a modification of policies, practices or procedures, or by the provision of auxiliary aids or services.

A number of commenters recommended that if ORR determines that a child with a disability's placement in a less restrictive setting amounts to a direct threat, even with reasonable modifications, the child should be placed in a Qualified Residential Treatment Program (QRTP),[121] rather than a secure juvenile detention facility which the commenters stated is harmful to children and especially inappropriate for children with disabilities. These commenters further stated that updated assessments must be conducted regularly, including when a child's placement is in a segregated setting, to determine if a more integrated setting, such as a family placement, is appropriate.

Response: ORR agrees with commenters that the determination relating to danger for placing a child with a disability in a secure facility including an RTC should be consistent with section 504. ORR notes that the TVPRA, 8 U.S.C. 1232(c)(2)(A) permits consideration of whether the child is a danger to self or others in any placement determination, and specifically states that a child may not be placed in a secure facility absent a determination that the child poses a danger to self or others or has been charged with a criminal offense. Thus, ORR believes it is appropriate to consider whether the child is a danger to self or others in order to identify a placement that best protects the safety and well-being of the child and others. However, as noted in a previous response in this section, ORR acknowledges that a child's danger to self should not be the sole basis for placement in a secure facility (that is not an RTC) and is making edits in the regulatory text by striking reference to ''danger to self'' in § 410.1105(a)(2) and § 410.1105(a)(3)(i), (ii), and (iii) as well as adding an affirmative statement to that effect in § 410.1105(a). In addition, as discussed previously, before placing any child in a secure facility, including an RTC, ORR determines if less restrictive alternatives in the best interest of the child are available and appropriate, and in doing so, ORR will consider whether there are any reasonable modifications to the policies, practices, or procedures of an available less restrictive placement or any provision of auxiliary aids and services that would allow an unaccompanied child with a disability to be placed in that less restrictive facility, consistent with section 504. ORR refers the reader to prior responses to comments concerning the placement of children with disabilities in restrictive facilities.

ORR will consider the commenters' recommendations regarding incorporation of the ''direct threat'' standard and placement in QRTPs and may address them further in future policymaking. Further, ORR notes that placements in restrictive settings are regularly reviewed to determine if a less restrictive placement is appropriate. As provided in § 410.1901, and finalized in this rule, ORR will conduct a review of all restrictive placements, including RTCs, at least every 30 days, and reviews of RTC placements must involve a psychiatrist or psychologist to determine whether the child should remain in restrictive residential care. ORR must also ensure a more intensive 90-day review by ORR supervisory staff for children in secure facilities.

Comment: Many commenters recommended revisions to § 410.1105(c). First, commenters recommended that the term ''serious mental health and behavioral issues'' should be replaced by ''serious mental health and behavioral needs'' to focus on the child's needs and reduce stigma. Second, commenters recommended that ORR add the following language to § 410.1105(c): ''ORR shall not consent to a child's placement in an RTC when the child has a disability and, with services or reasonable modifications, the child can be served in a more integrated setting.''

Response: ORR does not believe it is necessary or appropriate to change the term ''serious mental health and behavioral issues'' to ''serious mental health and behavioral needs.'' ORR believes that the term ''serious mental health and behavioral issues'' encompasses an assessment of whether there are ''serious mental health and behavioral needs'' and does not detract from a consideration of the child's needs. However, as noted above, ORR is adding new § 410.1105(d) to state that for an unaccompanied child with one or more disabilities, consistent with section 504 and § 410.1311(c), ORR's determination under § 410.1105 whether to place the unaccompanied child in a restrictive placement such as an RTC shall include consideration whether there are any reasonable modifications to the policies, practices, or procedures of an available less restrictive placement or any provision of auxiliary aids and services that would allow the unaccompanied child to be placed in that less restrictive facility. Finally, per § 410.1105(c), an unaccompanied child with serious mental health or behavioral health issues may only be placed into an RTC if the unaccompanied child is evaluated and determined to be a danger to self or others by a licensed psychologist or psychiatrist consulted by ORR or a care provider facility, which includes a determination by clear and convincing evidence documented in the unaccompanied child's case file, including documentation by a licensed psychologist or psychiatrist that an RTC is appropriate.

Comment: One commenter recommended that ORR provide interpretation for Indigenous children to ensure Indigenous children are not being placed in restrictive placements due to misunderstandings arising from difficulties in communication between the child and ORR staff, discrimination, or intimidation.

Response: ORR provides access to interpretation services as provided in § 410.1306. In particular, standard programs and restrictive placements

must prioritize the ability to provide in-person, qualified interpreters for unaccompanied children who need them, particularly for rare or indigenous languages. After the standard programs and restrictive placements make reasonable efforts to obtain in-person, qualified interpreters, then they may use professional telephonic interpreter services.

Final Rule Action: After consideration of public comments, ORR is finalizing § 410.1105 with the following modifications. First, ORR is revising § 410.1105(a) to provide that all determinations to place an unaccompanied child in a secure facility (that is not an RTC) will be reviewed and approved by ORR Federal field staff. Second, ORR is revising § 410.1105(a)(1) and (b)(1) to state that the placement determinations under paragraphs (a) and (b) must be made based on clear and convincing evidence documented in the unaccompanied child's case file. Third, ORR is removing references to ''danger to self'' in § 410.1105(a)(2) and § 410.1105(a)(3)(i), (ii), and (iii) and is adding an affirmative statement to § 410.1105(a)(1) that a finding that a child poses a danger to self shall not be the sole basis for a child's placement in a secure facility that is not an RTC. Fourth, because ORR is striking ''danger to self'' in § 410.1105(a)(3)(iii), ORR is deleting ''substance or alcohol use'' from the examples of ''unacceptably disruptive'' conduct addressed in that paragraph. Fifth, ORR is amending § 410.1105(a)(2) to state that it ''shall'' place an unaccompanied child in a heightened supervision facility or other non-secure facility as an alternative to a secure facility (that is not an RTC), provided that the unaccompanied child does not ''currently'' pose a danger to others and does not need placement in an RTC pursuant to the standard set forth at § 410.1105(c). Sixth, at the end of the first sentence of § 410.1105(c)(1), ORR is revising the phrase ''that RTC is appropriate'' to state ''that placement in an RTC is appropriate'' to clarify that the determination made in that paragraph relates to placement. Seventh, to clarify that there must be a determination of clear and convincing evidence for each child placed in an RTC, ORR is finalizing revisions to § 410.1105(c)(1) to provide that the child must be evaluated and determined to be a danger to self or others by a licensed psychologist or psychiatrist consulted by ORR or a care provider facility, which includes a determination by clear and convincing evidence documented in the unaccompanied child's case file, *including* documentation by a licensed psychologist or psychiatrist that placement in an RTC is appropriate. Eighth, ORR is revising § 410.1105(c)(1) to remove the last sentence (''In assessing danger to self or others, ORR shall use the criteria for placement in a secure facility at paragraph (a) of this section.''). Finally, ORR is adding new § 410.1105(d) to state that for an unaccompanied child with one or more disabilities, consistent with section 504, ORR's determination under § 410.1105 whether to place the unaccompanied child in a restrictive placement shall include consideration whether there are any reasonable modifications to the policies, practices, or procedures of an available less restrictive placement or any provision of auxiliary aids and services that would allow the unaccompanied child to be placed in that less restrictive facility. Section 410.1105(d) further states that ORR's consideration of reasonable modifications and auxiliary aids and services to facilitate less restrictive placement shall also apply to transfer decisions under § 410.1601 and will be incorporated into restrictive placement case reviews under § 410.1901. Section 410.1105(d) further clarifies that ORR is not required to take any action that it can demonstrate would fundamentally alter the nature of a program or activity. ORR is otherwise finalizing § 410.1105 as proposed.

Section 410.1106 Unaccompanied Children Who Need Particular Services and Treatment

ORR proposed in the NPRM at § 410.1106 to codify the requirements for ORR when placing unaccompanied children assessed to have a need for particular services, equipment, and treatment by staff (88 FR 68925). This section implements and updates paragraph 7 of the FSA, which requires ORR to assess unaccompanied children to determine if they have ''special needs,'' and, if so, to place such unaccompanied children, whenever possible, in licensed programs in which ORR places unaccompanied children without ''special needs,'' but which provide services and treatment for such ''special needs.'' As indicated by the definition for ''special needs unaccompanied child'' from the FSA and included in NPRM at § 410.1001, an unaccompanied child is considered to have ''special needs'' if ORR determines that the unaccompanied child has a mental and/or physical condition that requires particular services and treatment by staff. ORR may determine that an unaccompanied child needs particular services and treatment by staff for a variety of reasons including, but not limited to, those delineated within the definition of ''special needs unaccompanied child'' and specified in paragraph 7 of the FSA. For this reason, ORR proposed this section in the NPRM without limiting its scope to ''special needs unaccompanied child.'' ORR noted that an unaccompanied child may need particular services and treatment due to a disability, as defined at § 410.1001, but not all unaccompanied children with disabilities necessarily require particular services and treatment by staff. Likewise, an unaccompanied child does not need to have been identified as having a disability to be determined to require particular services and treatment to meet their individualized needs.

To avoid confusion, ORR refers in this section to unaccompanied children with ''individualized needs'' rather than using the outdated ''special needs'' terminology found in the FSA at paragraph 7. As noted above regarding § 410.1103, the term ''special needs'' has created confusion and may imply that in determining placement, ORR considers only a limited range of needs that fall within a special category. Instead, in assessing the appropriate placement of an unaccompanied child, ORR proposed in the NPRM to consider any need it becomes aware of that is specific to each unaccompanied child being assessed, regardless of the nature of that need. The examples provided in this section of individualized needs that may require particular services, equipment, and treatment by staff are illustrative, and not exhaustive. Furthermore, as also discussed at §§ 410.1001 and 410.1103, ORR was concerned about using the term ''special needs'' given its association as a placeholder or euphemism for disability whereas this section does not apply only to unaccompanied children with disabilities who require particular services and treatment.

ORR also noted that this section incorporates the preference for inclusive placements that serve unaccompanied children with a diversity of needs, including the need for particular services or treatments, whenever possible, as provided in paragraph 7 of the FSA, and particular equipment. This section is distinct from, but in alignment with, HHS's implementing regulation for section 504 at 45 CFR 85.21(d) that prohibits discrimination on the basis of disability by requiring that the agency administer programs and activities in the most integrated setting appropriate to the needs of individuals with disabilities. The most

integrated setting appropriate to the needs of an individual with a disability is a setting that enables individuals with disabilities to interact with individuals without disabilities to the fullest extent possible.[122]

Comment: One commenter recommended that the individualized assessment be evidence-based, trauma-informed, developmentally appropriate, culturally competent, and conducted in the child's preferred language. Additionally, the commenter recommended ORR adopt a strength-based needs assessment for children whose behavior indicates a need for services and/or supports and the possible strengths to assist with treatment to address the child's behavioral issues and needs. The commenter also recommended that a qualified individual with expertise or experience with the unaccompanied child's particular disability (as applicable) and who is known and trusted by the child conduct the assessment in a comfortable community-based setting to effectively identify a child's needs for particular services, equipment, and treatment. Lastly, the commenter recommended that needs assessments and integrated placement determinations be completed in a timely manner for children with and without disabilities.

Response: As clarified in § 410.1000, ORR does not intend 45 CFR part 410 to govern or describe the entire UC Program, including the specific procedures for how ORR is to assess an unaccompanied child to identify the child's individualized needs during placement. Where the regulations contain less detail, ORR plans to issue subregulatory guidance and other communications from ORR to care provider facilities to provide specific guidance on requirements. To the extent the commenter's recommendations do not reflect existing ORR policies, ORR may consider them for future policymaking.

Comment: One commenter expressed concern that § 410.1106 is unclear whether it incorporates evaluations for disability, as required by the anticipated *Lucas R.* settlement, into the assessment that determines whether the child needs particular services and treatment. Additionally, several commenters recommended a more formal evaluation for disability, stating this is required to ensure ORR protects the child's rights under section 504. These commenters recommended that the final rule require a prompt evaluation of an unaccompanied child suspected of having a disability by a qualified professional in circumstances where the child: (1) requests an evaluation for disability, (2) is psychiatrically hospitalized or evaluated for psychiatric hospitalization, or (3) is being considered for transfer to a restrictive setting based on danger to self or others. According to the commenters, such an evaluation for disability should consider the child's need for reasonable modifications and auxiliary aids and services. Further, a few commenters recommended including in the final rule a requirement that the child's attorney or child advocate can request an evaluation of the child for disability by a provider of their choice at no cost to the child. Finally, these commenters recommended that individualized assessments for unaccompanied children with disabilities or suspected disabilities be based on current medical knowledge and the best available objective evidence, which include evaluations of the services and supports that would enable children to live with their family.

Response: Consistent with its discussion of the *Lucas R.* litigation at section III.B.4, ORR is not incorporating the requirements related to more formal evaluations for disability in the proposed disability class settlement, or other recommended requirements for such evaluations in this final rule. However, ORR will continue to evaluate possible policy updates as the anticipated settlement is implemented, and the year-long needs assessment process is completed, and the disability plan developed.

Comment: Several commenters recommended ORR clarify that assessments or evaluations for disability do not delay a child's release.

Response: ORR clarifies in this final rule that an assessment of the unaccompanied child for particular services and treatment by staff or equipment to address their individualized needs should not delay the child's release. This is consistent with § 410.1311(e)(3), which prohibits ORR from delaying release of a child with one or more disabilities solely because post-release services are not in place before or following the child's release.

Comment: A few commenters recommended ORR clarify § 410.1106 with respect to whether unaccompanied children with individualized needs are placed in integrated placements which provide services and treatment for such individualized needs. One commenter recommended ORR clarify whether the last sentence of the regulation text should refer to unaccompanied children with individualized needs instead of unaccompanied children with disabilities. Another commenter recommended ORR clarify what ''reasonable modifications to the program'' means.

Response: Consistent with FSA paragraph 7, ORR is clarifying in the final rule that if ORR determines that an unaccompanied child's individualized needs require particular services and treatment by staff or particular equipment, ORR shall place the unaccompanied child, whenever possible, in a standard program in which the unaccompanied child with individualized needs can interact with children without those individualized needs to the fullest extent possible, but which provides services and treatment or equipment for such individualized needs. ORR has removed the reference to ''reasonable modifications'' for clarity and notes that this language has been incorporated into § 410.1311(c).

Comment: One commenter requested ORR clarify how care provider facilities would communicate transfers of unaccompanied children who need particular services and treatment and whether or not ORR would mandate that care provider facilities accept these children if the facilities have capacity. The commenter recommended ORR require care provider facilities to accept transfers or emergency transfers and not unnecessarily delay placement on the basis that they are unable to meet the children's needs. Further, the commenter requested ORR clarify how a care provider facility protects other children in the facility when there is no placement available for a child with emergency behavioral health needs and how the facility can ensure proper care of that child in the interim. Specifically, the commenter requested that ORR clarify what circumstances may warrant psychiatric hospitalization and what support ORR would provide to the care provider facility to make transfer decisions.

Response: ORR appreciates the commenter's request for clarification. ORR's transfer process for unaccompanied children, including children who need particular services and treatment is described at § 410.1601, which discusses ORR's finalized requirements regarding the transfer process, including communication about the timeframe, alternate placement recommendations at § 410.1601(a)(1), medical clearance at § 410.1601(a)(2), and advanced notification at § 410.1601(a)(3). Additionally, ORR notes that it does not intend this final rule to govern or describe the entire UC Program, and where a regulation contains less detail, additional detail to implement the

requirement may be issued in subregulatory guidance. To the extent the commenter's recommendations are not already captured in this final rule, ORR may consider them for future policymaking.

Final Rule Action: After consideration of public comments, ORR is making the following modifications to § 410.1106. ORR is revising the first sentence of § 410.1106 by adding ''and custody'' to clarify that unaccompanied child requires particular services and treatment by staff to address their individual needs while in the care ''and custody'' of the UC Program. ORR is revising the last sentence of § 410.1106 to state ''If ORR determines that an unaccompanied child's individualized needs require particular services and treatment by staff or particular equipment, ORR shall place the unaccompanied child, whenever possible, in a standard program in which the unaccompanied child with individualized needs can interact with children without those individualized needs to the fullest extent possible, but which provides services and treatment or equipment for such individualized needs.'' Otherwise, it is finalizing § 410.1106 as proposed in the NPRM.

Section 410.1107 Considerations When Determining Whether an Unaccompanied Child is a Runaway Risk for Purposes of Placement Decisions

ORR proposed in the NPRM at § 410.1107 to codify factors that it considers in determining whether an unaccompanied child is a runaway risk for purposes of placement decisions (88 FR 68925 through 68926). As described in § 410.1001, the FSA and ORR policy currently use the term ''escape risk,'' and ORR proposed in the NPRM to update the terminology to ''runaway risk'' and also proposed to update the definition provided in the FSA. ORR noted that the TVPRA provides that HHS ''may'' consider ''risk of flight,'' among other factors, when making placement determinations.[123] (ORR notes that 8 U.S.C. 1232(c)(2)(A) does not list risk of flight as a ground for placing an unaccompanied child in a secure facility. Therefore, even though paragraph 21D of the FSA states that being an escape risk (or runaway risk as finalized in this rule) is a ground upon which ORR may place an unaccompanied child in a secure facility, ORR did not propose in the NPRM that runaway risk is a basis for placement in a secure facility.). ORR proposed in the NPRM to interpret ''risk of flight,'' which is used in immigration law regarding an individual's risk of not appearing for their immigration proceedings, as including runaway risk. In its discretion, ORR considers these runaway risk factors when evaluating whether to transfer an unaccompanied child to another care provider facility, in accordance with § 410.1601. For example, an unaccompanied child may be transferred from a non-secure level of care to a heightened supervision facility where there is higher staff ratio and a secure perimeter (stepped up) if ORR determines the unaccompanied child is a runaway risk in accordance with § 410.1107.

ORR proposed in the NPRM at § 410.1107(a) through (c) to codify the risk factors to consider when evaluating whether an unaccompanied child is a runaway risk for purposes of placement. These factors are consistent with paragraph 22 of the FSA, which are also included in the 2019 Final Rule at § 410.204. Specifically, ORR proposed in the NPRM to consider the following factors: (a) whether the unaccompanied child is currently under a final order of removal (*i.e.,* the unaccompanied child has a legal duty to report for deportation); (b) whether the unaccompanied child's immigration history includes: (1) a prior breach of bond, (2) a failure to appear before DHS or the immigration court, (3) evidence that the unaccompanied child is indebted to organized smugglers for their transport, or (4) a previous removal from the U.S. pursuant to a final order of removal; and (c) whether the unaccompanied child has previously absconded or attempted to abscond from State or Federal custody. ORR noted that under paragraph 22B of the FSA, a voluntary departure from the U.S. by the unaccompanied child is also listed as a risk factor. Based on ORR's experience in placing unaccompanied children, ORR did not propose to codify whether the child's immigration history includes a voluntary departure because this factor has not been relevant in determining whether the child is a runaway risk.

ORR noted that paragraph 22 of the FSA provides a non-exhaustive list of factors to consider when evaluating runaway risk.[124] [125] Consistent with this language, as well as with ORR's authority generally to consider runaway risk in making placement determinations, ORR proposed in the NPRM additional factors at § 410.1107(d) and (e) for ORR to consider when determining whether an unaccompanied child is a runaway risk for purposes of placement decisions. ORR proposed in the NPRM at § 410.1107(d) to require ORR to consider whether the unaccompanied child has displayed behaviors indicative of flight or has expressed intent to run away. ORR proposed in the NPRM at § 410.1107(e), to consider evidence that the unaccompanied child is indebted to, experiencing a strong trauma bond to, or is threatened by a trafficker in persons or drugs, in determining whether the unaccompanied child is a runaway risk. ORR developed this proposal through its practical experience of making runaway risk placement decisions and believes it is appropriate to add as an additional factor to consider. ORR sought public comment on these proposed factors and welcomed feedback on other factors ORR should or should not consider when determining if an unaccompanied child is a runaway risk for purposes of placement decisions.

Comment: ORR received comments in support of ORR's proposal to not codify voluntary departure as a runaway risk factor, which is an immigration history factor from paragraph 22 of the FSA. One commenter stated the factors listed in the FSA are aids to assess the likelihood a child will abscond from ORR custody and are not determinative. The commenter stated there is no reason to include a factor in the final rule if it is not useful in predicting whether the child will attempt to abscond from ORR custody.

Response: ORR agrees that voluntary departure from the United States by the unaccompanied child is not a relevant factor in determining whether the child is a runaway risk and has not included an immigration history that includes a voluntary departure as a factor in § 410.1107.

Comment: A few commenters recommended that ORR not finalize the immigration history factors in § 410.1107(b) that ORR proposed in the NPRM to use when determining whether an unaccompanied child is a runaway risk for placement. These commenters expressed concern that an unaccompanied child's immigration history is outside of the child's control and is not predictive or useful in determining whether the child is a runaway risk. One commenter stated that the immigration factors ORR proposed in the NPRM at § 410.1107(b) are unnecessary as they reflect the immigration enforcement role of the former INS and are not appropriate to ORR's distinct role as a custodian of unaccompanied children. Another commenter recommended that ORR not assess flight risk based on an unaccompanied child's negative prior immigration history because, as ORR acknowledged in the preamble in the NPRM, it is not a law enforcement

agency. Additionally, this commenter stated that in their experience serving unaccompanied children, they have not seen any correlation between a prior receipt of a final order of removal or a failure to appear and the risk that children will run away from care provider facilities. Instead, the commenter stated children are more likely to stay in the care provider facilities and work with their legal services provider, attorney, or representative to resolve the prior receipt of a final order of removal. A separate commenter expressed concern that ORR conflates two different risks of flight in § 410.1107, stating a ''runaway risk'' from a shelter program is different from risk of flight in immigration proceedings; the commenter stated risk of flight exceeds ORR's purview, authority, and expertise. Specifically, the commenter stated that ORR conflates actions taken by others on the child's behalf (*e.g.,* prior breach of bond or failure to appear) with actions taken by the child (*e.g.,* child has previously absconded or attempted to abscond from State or Federal custody).

Response: ORR thanks the commenters for their recommendations to not finalize the immigration history factors at § 410.1107(b). ORR agrees that these factors are typically outside an unaccompanied child's control and do not predict whether a child will run away from a care provider facility based on ORR's experience in placing unaccompanied children. Similar to ORR's reasoning for not finalizing voluntary departure as a factor, it is ORR's experience that the unaccompanied child's immigration history has not been relevant in determining whether the child is a runaway risk. Accordingly, ORR is not finalizing the immigration history factors at § 410.1107(b).

Comment: ORR received comments related to how ORR weighs the factors listed at proposed § 410.1107(c) and (d) when determining an unaccompanied child's runaway risk. One commenter agreed that ORR should consider an unaccompanied child's prior escape when making a placement decision. Another commenter recommended ORR make a determination of runaway risk based on the totality of the circumstances and not base its determination on the child's attempt to run away, stating the proposed runaway risk factors are overbroad and do not reflect whether the unaccompanied child is a runaway risk. A different commenter expressed concern that the proposal at § 410.1107(d) is overbroad and asserted that a statement from the child that the child is going to leave does not require a step-up to a more restrictive placement but better services and a better care environment.

Response: ORR has provided a definition of ''runaway risk'' at § 410.1001 of this rule, pursuant to which ORR's determination that an unaccompanied child is a runaway risk must be made in view of a totality of the circumstances and should not be based solely on a past attempt to run away or a statement from the child that the child is going to leave or runaway. ORR applies this ''totality of the circumstances'' standard when making determinations under § 410.1107. ORR will monitor implementation of this regulation and, if needed, will take the commenter's recommendations into consideration for future policymaking. ORR further notes that an unaccompanied child is only placed in a heightened supervision facility after consideration of the criteria at § 410.1105(b)(2) and based on clear and convincing evidence supporting the placement change.

Comment: One commenter recommended removing all references to indebtedness in proposed § 410.1107(b)(3) and (e) because indebtedness does not relate to flight risk and the commenter stated this is an unacceptable rationale for placing a child in a restrictive placement. The same commenter recommended that ORR not incorporate the term ''trauma bond'' in proposed § 410.1107(e) because there is ''no medical standard for diagnosis . . . nor any agreed upon definition.''

Response: ORR is not finalizing the factors at § 410.1107(b), which includes indebtedness to smugglers at § 410.1107(b)(3). Additionally, ORR agrees with the commenter that indebtedness to a trafficker in persons or drugs is not relevant in determining whether the unaccompanied child is a runaway risk. Similar to ORR's reasoning for not finalizing voluntary departure and immigration history as factors, whether the unaccompanied child is indebted to a trafficker in persons or drugs has not been relevant in ORR's experience in determining whether the child is a runaway risk. Accordingly, ORR is revising § 410.1107(e) as proposed in the NPRM to remove ''indebted to.''

Additionally, ORR does not agree with the commenter's recommendation to not incorporate the term ''trauma bond'' § 410.1107(e) as proposed in the NPRM and believes that it is appropriate to use the term ''trauma bond'' in § 410.1107(e), which is consistent with how the Department of State's Office to Monitor and Combat Trafficking in Persons defined the term in its factsheet, Trauma Bonding in Human Trafficking.[126] ORR believes there is a generally accepted definition of ''trauma bond'' and defined the term at § 410.1001 so that readers can understand how ORR uses the term in 45 CFR part 410.

Comment: A number of commenters opposed ORR codifying runaway risk factors for placement determinations at § 410.1107, stating ORR does not have the capacity to make this assessment because, as ORR stated in the preamble for § 410.1105(a)(3), that ''because it is not a law enforcement agency, unlike the former INS, ORR is not in a position to make determinations such as whether an unaccompanied child is 'chargeable.' ''

Response: As an initial matter, ORR notes that it is unclear whether commenters were challenging ORR's authority to assess whether an unaccompanied child is a runaway risk or ORR's ability to do so when exercising such authority. Under the HSA and TVPRA, ORR is responsible for the care and placement of unaccompanied children. The TVPRA, at 8 U.S.C. 1232(c)(2), provides that ORR may consider the child's risk of flight in determining the least restrictive setting to place the child that is in the child's best interest. Therefore, ORR clarifies that it has the legal authority to determine whether an unaccompanied child is a runaway risk. ORR's statement in the NPRM preamble for § 410.1105(a)(3) relates to its proposal to not codify that an unaccompanied child may be placed in a secure facility if the unaccompanied child is ''chargeable with a delinquent act.'' As stated in the preamble to the NPRM, ORR is not a law enforcement agency and is therefore unable to make a probable cause determination whether a child is ''chargeable'' (88 FR 68923). However, the language at § 410.1105(a)(3) does not have bearing on ORR's authority or ability to assess an unaccompanied child's runaway risk; when ORR assesses runaway risk it is not deciding whether an unaccompanied child is ''chargeable with a delinquent act.''

Final Rule Action: After consideration of public comments, ORR is making the following modifications. ORR is not finalizing § 410.1107(b) as proposed in the NPRM. ORR is updating the numbering for proposed § 410.1107(c) through (e) and finalizing as § 410.1107(b) through (d). ORR is revising proposed § 410.1107(e), which is now § 410.1107(d), to state ''Evidence that the unaccompanied child is experiencing a strong trauma bond to or is threatened by a trafficker in persons

or drugs.'' ORR is otherwise finalizing § 410.1107 as proposed in the NPRM.

Section 410.1108 Placement and Services for Children of Unaccompanied Children

ORR proposed in the NPRM at § 410.1108, the requirements for the placement of children of unaccompanied children and services they would receive while in ORR care (88 FR 68926). ORR believes that when unaccompanied children are parents of children, it is in the best interests of the children to be placed in the same facility as their parents, who are also unaccompanied children. Accordingly, ORR proposed in the NPRM at § 410.1108(a) to codify its existing policy that it will place unaccompanied children and their children together at the same care provider facilities, except in unusual or emergency situations. ORR considered limiting the proposal to the biological children of unaccompanied children. However, at the time of intake and placement, it may not be known whether the children are the biological children of the unaccompanied children. Accordingly, ORR did not limit the proposal to the biological children of unaccompanied children and instead proposed broader language to allow for flexibility in placing unaccompanied children and their children to account for other situations (for example, the unaccompanied child may not be the biological parent of a child but is the child's caretaker).

Consistent with existing policy, and with its responsibility to consider the best interests of children in making placement decisions, ORR proposed in the NPRM that unusual or emergency situations would include, but not be limited to: hospitalization or need for a specialized care or treatment setting that cannot provide appropriate care for the child of the unaccompanied child; a request by the unaccompanied child for alternate placement of the child of the unaccompanied child; and when the unaccompanied child is the subject of substantiated allegations of abuse or neglect against the child of the unaccompanied child (or temporarily in urgent cases where there is sufficient evidence of child abuse or neglect warranting temporary separation for the child's protection). ORR proposed in the NPRM to codify these requirements into regulation at § 410.1108(a)(1) through (3).

ORR is aware that children of unaccompanied children may not be unaccompanied children within the definition provided in the HSA at 6 U.S.C. 279(g)(2). For example, a child born in the United States will likely be a U.S. citizen at birth under section 1401(a) of the INA, 8 U.S.C. 1401(a), and the U.S. Constitution, as amended, XIV section 2. Additionally, a noncitizen child who is in the custody of a parent who is an unaccompanied child who is available to provide care and physical custody, may not be an unaccompanied child. ORR understands that it has custody of the unaccompanied child, consistent with its statutory authorities, and that the unaccompanied child has custody of their child. ORR does not seek to place the parent and child in different facilities or shelters except in the limited circumstances noted above. ORR understands this to be consistent with its responsibility to consider the interests of unaccompanied children.[127] If the child who is in the custody of their unaccompanied child parent has another parent who is a citizen present in the U.S., ORR would consider whether it is in the best interests of the child to place the child with the unaccompanied child parent or the parent who is a U.S. citizen. ORR requested comments regarding this interpretation of its authorities under the TVPRA and the HSA, because neither statute expressly contemplates scenarios where an unaccompanied child is a parent.

ORR proposed in the NPRM at § 410.1108(b) to describe requirements for providing services to children of unaccompanied parenting children while in ORR care. ORR proposed in the NPRM at § 410.1108(b)(1), that children of unaccompanied children would receive the same care and services as ORR provides to the unaccompanied children, as appropriate, regardless of the children's immigration or citizenship status. Additionally, U.S. citizen children of unaccompanied children would be eligible for mainstream public benefits and services to the same extent as other U.S. citizens (for example, Medicaid). Application(s) for public benefits and services shall be submitted on behalf of the U.S. citizen children of unaccompanied children by the care provider facilities. This may include, but is not limited to, helping file for birth certificates or other legal documentation as necessary. Further, ORR proposed in the NPRM at § 410.1108(b)(2), that utilization of those public benefits and services should be exhausted to the greatest extent practicable for U.S. citizen children of unaccompanied children before ORR-funded services are utilized for these children.

Comment: A number of commenters expressed concerns about the possibility under § 410.1108(a) of the NPRM that ORR might separate parenting unaccompanied children from their own children under unusual or emergency circumstances. Some commenters recommended that ORR not provide for such separations under any circumstances, with some recommending relying on State child welfare agencies for any determination of the need to separate parenting unaccompanied children from their own children. Others recommended that ORR revise § 410.1108(a) to specify that ORR may only separate an unaccompanied parenting child from their child in unusual or in emergency situations where keeping the parenting child and child together poses an immediate danger to the children's safety. Some commenters recommended that a separation should occur only if there has been an adjudication using clear and convincing evidence that the unaccompanied child poses an immediate danger to their child that cannot be mitigated. Commenters also recommended that if such separations were to occur, ORR should address due process concerns, specify who will make the decision, and build in a requirement for prior authorization from ORR before care provider staff are able to separate unaccompanied sibling children or an unaccompanied parenting child from their child. One commenter recommended that in the event of a separation, ORR should provide guidance on the circumstances when ORR would separate unaccompanied parenting children from their children, the basis for separating them, how long that separation could last, and whether the parenting unaccompanied child can challenge the separation. Commenters also discussed the importance of legal counsel for a parent facing separation and their recommendation to discuss the rights of parents during a period of separation, and recommended ORR require immediate notification to the unaccompanied parenting child's attorney or child advocate, if appointed, of the separation. Some commenters noted the importance of services to facilitate unifications.

Additionally, commenters recommended that ORR incorporate provisions describing the ability of parenting unaccompanied children to continue making parental decisions on behalf of their child, as appropriate, including making informed decisions about health, diet, religion, and other matters. Commenters also recommended ORR require documentation of the recommendation to separate parenting unaccompanied children from their

children, as well as include provisions describing the swift unification of parenting unaccompanied children with their children where appropriate. Finally, some commenters recommended that separations on the basis of medical need be permitted only upon the recommendation of health care professionals, and the placement of parenting unaccompanied children, or their child, be as close as possible to where the underlying medical care is taking place.

Response: ORR's guiding policy is to maintain family unity of the parenting unaccompanied child and their child. ORR wants to clearly state that it would not separate a parenting unaccompanied child from their own child absent compelling circumstances where the life or safety of a child is at risk or the parent or child needs hospitalization or specialized care. Having said this, the commenters raised concerns that have led ORR to conclude that further policy development is needed to address the extreme circumstances noted in the NPRM, and therefore, ORR is not adopting § 410.1108(a) as proposed in the NPRM. Instead, ORR is codifying its general policy at § 410.1108(a) that ORR shall accept referrals for placement of parenting unaccompanied children who arrive with children of their own to the same extent that it receives referrals of other unaccompanied children and shall prioritize placing and keeping the parent and child together in the interest of family unity.

Comment: One commenter expressed concern about the requirement that the public benefits and services for U.S. citizen children of unaccompanied parenting children must be utilized and exhausted to the greatest extent practicable before utilizing ORR-funded services. Specifically, the commenter expressed concern that delays in public benefit applications, or lack of eligibility for services, could impede these children from timely accessing medical and psychiatric services while in ORR care and custody. To address this concern, the commenter recommended ORR clarify in the final rule that public benefits and services shall be exhausted to the greatest extent practicable before utilizing ORR-funded services unless doing so causes a delay or material change in the quality of necessary medical or psychiatric treatment of the child.

Response: ORR does not expect that delays in public benefit applications and ineligibility for services would impede the ability of a child of an unaccompanied parenting child to access medical and mental health services. ORR will monitor implementation of this regulation for any unintended consequences and as needed, will consider the commenter's recommendation for future policymaking.

Final Rule Action: For the reasons stated, ORR is revising § 410.1108(a) to state ''ORR shall accept referrals for placement of parenting unaccompanied children who arrive with children of their own to the same extent that it receives referrals of other unaccompanied children and shall prioritize placing and keeping the parent and child together in the interest of family unity.'' ORR is not finalizing § 410.1108(a)(1) through (3) as proposed in the NPRM. Otherwise, it is finalizing § 410.1108 as proposed in the NPRM.

Section 410.1109 Required Notice of Legal Rights

ORR proposed in the NPRM at § 410.1109(a), that it would be required to promptly provide each unaccompanied child in its custody with the information described in § 410.1109(a)(1) through (3) in a language and manner the unaccompanied child understands (88 FR 68926 through 68927). First, ORR proposed in the NPRM at § 410.1109(a)(1), to require that unaccompanied children in ORR custody be promptly provided with a State-by-State list of free legal service providers compiled and annually updated by ORR and that is provided to unaccompanied children as part of a Legal Resource Guide for unaccompanied children. This requirement is consistent with TVPRA at 8 U.S.C. 1232(c)(5) (requiring that HHS ''ensure, to the greatest extent practicable and consistent with section 292 of the Immigration and Nationality Act (8 U.S.C. 1362), that all unaccompanied alien children who are or have been in the custody of the Secretary or the Secretary of Homeland Security, and who are not described in subsection (a)(2)(A), have counsel to represent them in legal proceedings or matters and protect them from mistreatment, exploitation, and trafficking,'' and that to the greatest extent practicable HHS ''make every effort to utilize the services of pro bono counsel who agree to provide representation to such children without charge.''). In addition, the requirement is consistent with the HSA at 6 U.S.C. 279(b)(1)(I) (requiring ORR to compile, update, and publish ''at least annually a State-by-State list of professionals or other entities qualified to provide guardian and attorney representation services for unaccompanied alien children.''). ORR noted that the list of free legal service providers may also be compiled and updated by an ORR contractor or grantee.

ORR proposed in the NPRM at § 410.1109(a)(2), that it would also be required to provide the following explanation of the right of potential review: ''ORR usually houses persons under the age of 18 in the least restrictive setting that is in an unaccompanied child's best interest, and generally not in restrictive placements (which means secure facilities, heightened supervision facilities, or residential treatment centers). If you believe that you have not been properly placed or that you have been treated improperly, you may call a lawyer to seek assistance. If you cannot afford a lawyer, you may call one from the list of free legal services given to you with this form.'' ORR noted in the NPRM that this requirement updates language described in the requirement to deliver a similar notice under Exhibit 6 of the FSA,[128] to reflect current placement requirements detailed in this rule. The FSA language, for example, refers to the former INS, instead of ORR, and to ''detention facilities'' rather than restrictive settings or placements.

ORR also proposed at § 410.1109(a)(3) that a presentation regarding their legal rights would be provided to each unaccompanied child as provided under § 410.1309(a)(2). ORR referred readers to § 410.1309(a) for additional information regarding this presentation. ORR stated that it would take appropriate steps to ensure that the information it presents to unaccompanied children is communicated effectively to individuals with disabilities, including through the provision of auxiliary aids and services as required by section 504 and HHS's implementing regulations at 45 CFR 85.51. ORR also stated that it would take reasonable steps to ensure that individuals with limited English proficiency have a meaningful opportunity to access information and participate in ORR programs, including through the provision of interpreters or translated documents. ORR requested comments on steps ORR should take to ensure that it provides effective communication to unaccompanied children who are individuals with disabilities. ORR also requested comment on steps ORR should take to ensure meaningful access to unaccompanied children who are limited English proficient regarding information about and participation in ORR programs.

Finally, ORR proposed in the NPRM that under § 410.1109(b), consistent with ORR's existing policy, ORR shall not engage in retaliatory actions against

legal service providers or any other practitioner because of advocacy or appearance in an action adverse to ORR. ORR proposed in the NPRM this text, notwithstanding the general presumption that government agencies and officials act with integrity and regularity,[129] to further express ORR's intent to promote and protect unaccompanied children's ability to access legal counsel. As noted below, in this final rule, ORR is deleting § 410.1109(b) because it is redundant of § 410.1309(e). For discussion regarding the availability of administrative review of ORR placement decisions, ORR referred readers to subpart J.

Comment: One commenter recommended that proposed § 410.1109(a)(1) (which requires that ORR provide each child in its custody with a State-by-State list of free legal service providers compiled and annually updated by ORR) be strengthened by adding that information will also be made accessible by other means, and not solely via a printed list. The commenter cautioned that printed lists that require regular updating become quickly outdated and that accessibility of written information may be hindered for children with limited literacy. In addition, the commenter noted that many unaccompanied children communicate and receive information via WhatsApp, Facebook Messenger, or other apps. Finally, the commenter noted that supplementary means of making information accessible, such as through The International Rescue Committee's ORR-funded ImportaMi program, have been very effective for ensuring children's greater access to critical information.

Response: ORR appreciates the commenter's recommendations and will consider making the list required under § 410.1109(a)(1) accessible by electronic means as well as enhancing access to such information. The specific requirement at § 410.1109(a)(1) for a list does not preclude ORR from making this information available through other means as there are continuing developments in technologies.

Comment: One commenter recommended that § 410.1109 be more precise so that the unaccompanied child is proactively assigned a lawyer or authorized immigration advocate at the Government's expense and a translator to explain and act in the child's best interest.

Response: As described at § 410.1109(a)(1), ORR shall provide each unaccompanied child in its custody, in a language and manner the unaccompanied child understands, with a State-by-State list of free legal service providers compiled and annually updated by ORR and that is provided to unaccompanied children as part of a Legal Resource Guide for unaccompanied children. ORR refers readers to the discussion of §§ 410.1306 and 410.1309 in this final rule for more information about language access services (including translator services) and legal services available to unaccompanied children.

Comment: Several commenters stated that proposed § 410.1109(a)(2) provides for a notice of rights that includes some language similar to FSA Exhibit 6 but omits providing a statement of the right to ask a Federal judge to review the child's case, and thus recommended that the final rule include a statement informing the unaccompanied child of the right to seek review of a placement determination or noncompliance with FSA Exhibit 1 standards in a United States District Court with jurisdiction. The commenters noted that the preamble states the proposed rule does not expressly provide for judicial review of placement or compliance because a regulation cannot confer jurisdiction on a Federal court (88 FR 68975). However, the commenters contended that this limitation is not an obstacle to informing children of their right to potential judicial review in a court with jurisdiction and venue.

Response: Section 410.1109(a)(2) provides an explanation of the right to contact a lawyer to receive advice about challenging a placement determination or improper treatment. As noted by the commenters, the language in § 410.1109(a)(2) is slightly different than the language in FSA Exhibit 6. The final rule language, however, more accurately accounts for recent changes in the law and current placement requirements. For instance, as a result of the *Lucas R.* case, ORR now has a nationwide and more robust process for administrative review of restrictive placements which unaccompanied children may avail themselves of as discussed further in § 410.1902. At the time the FSA was approved, no such administrative review existed. Unaccompanied children are also entitled to a risk determination hearing in some cases, as discussed further in § 410.1903. FSA Exhibit 6 simply advised that the child ''may ask a federal judge to review [their] case'' and ''may call a lawyer to help [them] do this.'' The final rule recognizes the complexities of the current process and advises that the child ''may call a lawyer to seek assistance and get advice about your rights to challenge this action.'' During that call, the lawyer would be able to explain to the child the placement review panel process detailed in § 410.1902, or the risk determination hearing process in § 410.1903, for example, or other potential avenues for relief. ORR believes that the explanation of the right of potential review provided in § 410.1109(a)(2) is more accurate than the language in FSA Exhibit 6.

Comment: Many commenters recommended that ORR take additional steps and that the rule include additional details to ensure adequate communication assistance and access so that unaccompanied children understand their legal rights. Specifically, these commenters recommended that ORR take the following steps to ensure adequate communication access to unaccompanied children with disabilities: (1) Identify community members who can facilitate communication with children with disabilities (such as sign language interpreters, advocates for persons with disabilities, inclusive education or special education teachers, or other caregivers of children with disabilities, or speech therapists); (2) For children with visual disabilities, describe the surroundings and introduce people present, and ask permission if offering to guide or touch the child or his or her assistive devices, such as wheelchairs or white canes; (3) For children with hearing disabilities, provide sign language interpreters and use visual aids; (4) If the child has difficulty communicating or understanding messages (such as children with disabilities), ensure the use of clear verbal communication and simple language, ask children to repeat information back and repeat as many times as necessary, in different ways and check for their understanding; (5) For children for whom there are concerns regarding capacity to make decisions regarding their case, ensure that children are quickly referred for a child advocate.

Response: ORR thanks commenters for their recommendations. As proposed, under § 410.1109(a)(3), ORR will provide unaccompanied children a presentation regarding their legal rights as provided under § 410.1309(a)(2). In providing this presentation, ORR will take appropriate steps to ensure that the information it presents to unaccompanied children is communicated effectively to children with disabilities, including through the provision of auxiliary aids and services as required by section 504 and HHS's implementing regulations at 45 CFR 85.51. ORR will also take reasonable steps to ensure that individuals with limited English proficiency have a

meaningful opportunity to access information and participate in ORR programs, including through the provision of interpreters or translated documents. ORR appreciates the specific steps recommended by commenters and will consider including these recommendations in future policymaking. ORR refers readers to proposed § 410.1309(a) for additional information regarding the legal rights presentation.

Comment: One commenter recommended that § 410.1109(a)(3) include a clarification that the legal rights presentation is funded and provided through a contracted provider separate from the care provider facility and that this must be provided within a certain number of days.

Response: Section 410.1309(a)(2)(A), as finalized in this rule, provides that the legal rights presentation shall be provided by an independent legal service provider that has appropriate qualifications and experience, as determined by ORR, to provide such a presentation, and § 410.1309(a)(2)(B) provides the timeframe within which such presentation must be provided. As such, ORR does not believe it is necessary to include this information in § 410.1109, as finalized in this rule. ORR refers readers to proposed § 410.1309(a) for additional information regarding the legal rights presentation.

Final Rule Action: After consideration of public comments, ORR is amending the notice described at § 410.1109(a)(2), adding to the second sentence of the notice that an unaccompanied child may call a lawyer to seek assistance ''and to get advice about your rights to challenge this action.'' In addition, ORR is not finalizing § 410.1109(b) because it is redundant of § 410.1309(e). ORR believes that eliminating this redundancy will enhance clarity as to the applicable requirements regarding retaliation against legal service providers and prevent potential confusion.

Subpart C—Releasing an Unaccompanied Child From ORR Custody

Section 410.1200 Purpose of This Subpart

This subpart describes ORR's policies and procedures regarding release, without unnecessary delay, of an unaccompanied child from ORR custody to a vetted and approved sponsor. ORR proposed in the NPRM to define release in subpart A as the ORR-approved transfer of an unaccompanied child from ORR care and custody to a vetted and approved sponsor in the United States. Accordingly, ORR stated that release does not include discharge for other reasons, including but not limited to the child turning 18, attaining legal immigration status, or being removed to their home country.

As discussed in this subpart of the NPRM, once an unaccompanied child is released by ORR to a sponsor, that unaccompanied child is no longer in ORR's custody (88 FR 68927). The TVPRA distinguishes unaccompanied children in HHS custody from those released to ''proposed custodians'' determined by ORR to be ''capable of providing for the child's physical and mental well-being.'' [130] In addition, under the FSA, once an unaccompanied child is released to a sponsor, the sponsor assumes physical custody.[131] ORR stated in the NPRM that this subpart includes the process for determining that sponsors are able to care for the child's physical and mental well-being.

In the NPRM, subpart C also proposed notice and appeal processes and procedures that certain potential sponsors will be afforded (88 FR 68927). ORR proposed in the NPRM that parents or legal guardians of an unaccompanied child who are denied sponsorship of that unaccompanied child be afforded the ability to appeal such denials. ORR noted that because issues relating to procedures for non-parent relatives are currently in litigation in the *Lucas R.* case, they are not part of this rulemaking. For the purposes of this final rulemaking, ORR has made certain updates relevant to release of unaccompanied children, consistent with its discussion of the *Lucas R.* case at Section III.B.4 above.

Comment: One commenter stated the proposed rule is silent on planning for transition-age youth who will age-out from ORR custody. The commenter recommended that ORR develop plans for every unaccompanied child in its custody at least 60 days in advance of their 18th birthday, and the plans should identify safe placement, social support services, employment assistance, and public benefits. Additionally, the commenter recommended ORR develop plans in conjunction with the unaccompanied child and their families, track the plans to ensure effectiveness, and regularly review and evaluate the plans for any necessary changes.

Response: ORR thanks the commenter for their recommendations. ORR notes that under current policies, which are consistent with this final rule, it requires care provider facilities to create written plans regarding unaccompanied children expected to turn 18 while still in ORR custody. Consistent with ORR's current policies, each post-18 plan should, at a minimum, identify an appropriate non-secure placement for the child and identify any necessary social support services for the child. Additionally, the plan is to include an assessment and recommendation of any ongoing supporting social services the youth may require, an assessment of whether the youth is a danger to the community or risk of flight, identification of any special needs, and arrangements for transportation after the youth ages out to either the non-secure placement option or to DHS where appropriate. Such plans must be completed at least two weeks before an unaccompanied child turns 18. ORR will study the commenter's recommendations and may consider them for future policymaking.

Final Rule Action: After consideration of public comments, ORR is finalizing this section as proposed.

Section 410.1201 Sponsors to Whom ORR Releases an Unaccompanied Child

ORR proposed in the NPRM at § 410.1201 the sponsors to whom ORR may release an unaccompanied child and criteria that ORR employs when assessing a potential sponsor (88 FR 68927 through 68928). As discussed, the HSA makes ORR responsible for making and implementing placement determinations for unaccompanied children.[132] In addition to these statutory requirements, the FSA establishes a general policy favoring release of unaccompanied children to sponsors, and further describes a preferred order of release, which ORR has incorporated into its policies.[133]

Consistent with its statutory authority and the FSA, ORR proposed in the NPRM at § 410.1201(a) potential sponsors in order of release preference. ORR noted that this order of preference reflects its strong belief that, generally, placement with a vetted and approved family member or other vetted and approved sponsor, as opposed to placement in an ORR care provider facility, whenever feasible, is in the best interests of unaccompanied children. ORR proposed in the NPRM, at § 410.1201(a) to codify the following order of preference for release of unaccompanied children: (1) to a parent; (2) to a legal guardian; (3) to an adult relative; (4) to an adult individual or entity, designated by the parent or legal guardian as capable and willing to care for the unaccompanied child's well-being through a declaration signed by the parent or legal guardian under penalty of perjury before an immigration or consular officer, or through such

other document(s) that establish(es) to the satisfaction of ORR, in its discretion, the affiant's maternity, paternity, or guardianship; (5) to a standard program willing to accept legal custody of the unaccompanied child; or (6) to an adult individual or entity seeking custody, in the discretion of ORR, when it appears that there is no other likely alternative to long term custody and release to family members does not appear to be a reasonable possibility. ORR stated that possible scenarios in which ORR envisions (6) may be applicable include, for example, foster parents or other adults who have built or are building a relationship with an unaccompanied child while in ORR care, such as a teacher or coach, and in which it is possible to ensure that a healthy and viable relationship exists between the unaccompanied child and potential sponsor. However, under current ORR policy, care provider staff, contractors, and volunteers may not have contact with any unaccompanied children outside of the care provider facility beyond that necessary to carry out job duties while the child is in ORR care. ORR proposed in the NPRM at § 410.1202, as discussed below, sponsor suitability assessment process, which includes an assessment of the potential sponsor's previous and existing relationship with the unaccompanied child.

ORR proposed in the NPRM under § 410.1201(b), consistent with existing policy, that it would not disqualify potential sponsors based solely on their immigration status. In addition, ORR proposed in the NPRM that it shall not collect information on immigration status of potential sponsors for law enforcement or immigration enforcement related purposes. ORR stated that it will not share any immigration status information relating to potential sponsors with any law enforcement or immigration related entity at any time. ORR further stated that to the extent ORR does collect information on the immigration status of a potential sponsor, it would be only for the purposes of evaluating the potential sponsor's ability to provide care for the child (*e.g.,* whether there is a plan in place to care for the child if the potential sponsor is detained).

ORR proposed in the NPRM under § 410.1201(c), that, in making determinations regarding the release of unaccompanied children to potential sponsors, ORR shall not release unaccompanied children on their own recognizance.

Comment: Several commenters supported the proposal at § 410.1201(a) to prioritize placement with family members. One commenter appreciated the preference provided to family members, stating that placement with family members provides connection to the child's language, culture, and community. This commenter further recommended that ORR apply the principles of the Indian Child Welfare Act (ICWA) to the care and placement of unaccompanied children, ensuring their continued connection to their language, culture, traditions, and community. Another commenter recommended placing unaccompanied children with sponsors who are members of the Indigenous community from which the child originates and who understand the specific needs of an Indigenous child to ensure the child's welfare and rights are protected. One commenter specifically supported the proposed rule's presumption of unifying unaccompanied children with their parents because the commenter believed that it comports with international standards under Article 9 of the Convention on the Rights of the Child.

Response: ORR thanks the commenters for their recommendations, and believes that the potential sponsors prioritized under § 410.1201(a)(1) through (4) reflect the preference to place an unaccompanied child with a potential sponsor who will likely be able to provide a connection to the unaccompanied child's language, culture, and community by virtue of the fact that they are known to the unaccompanied child because they are a family member or legal guardian, or known to the unaccompanied child's parent or legal guardian. In reference to Indigenous children, ORR notes that ICWA does not govern the UC program. However, ORR notes that under current policies it considers the linguistic and cultural background of the unaccompanied child and sponsor.

Comment: A few commenters expressed strong support for the list of potential sponsors and order of release preference proposed at § 410.1201(a), stating that that it aligns with central principles of the FSA.

Response: ORR agrees that the list of potential sponsors and order of release preference proposed at § 410.1201(a) aligns with central principles of the FSA.

Comment: One commenter recommended that ORR explicitly state that unification with family is the primary goal for unaccompanied children whenever possible.

Response: ORR agrees that it is obligated to ensure that programs make prompt and continuous efforts toward family unification and release of children consistent with FSA paragraph 14 and the TVPRA,[134] and this remains unchanged in this final rule at § 410.1201(a). ORR also reiterates its strong belief, expressed in the NPRM, that placement with a vetted and approved family member or other vetted and approved sponsor, as opposed to continued placement in an ORR care provider facility, is generally in the best interests of unaccompanied children whenever feasible.[135]

Comment: One commenter was encouraged to see that ORR has explicitly included youth participation in decision-making as a foundational principle that applies to the care and placement of unaccompanied children in § 410.1003(d) and stated that this principle should also apply to releases to sponsors.

Response: ORR thanks the commenter for their recommendation and will take it into consideration in future policymaking in this area. ORR notes that § 410.1202(c) provides that ORR's sponsor suitability assessments shall take into consideration the wishes and concerns of the unaccompanied child.

Comment: Many commenters opposed the release of unaccompanied children to unrelated or distantly related sponsors. A few commenters expressed concern that non-relative or distant relative sponsors are not sufficiently vetted by ORR prior to release, which commenters believed could lead to increased risk of child trafficking and exploitation. One commenter recommended that ORR only release unaccompanied children to parents or legal guardians to ensure that unaccompanied children are not released to strangers, potential criminals, traffickers, and abusers. Several commenters expressed concern that proposed § 410.1201(b) could result in placement with unknown sponsors, without sufficient follow-up or enforcement to ensure children are protected from trafficking.

Response: ORR emphasizes its commitment to prevention of child trafficking and exploitation and believes that codifying these protective measures, many of which already exist in policy guidance, will strengthen its ability to do so. Specifically, ORR emphasizes that decisions to place a child with a sponsor are undertaken in accordance with its responsibility to ensure the safety and best interest of the child and only after the sponsor has been thoroughly vetted and approved by ORR, consistent with statutory requirements set forth in the TVPRA and further elaborated in this subpart. Consistent with the FSA, ORR agrees that priority should be given to a parent, legal guardian, or adult relative of the

child. However, as is also consistent with the FSA, in some cases individuals who are closely related to the child are either unable or unwilling to provide care. In such cases, ORR next prioritizes placement with another adult designated by the child's parent or legal guardian as verified by a signed declaration or other documentation that establishes a parental relationship per § 410.1201(a)(4)(i) through (ii). This usually necessitates that the individual is known to the parent or legal guardian and therefore is not a stranger. Furthermore, at § 410.1202(d), ORR stated that ORR may deny release to unrelated individuals who have applied to be a sponsor but who have no pre-existing relationship with the child or the child's family prior to the child's entry into ORR custody. Consistent with the FSA, ORR notes that a lack of a pre-existing relationship with the child would not categorically disqualify a potential sponsor, but lack of such relationship may be a factor in ORR's overall suitability assessment and when determining whether placing the child with a vetted and approved family member or other vetted and approved sponsor, as opposed to remaining in an ORR care provider facility, is in the best interests of the child. In addition, at § 410.1202(e), ORR provides that ORR shall consider the sponsor's motivation for sponsorship; the unaccompanied child's preferences and perspective regarding release to the potential sponsor; and the unaccompanied child's parent's or legal guardian's preferences and perspective on release to the potential sponsor, as applicable.

Comment: Many commenters expressed concern with proposed § 410.1201(a)(6), which may permit the release of unaccompanied children to potential sponsors with whom an unaccompanied child has built a healthy and viable relationship while in ORR care. The commenters believed that an unaccompanied child and a potential sponsor cannot develop a bond over 14–30 days that would be sufficient to be awarded custody and noted that ORR has not included bonding thresholds into any stage of the release process.

Response: ORR thanks the commenters for their concern. ORR first notes that § 410.1201(a)(6) is consistent with the FSA at paragraph 14. Further, ORR notes that it did not require a specific minimum timeframe to determine if there is a relationship between the child and prospective sponsor seeking custody because a decision on such a threshold alone is likely to be arbitrary. ORR notes that there are additional substantive factors to consider to ensure that a healthy and viable relationship exists between the unaccompanied child and potential sponsor. ORR notes that every prospective sponsor is subject to a sponsor suitability assessment under § 410.1203(d). Furthermore, at § 410.1202(d), ORR stated that ORR shall assess the nature and extent of the potential sponsor's previous and current relationship with the unaccompanied child, and the unaccompanied child's family, if applicable. Lack of a pre-existing relationship with the child does not categorically disqualify a potential sponsor, but lack of such a relationship may be a factor in ORR's overall suitability assessment. ORR emphasizes that the criteria for ensuring a healthy and viable relationship with a non-relative prospective sponsor only apply when a parent, guardian, or relative is unable or unwilling to sponsor within 30 days of the child being in ORR care. ORR believes that it is important to consider placements with non-relatives who are assessed as suitable sponsors to avoid the child's placement in institutional care for longer than necessary.

Comment: Several commenters expressed concern with the interpretation of ''standard program'' as proposed under § 410.1201(a)(5). Several commenters noted that the language in proposed § 410.1201(a) mirrors that of paragraph 14 of the FSA, except that paragraph (a)(5) refers to ''a standard program willing to accept legal custody'' as opposed to ''a licensed program willing to accept legal custody.'' These commenters expressed concern that the proposed rule's elimination of the FSA's ''licensed program'' requirement in the release context would allow an unaccompanied child to be released from ORR custody for long-term placement in a facility that is not licensed or monitored by any State. Commenters further stated that it is not clear what ''a standard program willing to accept legal custody'' means in the release context because the proposed rule defines ''standard program'' within the framework of ORR care providers.

Response: ORR thanks the commenters for their input. ORR notes that it is updating the language at § 410.1201(a)(5) of this final rule to replace ''standard program,'' as used in the NPRM, with ''licensed program,'' consistent with the FSA.

Comment: Many commenters expressed support for § 410.1201(b). Many commenters stated that disclosing a sponsor's immigration status to immigration authorities or other law enforcement agencies, including DHS, could have a chilling effect on an eligible individual who wants to sponsor a child and may lead to a prolonged stay in ORR custody because qualified sponsors would be discouraged from coming forward to care for the child. One of these commenters further stated that this proposal would encourage more suitable individuals, including relatives, with cultural competency to sponsor a child without fear of adverse immigration action.

Response: ORR thanks the commenters for their feedback.

Comment: Many commenters, while strongly supporting proposed § 410.1201(b), made recommendations that they believed would strengthen the provision. First, these commenters urged ORR to clarify that it will not share any sponsor information with law enforcement or immigration enforcement entities except as needed to complete background checks or by judicial order. In addition, the commenters recommended that ORR make clear that both the unaccompanied child's and sponsor's personal information and ORR case files (including counseling and case management notes and records) will be maintained separately from the child or sponsor's immigration files (''A-files'') and will be provided to law enforcement or immigration enforcement only at the request of the individual (child or sponsor) or by judicial order. The commenters explained that without this protection, children and their sponsors' engagement with ORR in the unification process could easily be used to undermine sponsor placements that would otherwise be safe and stable. The commenters further noted that such protections would be consistent with ORR's clear mandate as a child welfare entity rather than as an arm or extension of law or immigration enforcement entities. One commenter stated that while they support ORR's decision to not ask about immigration status of a potential sponsor, it was concerned about ORR's ability to effectively implement this protection. Specifically, the commenter stated that ORR's ability to verify a sponsor's employment essentially serves as an immigration status verification, which it believed poses a risk for undocumented sponsors if their employers are contacted by ORR. The commenter was concerned that this provision will prevent potential sponsors from coming forward to take custody of an unaccompanied child. One commenter recommended that ORR include a specific and clear exception to share information with law enforcement

in the case a sponsor is a trafficker or could otherwise harm the child.

Response: ORR appreciates the commenters' recommendations. ORR notes that it proposed in the NPRM that it shall not collect information on immigration status of potential sponsors for law enforcement or immigration enforcement related purposes (88 FR 68928). ORR further stated in this paragraph that it will not share any immigration status information relating to potential sponsors with any law enforcement or immigration related entity at any time. To the extent ORR does collect information on the immigration status of a potential sponsor, it would be only for the purposes of evaluating the potential sponsor's ability to provide care for the child (*e.g.,* whether there is a plan in place to care for the child if the potential sponsor is detained). ORR prioritizes the prevention of human trafficking and the best interests of children but does not believe it is necessary to establish a specific exception in this section to allow disclosures to law enforcement if there is evidence of human trafficking because ORR already has policies in place to refer such cases to the proper Federal agency. Current ORR policies require the ORR NCC to report, as appropriate, matters of concern to ORR, local law enforcement, and/or local child protective services, and refers potential victims of human trafficking or smuggling to OTIP, and that a child be referred to a child advocate for support if a historical disclosure is made related to labor or sex trafficking. ORR further notes that the purpose of verification of the identity and income of the individuals offering support is to ensure the care and safety of the child and not to confirm immigration status. As a matter of practice, ORR notes that it does not routinely contact employers unless that information is provided as a source of verification of income on a sponsor application. ORR also notes that records in the case file are only related to services provided and case management of the child and not the child or sponsor's immigration status and are required to be protected from unauthorized disclosure. ORR does not maintain ''A-files'' on either unaccompanied children or potential sponsors, as that is a function performed by other Federal agencies, which are responsible for immigration enforcement.

Comment: One commenter expressed support for proposed § 410.1201(b), noting that it would prohibit use of sponsors' information in ways that are contrary to children's best interests and enable ORR to remain focused on the well-being and safety of unaccompanied children and its child protection mission, rather than diverting this critical attention to immigration enforcement purposes that are the purview of DHS. This commenter further urged ORR to add provisions codifying restrictions on the sharing of information or notes from mental health counseling provided to children in ORR custody, noting that past sharing of ORR information with ICE or EOIR has undermined children's rights, including the right to due process, as information collection intended to help identify children's protection needs and to aid them in healing from trauma were misused against children in removal proceedings.

Response: ORR thanks the commenter for their support and appreciates the commenter's recommendations. Safeguarding and maintaining the confidentiality of unaccompanied children's case file records is critical to carrying out ORR's responsibilities under the HSA and the TVPRA. ORR notes that confidentiality of the child's records including mental health treatment are protected from disclosure at care provider facilities, and PRS providers may not release unaccompanied children's case file records or information contained in the case files for purposes other than program administration without prior approval from ORR. As stated at finalized § 410.1303(h)(2), however, limited disclosures of mental health treatment are authorized for program administration purposes, such as to expeditiously provide emergency services and routine treatment, without waiting for approval from ORR.

Comment: Many commenters opposed proposed § 410.1201(b). Many commenters believed this information should be used to make sponsor assessments and should be shared with other agencies to protect unaccompanied children. One commenter expressed concern that the proposed provision could result in placing a child with a person currently under a deportation order, or not communicating to law enforcement that a potential sponsor had been ordered removed due to criminal convictions or illegally re-entry. Another commenter opposed proposed § 410.1201(b), stating that immigration status should be an important part of vetting sponsors to ensure safety of unaccompanied children and compliance with immigration proceedings. One commenter stated that the proposed rule should facilitate, not restrict, information sharing between Federal Government agencies and State and local law enforcement and that the proposed restrictions at § 410.1201(b) are overbroad.

Response: ORR thanks the commenters for their concern, and emphasizes that assessment of suitability of a sponsor includes a thorough background check to assess whether the sponsor has a criminal history, or any other factors that call into question the suitability of the sponsor. ORR also notes that at § 410.1210(i)(4)(i), this final rule also requires PRS providers concerned about an unaccompanied child's safety and well-being to document and report a Notification of Concern (NOC) to ORR and, as applicable, to other investigative agencies (*e.g.,* law enforcement or child protective services). However, ORR notes that it is not an immigration enforcement agency, and does not have statutory authorization to investigate the immigration status of potential sponsors. The HSA and the TVPRA do not make any mention of a sponsor's potential immigration status as a prerequisite to receive an unaccompanied child into their custody and do not imbue ORR with the authority to inquire into immigration status as a condition for sponsorship. As a result, to the extent ORR does collect information on the immigration status of a potential sponsor, it would be only for the purpose of evaluating the potential sponsor's ability to provide care for the child (*e.g.,* whether there is a plan in place to care for the child if the potential sponsor is detained). ORR does not share immigration status information relating to potential sponsors with any law enforcement or immigration entity at any time. In reference to the comment concerning misrepresentation of an individual's age, in cases where ORR reasonably suspects that an individual in its custody is not a minor and subsequently determines that such individual has reached the age of 18, ORR follows all required procedures including referral for a transfer evaluation with DHS/ICE. If the individual is determined to be an adult based on the age determination, the individual is transferred to the custody of DHS/ICE.

Comment: One commenter recommended that ORR amend its proposal to prioritize uniting unaccompanied children with their families in their home countries. This commenter stated that ORR should work with DHS to ensure that all unaccompanied children are united safely in their home countries, stating that repatriating and uniting unaccompanied children in their home

countries, rather than in the United States, is the most humane policy that maintains the integrity of the immigration system, consistent with Federal immigration law. The commenter further stated that this policy would eliminate any incentive to send minors alone or with smugglers to cross the border and mitigate the humanitarian crisis that has strained the immigration system's limited resources. Furthermore, the commenter stated that amending this proposal to prioritize the repatriation of unaccompanied children furthers congressional intent in enacting the TVPRA as set forth at 8 U.S.C. 1232(a)(5).

Response: ORR acknowledges the commenter's concern, and notes that unaccompanied children generally remain in ORR custody until they are released to a parent or other sponsor in the United States, are repatriated to their home country by DHS, obtain legal status, or otherwise no longer meet the statutory definition of unaccompanied child (*e.g.,* turn 18). ORR notes that it is not an immigration enforcement agency and is not authorized to make decisions regarding repatriating individuals in their country of origin; such decisions are in the purview of DHS and DOJ. In cases where appropriate, ORR may unite children with a parent abroad. ORR believes, consistent with its statutory responsibilities, that placement with a vetted and approved family member or other vetted and approved sponsor is generally in the best interest of the child. Subject to vetting and approval, if a parent or legal guardian is already in the United States, ORR does not believe delaying placement with a sponsor for the sake of uniting children with a parent abroad would necessarily be in the best interest of the child.

Comment: A few commenters commented on the verification of familial relationships under proposed § 410.1201. A few commenters recommended that ORR explain how it will verify familial relationships without DNA testing. Another commenter recommended that ORR amend proposed § 410.1201 to make any adult who claims a familial relationship with an unaccompanied child but fails a DNA test or provides false identity documentation, barred from sponsoring an unaccompanied child.

Response: ORR thanks the commenters for their recommendations. ORR recognizes the utility of DNA testing in the context of law enforcement activities undertaken by other agencies. ORR notes that the TVPRA requires ORR's sponsor suitability determination to include, ''at a minimum,'' verification of the custodian's identity and relationship to the child, if any, as well as an independent finding that the individual has not engaged in any activity that would indicate a potential risk to the child.[136] However, the use of DNA testing raises multiple issues and is outside the scope of this rule. ORR does not agree that it should implement a regulation barring any sponsor who claims a familial relationship with a child that cannot be proven through analysis of DNA since ORR accepts other evidence of a familial or pre-existing relationship, including a child's birth certificate and sponsor identity documentation. While DNA testing may establish a biological relationship, not all familial relationships are biological. While a parent or other adult relatives are given priority when evaluating release to a sponsor, ORR also releases children to willing and able adults designated by the child's parent or guardian and vetted and approved by ORR when there is no parent or other adult relative willing or able to care for the minor's well-being in order to protect the best interests of the child. In reference to false identity documentation, § 410.1202 provides that to ensure the best interest of the child, ORR may require a positive result in a suitability assessment of an individual or program prior to releasing an unaccompanied child to that individual or entity, which includes discretion to deny sponsorship if identity cannot be verified. Under current ORR policy, in the case of a potential sponsor who is neither a parent or legal guardian, nor a close relative, and lacks a bona fide relationship to the child, if a sponsor, household member, or adult caregiver provides any false information in the sponsor application and/or accompanying documents or submits fraudulent documents for the purposes of obtaining sponsorship of the child, ORR will report the incident to HHS Office of the Inspector General (OIG).

Final Rule Action: After consideration of public comments, ORR is finalizing the language of § 410.1201 as proposed in the NPRM.

Section 410.1202 Sponsor Suitability

Before releasing an unaccompanied child to a sponsor, ORR has a responsibility to ensure that the sponsor is capable of providing for the child's physical and mental well-being and has not engaged in activity that would indicate a potential risk to the child.[137] Further, under the FSA, ORR may require a positive result in a suitability assessment of an individual or program prior to releasing an unaccompanied child to that individual or entity, which may include an investigation of the living conditions in which the unaccompanied child would be placed, the standard of care the child would receive, verification of the identity and employment of the individuals offering support, interviews of members of the household, and a home visit. The FSA also provides that any such assessment should also take into consideration the wishes and concerns of the minor. In the NPRM, ORR stated that it believes this assessment of suitability may also include review of the potential sponsor's or adult household member's past criminal history, if any, and fingerprint background checks, as discussed subsequently in this section (88 FR 68928).

Consistent with statutory authorities, the FSA, and existing policy, ORR proposed in the NPRM at § 410.1202(a) to require potential sponsors to complete an application package to be considered as a sponsor for an unaccompanied child (88 FR 68928). ORR stated that an application package will be made available in the potential sponsor's native or preferred language from either the care provider facility or from ORR directly.

Also consistent with existing policy, ORR proposed in the NPRM at § 410.1202(b) to establish that suitability assessments will be conducted for all potential sponsors prior to release of a child to such a potential sponsor and described the minimum requirements for a suitability assessment (88 FR 68928). Consistent with ORR's responsibilities under 8 U.S.C. 1232(c)(3)(A), and with its current policies, ORR stated that suitability assessments would, at minimum, consist of review of the potential sponsor's application package described in § 410.1202(a), including verification of the potential sponsor's identity and the potential sponsor's relationship to the child. ORR further stated that it may consult with the issuing agency (*e.g.,* consulate or embassy) of the sponsor's identity documentation to verify the validity of the sponsor identity document presented and may also conduct a background check on the potential sponsor.

ORR proposed in the NPRM at § 410.1202(c) through (i) additional requirements or discretionary provisions related to completion of a suitability assessment (88 FR 68928 through 68929). These proposed requirements were in addition to those described in the TVPRA at 8 U.S.C. 1232(c)(3)(A) (describing ''minimum'' requirements for suitability assessments), and ORR proposed such

requirements in the NPRM consistent with its authority to implement policies regarding the care and placement of unaccompanied children as described at 6 U.S.C. 279(b)(1)(E). ORR proposed in the NPRM under § 410.1202(c) to utilize discretion to evaluate the overall living conditions into which the unaccompanied child would be placed upon release to the potential sponsor. Proposed paragraph (c) therefore provided that ORR may interview members of the potential sponsor's household, conduct a home visit or home study pursuant to § 410.1204, and conduct background and criminal records checks, which may include biometric checks such as fingerprint-based criminal record checks on a potential sponsor and on adult household members, consistent with the TVPRA requirement to make an independent finding that the potential sponsor has not engaged in any activity that would indicate a potential risk to the child. ORR proposed in the NPRM at § 410.1202(c) to permit ORR to verify the employment, income, or other information provided by the individuals offering support. The TVPRA at 8 U.S.C. 1232(c)(3) does not require a verification of the sponsor's employment. However, ORR proposed in the NPRM including this as a permissible consideration as part of the suitability assessment to ensure sponsors can show they have resources to provide for the child's physical and mental well-being upon release. ORR stated in the NPRM that although it believes this information may be relevant, it would not automatically deny an otherwise qualified sponsor solely on the basis of low income or employment status (either formal or informal). Finally, ORR proposed in the NPRM under § 410.1202(c) to require that any suitability assessment also take into consideration the wishes and concerns of the unaccompanied child, consistent with FSA paragraph 17.

As part of a suitability assessment and the determination whether a potential sponsor is capable of providing for an unaccompanied child's physical and mental well-being, ORR proposed in the NPRM including additional assessment components to evaluate the environment into which the unaccompanied child may be placed. ORR proposed in the NPRM under § 410.1202(d) to assess the nature and extent of the sponsor's previous and current relationship with the unaccompanied child and, if applicable, the child's family. ORR proposed in the NPRM that it would be able to deny release of an unaccompanied child to unrelated sponsors who have no pre-existing relationship with the child or the child's family prior to the child's entry into ORR custody. ORR stated that it intended that this language be read consistently with proposed § 410.1201(a)(4), such that ORR may release an unaccompanied child to an individual with no pre-existing relationship with the child if the individual is designated by the child's parent or legal guardian, but ORR would not be required to do so. Additionally, ORR proposed in the NPRM under § 410.1202(e) to consider the sponsor's motivation for sponsorship; the opportunity for the potential sponsor and unaccompanied child to build a healthy relationship while the child is in ORR care; the unaccompanied child's preferences and perspective regarding release to the sponsor; and the unaccompanied child's parent's or legal guardian's preferences and perspective on release to the sponsor, as applicable.

ORR proposed in the NPRM at § 410.1202(f) considering risks and concerns specific to the individual child that should be evaluated in conjunction with the child's current functioning and strengths (88 FR 68929). ORR proposed in the NPRM that these shall include risks or concerns such as: (1) whether the unaccompanied child is a victim of sex or labor trafficking or other crime, or is considered to be at risk for such trafficking due to, for example, observed or expressed current needs (*e.g.,* expressed need to work or earn money because of indebtedness or financial hardship); (2) the child's history of involvement with the criminal justice system or juvenile justice system (including evaluation of the nature of the involvement, such as whether the child was adjudicated and represented by counsel, and the type of offense), or gang involvement; (3) the child's history of behavioral issues; (4) the child's history of violence; (5) any individualized needs, including those related to disabilities or other medical or behavioral/mental health issues; (6) the child's history of substance use; and/or (7) the child is either a parent or is pregnant.

ORR proposed in the NPRM at § 410.1202(g) a non-exhaustive list of factors that it would consider when evaluating a potential sponsor's ability to ensure the physical or mental well-being of a child (88 FR 68929). ORR proposed in the NPRM considering the potential sponsor's strengths and resources in conjunction with any risks or concerns including: (1) the potential sponsor's criminal background; (2) the potential sponsor's current illegal drug use or history of abuse or neglect; (3) the physical environment of the home; and/or (4) other child welfare concerns. ORR noted that the term ''other child welfare concerns'' is intentionally broad to allow for discretion and notes that the term may include the well-being of any other unaccompanied children currently or previously under the potential sponsor's care. Pursuant to section 504 and HHS's implementing regulations at 45 CFR part 85, ORR noted that it shall not discriminate against a qualified individual with a disability when evaluating their capability to serve as a sponsor. In addition, ORR noted that it does not consider these listed risks or concerns as necessarily disqualifying to potential sponsorship. However, in keeping with its responsibility to ensure the safety and well-being of the child, ORR must assess the extent to which any of these risks or concerns could be detrimental to, or seriously impede a potential sponsor's capability to, provide for the unaccompanied child's physical and emotional well-being. ORR must give thorough consideration to the sponsor's specific situation and whether reasonable adaptations could be made to a release plan to ensure the unaccompanied child's safety and well-being as required by proposed § 410.1202(i).

ORR proposed in the NPRM at § 410.1202(h) to assess the potential sponsor's understanding of the unaccompanied child's needs, plan to provide the child with adequate care, supervision, and housing, understanding and awareness of responsibilities related to compliance with the unaccompanied child's immigration court proceedings, school attendance, and U.S. child labor laws, as well as awareness of and ability to access community resources (88 FR 68929).

Finally, ORR proposed in the NPRM at § 410.1202(i) to develop a release plan that could enable a safe release to the potential sponsor through the provision of post-release services, if needed (88 FR 68929).

Comment: Several commenters supported the proposed changes to the sponsor suitability assessment, stating the additional vetting process ensures specific standards and services are met, considers the unaccompanied child's wishes and concerns in the sponsor suitability assessment, and ensures the child's safety. One commenter noted that these changes recognize the right of the child's effective participation in this process and comply with international standards.

Response: ORR thanks the commenters for their comments.

Comment: One commenter supported the increased focus on the vulnerability of unaccompanied children to child labor exploitation, specifically the proposal requiring an unaccompanied child's potential sponsor to demonstrate understanding and awareness of the sponsor's responsibilities related to compliance with the child's immigration court proceedings, school attendance, and U.S. child labor laws. The commenter stated these proposals will ensure unaccompanied children and their sponsors are informed of their rights with respect to safe and appropriate work for children.

Response: ORR thanks the commenter for their feedback.

Comment: A few commenters expressed concern that the potential sponsor suitability assessment criteria are vague, unclear, may not directly relate to the safety of the unaccompanied child, and may be overly burdensome and prohibitive to potential sponsors. One of these commenters recommended ORR evaluate the list of sponsor suitability assessment criteria and remove all those not directly related to the safety of the unaccompanied child. Another commenter recommended ORR provide clear and predictable criteria to assess sponsor suitability applications to lead to clear and predictable decisions.

Response: ORR believes that all the factors considered are directly related to ORR's statutory responsibility under the TVPRA to make the requisite determination whether a potential sponsor is capable of providing for the unaccompanied child's physical and mental well-being.[138] The potential sponsor is subjected to an evaluation of their criminal background, substance use or history of abuse or neglect; the physical environment of the home; and/or other child welfare concerns. ORR added other child welfare concerns to account for policy changes or individualized needs that this rule may not anticipate. ORR studied best practices in child welfare in other contexts and adapted them to ORR's unique context involving the care of unaccompanied children, specifically with respect to evaluating the unaccompanied child's current functioning and strengths in conjunction with any risks or concerns such as sex or labor trafficking, and any individualized needs, including those related to disabilities or other medical or behavioral/mental health issues. ORR will continue to study and monitor the effectiveness of these suitability assessment criteria as they are implemented and may engage in future policymaking to continue to improve them, as appropriate.

Comment: Several commenters had recommendations for verifying the sponsor's suitability, including identification documents, additional scrutiny of the sponsor's application, and other requirements. A few commenters recommended verifying the sponsor's identification with the issuing Government. A few commenters also recommended other State, local, or Federal agencies verify the sponsors' identity. One commenter recommended that State and local law enforcement should have a role in verifying sponsors, stating this would increase accountability. Another commenter also recommended that DHS conduct sponsor vetting. One commenter recommended a single entity conduct the verification process for the validity of sponsor identity documents and verify identity documents with the issuing Government when there is doubt. Another commenter recommended routinely validating the sponsor's identity documentation with the issuing agency, consulate, or embassy, regardless of whether there is doubt. One commenter recommended requiring the sponsor to present at least two identity documents. One commenter recommended a requirement that a potential sponsor who is not a biological parent or court-ordered legal guardian submit themselves and the unaccompanied child to a family court for a formal legal determination.

Response: ORR proposed in the NPRM at § 410.1202(d) that it would conduct a suitability assessment to verify at a minimum the sponsor's identity among other elements in the potential sponsor's application package. ORR notes that even though it does not specify required types or the quantity of identification documents that must be submitted, in the NPRM ORR proposed that, as appropriate in individual cases, it may consult with the issuing agency (*e.g.,* consulate or embassy) of the sponsor's identity documentation to verify the validity of the sponsor identity document presented and may also conduct a more extensive background check on the potential sponsor (88 FR 68928). However, ORR believes that requiring all of these approaches in every case would be unnecessary and would likely result in unnecessary delays in placement of the child with a suitable sponsor, particularly when ORR is often able to verify identity without consulting with other agencies. ORR notes that as the Federal custodian it—as opposed to local family courts—is the agency statutorily responsible under the TVPRA for making suitability determinations of potential sponsors seeking the release of unaccompanied children to them.[139]

Comment: One commenter recommended that potential sponsors provide evidence they are respected and responsible citizens, and if they have previously sponsored children, how many they have sponsored, records of sponsorship, the location of the children, and the children's current health and well-being.

Response: ORR notes that the TVPRA only requires that potential sponsors be determined to be capable of providing for the physical and mental well-being of the unaccompanied children that they sponsor. ORR emphasizes that, consistent with the TVPRA, the suitability assessment required at § 410.1202 will include consideration of the following: the potential sponsor's strengths and resources in conjunction with any risks or concerns that could affect their ability to function as a sponsor including: (1) criminal background; (2) substance use or history of abuse or neglect; (3) the physical environment of the home; and/or (4) other child welfare concerns, which may include the well-being of other children currently or previously under the potential sponsor's care. ORR further notes that, as required under § 410.1204 and consistent with existing policy, ORR will conduct a home study before releasing any child to a potential non-relative sponsor who is seeking to sponsor multiple children or who has previously sponsored children.

Comment: Several commenters emphasized the importance of thoroughly vetting sponsors to ensure the safety and well-being of unaccompanied children. However, some of these commenters did not support the potential sponsor suitability assessment process at § 410.1202 because commenters believed the verification process is inadequate to protect children from sponsors who may abuse, exploit, or victimize them. Additionally, commenters expressed concern that the sponsors may submit false or invalid documentation, that ORR may be unable to verify the relationship between the unaccompanied children and the sponsors, and that ORR may be unable to detect sponsor fraud. One commenter did not support the sponsor suitability proposals because they think the measures provide too much discretion in evaluating suitability, require a minimal review of the potential sponsor's application, and place too much trust in the potential sponsor's

statements in the application without independent verification.

Response: ORR notes that verification of documentation submitted in the sponsor application may include an investigation of the living conditions and standards of care in which the unaccompanied child would be placed, verification of the identity and employment of the individuals offering support, interviews of members of the household, and a home visit. ORR also notes that § 410.1202(c), consistent with the FSA, provides that a sponsor suitability assessment should take into consideration the wishes and concerns of the minor. ORR notes that all assessments of suitability include review of past criminal history, if any, and a background check, which may include fingerprinting of the sponsor and household members.

Comment: Several commenters expressed concern that the proposed background checks are insufficient to vet sponsors and recommended stricter background checks, including an FBI fingerprint check, for all potential sponsors. One commenter recommended background checks of abductions or alerts as part of the sponsor's suitability assessment, while another commenter recommended local law enforcement conduct investigations of sponsors. In addition to recommending more stringent background checks, one commenter recommended that if a potential sponsor refuses to submit to a security and background check, ORR should bar the potential sponsor from receiving custody of the unaccompanied child.

Response: ORR thanks the commenters for their recommendations. ORR emphasizes that it utilizes critical background check requirements for potential sponsors in all cases. What varies however, is which combination of background check requirements apply to individual sponsors or a sponsor household given specific factors, including the closeness of the relationship between the sponsor and the child. For example, measures such as public records checks and sex offender registry checks (through the U.S. Department of Justice National Sex Offender registry) are conducted for all sponsors. Other measures like the FBI background check are conducted for some sponsors, which per current ORR policy includes proposed sponsors who are unrelated, more distant relatives, or immediate relatives (*e.g.,* aunt, uncle, first cousin) who were not previously the child's primary caregiver.

Comment: One commenter expressed concern that ORR is releasing children to sponsors prior to a response from ACF's OTIP.

Response: In placing a child with a sponsor, ORR stated in the NPRM that at minimum, a sponsor suitability review shall consist of verification of the potential sponsor's identity, physical environment of the sponsor's home, relationship to the unaccompanied child, if any, and an independent finding that the individual has not engaged in any activity that would indicate a potential risk to the unaccompanied child (88 FR 68985). Independent findings include information such as Government reports, background check results from other entities (like the FBI), third-party reviews of the case by a social worker not employed by the care provider, and information from state databases such as sex offender registry lists. ORR notes that it requires that OTIP be notified if during their initial intake, the unaccompanied child's responses to questions during any examination or assessment indicate the possibility that the unaccompanied child may have been a victim of human trafficking or labor exploitation. ORR also notes that its case managers are trained to identify common human trafficking indicators through their sponsor assessments, identity verification processes, and interviews, and ORR works closely with OTIP whenever there are any potential signs of trafficking in a case. If ORR has no further concerns about a release to a sponsor upon investigation of issues that come up during assessment, placement with a sponsor may move forward; however, a home study may be warranted, pursuant to the requirements and procedures at § 410.1204 below.

Comment: A number of commenters expressed concern that ORR releases unaccompanied children to unemployed sponsors, stating this is an indicator for trafficking. Some commenters expressed concern that ORR does not require potential sponsors to have a means to support unaccompanied children. Other commenters, however, recommended ORR clarify in the final rule that the risks and concerns listed in § 410.1202 do not necessarily disqualify a potential sponsor. Another commenter recommended ORR clarify that a potential sponsor's financial situation does not disqualify the potential sponsor unless it is so severe as to raise concerns about the sponsor's ability to meet the unaccompanied child's basic needs.

Response: ORR notes that while the TVPRA at 8 U.S.C. 1232(c)(3) does not require verification of the sponsor's employment, the FSA does include employment as one possible factor in sponsor suitability. ORR proposed in the NPRM at § 410.1202 to include this as a permissible consideration as part of the suitability assessment to ensure sponsors can show they have adequate resources to provide for the child's physical and mental well-being (88 FR 68928 through 68929). However, ORR will not deny an otherwise qualified sponsor solely on the basis of low income or employment status.

Comment: A few commenters expressed concern about ORR releasing unaccompanied children to non-relative sponsors due to safety and well-being concerns about the children. One of these commenters recommended ORR revise § 410.1202 to bar potential non-relative sponsors who already have custody of an unaccompanied child from receiving custody of other non-relative unaccompanied children to decrease the risk that ORR releases these unaccompanied children to sponsors who may traffic, abuse, or exploit them. Another commenter recommended additional assessment of non-relative sponsors who are responsible for several unaccompanied children and involving other agencies when further investigation is needed, especially in cases of suspected smuggling or trafficking.

Response: ORR believes that the policies codified in this section provide important protections which decrease the risk of release to sponsors who would traffic, abuse, or exploit children. Specifically, under § 410.1202(d), ORR will assess the nature and extent of the potential sponsor's previous and current relationship with the unaccompanied child, and the unaccompanied child's family, if applicable, and may deny release to unrelated individuals who have applied to be a sponsor but who have no preexisting relationship with the child or the child's family prior to the child's entry into ORR custody Furthermore, ORR will consider the potential sponsor's motivation for sponsorship; the unaccompanied child's preferences and perspective regarding release to the potential sponsor; and the preferences of the unaccompanied child's parent or legal guardian and perspective on release to ORR. While ORR does not believe it would be able to serve the best interests of children in their custody by broadly excluding non-relative sponsors who already have custody of another unaccompanied child, under ORR policy such sponsorships are subject to a mandatory home study. ORR notes that under § 410.1205(a), a sponsorship would be denied if, as part of the sponsor assessment process described at

proposed § 410.1202 or the release process described at § 410.1203, ORR determines that the potential sponsor is not capable of providing for the physical and mental well-being of the unaccompanied child or that the placement would result in danger to the unaccompanied child or the community.

Comment: One commenter expressed concern that the proposed rule did not contain any protocols or information sharing requirements when ORR determines that an adult has fraudulently claimed to be a parent or relative of an unaccompanied child. Another commenter suggested that fraudulent representations made by a potential sponsor regarding their relationship to the unaccompanied child should be a crime and that such representations should be reported to ICE and applicable State law enforcement agency.

Response: Under current ORR policy, in the case of a potential sponsor who is neither a parent or legal guardian, nor a close relative, and who lacks a bona fide pre-existing relationship with the unaccompanied child, or if a sponsor, household member, or adult caregiver provides any false information in the sponsor application and/or accompanying documents or submits fraudulent documents for the purposes of obtaining sponsorship of the child, ORR will report the incident to the HHS Office of the Inspector General (OIG). ORR also notes that notification of fraud is further addressed in current ORR policy, which provides that ORR may deny release if it is determined that fraudulent documents were submitted during the sponsor application process.

Comment: One commenter recommended that if an unaccompanied child refuses a DNA test, the child should remain in ORR's custody.

Response: ORR refers readers to the response above in § 410.1201 on using DNA to identify relationships between unaccompanied children and potential sponsors and reiterates that ORR releases children to willing and able adults designated by the child's parent or guardian who may not have a biological relationship with the child, and thus such relationships are not DNA-confirmable. ORR vets and approves such non-biological relative sponsors when there is no parent or other adult relative capable of providing for the child's physical and mental well-being. Furthermore, ORR believes that it is important that any disclosure of unaccompanied children's information is compatible with program goals and protects the safety and privacy of unaccompanied children.

Comment: Several commenters expressed a belief and concern that case managers are not allowed to ask potential sponsors how many children they have sponsored, stating this question is necessary to ensure there is no child trafficking. A few commenters also expressed the belief that case managers are prohibited from fully investigating sponsors and are instead compelled to expedite unifications without conducting comprehensive safety assessments of the placement. A few commenters expressed concern that they believe case managers may risk termination if they call law enforcement to investigate sponsors and suspicious activities. One commenter recommended that case managers who report such concerns should not be subject to disciplinary action, including termination.

Response: ORR notes that current policy not only permits case managers to evaluate if a potential sponsor has served as a sponsor before, but actually requires such an evaluation. Section 410.1202 sets out parameters that specifically require certain issues be evaluated, considered, or assessed, and ORR policy requires an evaluation of information relating to prior sponsorship as a vital part of the case manager's role in the sponsor assessment process. ORR's decision not to include detailed standards about all of the areas of potential inquiry by case managers in this regulation is not indicative of an inability or unwillingness to collect such vital information. ORR also notes that it provides for ongoing case management services and disagrees that case managers are compelled to expedite release to a sponsor. ORR further notes that its sponsor suitability assessment process has no effect on existing whistleblower protections, which remain in place and continue to be a key mechanism for ensuring the safety and well-being of all children in ORR care. Moreover, case managers are required to report safety concerns to local law enforcement and other appropriate investigative authorities (*e.g.,* child protection agencies) in the course of reviewing a potential sponsor's application. In addition, independent of case manager communications and findings, current ORR policy requires additional scrutiny of potential sponsors who have previously sponsored children, such as through mandatory home studies.

Comment: Many commenters expressed concern that ORR does not propose to vet all members of each potential sponsor's household. Several commenters recommended that ORR vet and conduct background checks on all other adults that may be present in any potential sponsor's household to ensure the safety of unaccompanied children from unlawful employment and trafficking.

Response: ORR notes that proposed § 410.1202(c) requires background and criminal records checks, which when safety concerns are present, may include a fingerprint-based background check on the potential sponsor and on any adult resident of the potential sponsor's household. Details regarding background check requirements and applicability to specific categories of potential sponsors, adult household members, and adults identified in the sponsor care plan are discussed further in the ORR Policy Guide. ORR also uses home visits and home studies in mandatory and discretionary cases to further evaluate the suitability of a home to receive unaccompanied children. ORR additionally notes that its case managers are specially trained to look for indicators of human trafficking in a household while they complete sponsor vetting. Those requirements are now codified in this final rule. In addition, ORR is further clarifying at § 410.1202(c) to state that the sponsor suitability assessment shall include all needed steps to determine that the potential sponsor is capable of providing for the unaccompanied child's physical and mental well-being.

Comment: One commenter expressed concern about ORR's ability to thoroughly assess potential sponsors' suitability within 10 to 20 days to allow for release of the unaccompanied children within 30 days of placement at a care provider facility.

Response: ORR has found that 10 to 20 days is generally sufficient to thoroughly assess sponsor suitability and notes that additional time may be needed for a home study or other background checks in some cases. ORR is finalizing revisions to § 410.1205(b) to include that it will adjudicate the completed sponsor application of a parent or legal guardian or brother, sister, or grandparent, or other close relative sponsor within 10 calendar days of receipt of that application, absent an unexpected delay (such as a case that requires completion of a home study). ORR will also adjudicate the completed sponsor application for other close relatives who were not previously the child's primary caregiver within 14 calendar days of receipt of that application, absent an unexpected delay (such as a case that requires completion of a home study).

Comment: A few commenters expressed concern that proposed

§ 410.1202(d) denies release to an unrelated individual with whom the unaccompanied child does not have a pre-existing relationship. One of these commenters stated the proposal is inconsistent with the FSA because it would make the release priorities in paragraph 14D and 14F of the FSA optional for ORR and the FSA does not permit ORR to decline consideration of a potential sponsor due to a lack of a pre-existing relationship with the child. Additionally, the commenter stated this proposal is not needed to ensure safe placement and could result in unnecessary delays to release. The commenter also noted that the proposed rule does not include the opportunity for a potential sponsor to build a relationship with the unaccompanied child as described in ORR's current policy. To be consistent with the FSA and ORR policy, the commenter recommended the final rule state the potential sponsor's lack of a pre-existing relationship will not automatically disqualify a potential sponsor from consideration and, if necessary to ensure a safe release, ORR will provide an opportunity for a potential sponsor to establish a relationship with an unaccompanied child while the child is in ORR custody.

Response: Under § 410.1202(d), ORR will assess the nature and extent of the sponsor's previous and current relationship with the unaccompanied child and, if applicable, the child's family. ORR proposed in the NPRM that it would be able to deny release of an unaccompanied child to unrelated sponsors who have no pre-existing relationship with the child or the child's family prior to the child's entry into ORR custody (88 FR 68929). The final rule at § 410.1201(a)(4) recognizes, however, that lack of a pre-existing relationship with the child does not categorically disqualify a potential sponsor, but the lack of such relationship may be a factor in ORR's overall suitability determination. ORR notes, to further clarify its explanation in the preamble to the NPRM, that it intends that this proposed language be read consistently with proposed § 410.1201(a)(4) and (6), which implement FSA paragraphs 14D and F, respectively, such that ORR may release an unaccompanied child to an individual with no pre-existing relationship with the child after a suitability assessment, but ORR would not be required to do so. Additionally, § 410.1202(e) requires ORR to consider the sponsor's motivation for sponsorship; the opportunity for the potential sponsor and unaccompanied child to build a healthy relationship while the child is in ORR care; the unaccompanied child's preferences and perspective regarding release to the sponsor; and the unaccompanied child's parent's or legal guardian's preferences and perspective on release to the sponsor, as applicable (88 FR 68929).

Comment: One commenter recommended the sponsor suitability assessment consider the child's best interests in making any unification decisions, including the harm to the child's well-being of continued Federal custody and the benefits of release to a community placement. The commenter also recommended consideration of the sponsor's ability to provide for the child's welfare. This commenter expressed concern that the proposal at § 410.1202(f)(1) to evaluate the unaccompanied child's risk of labor trafficking, including observed or expressed need to work or earn money, are overly broad risk assessment factors that do not adequately consider cultural norms in the families of unaccompanied children. The commenter recommended ORR identify and adopt a verified assessment tool to determine whether a child is at risk for trafficking in order to avoid prolonged Federal custody for a child while the suitability assessment process ensues.

Response: ORR notes that a child expressing the need to work would not alone be considered a disqualifying factor but may warrant further inquiry during the sponsor suitability assessment. ORR is required to consider the best interest of the child and identify risk for child trafficking when making placements. A child's desire to make money is potentially an indicator that they are more vulnerable to exploitation and are at heightened risk. With respect to assessment tools, ORR notes that it utilizes several standardized screening tools for sex and labor trafficking available to federal agencies.

Comment: A few commenters expressed concern that, without more context and explanation of what it means to evaluate the unaccompanied child's individualized needs related to any disability as part of ORR's assessment of a potential sponsor, care provider facilities could discriminate against children with disabilities by adding obstacles not faced by children without disabilities. The commenters recommended the final rule state that consideration of a child's disability or disabilities must explicitly consider the potential benefit to the child of release to a community placement with a sponsor and the potential harm to the child of continued ORR custody. Further, the commenters recommended the final rule clearly state that a child's disability is not a reason to delay or deny release to a sponsor unless the sponsor is determined to be incapable of providing for the child's physical and mental well-being despite documented efforts by ORR to educate the sponsor about the child's needs and to assist the sponsor in accessing and coordinating post-release services and supports. Lastly, the commenters recommended the final rule require that when the sponsor needs support or training to meet the child's disability-related needs, such support and training should be provided as a reasonable modification for the child and to enable the child to live in the most integrated setting appropriate to their needs.

Response: ORR notes that it has a statutory duty under the TVPRA to assess the suitability of a potential sponsor before releasing a child to that person,[140] and such an assessment must necessarily include an assessment of the potential sponsor's ability to meet the child's disability-related needs (which may also require the provision of PRS). ORR agrees that under this subpart, a potential sponsor's capability to provide for the physical and mental well-being of the child must necessarily include explicit consideration of the impact of the child's disability or disabilities, and whether PRS are needed to meet the child's disability-related needs. Correspondingly, ORR must consider the potential benefits to the child of release to a community-based setting. Thus, under § 419.1202(f)(5), ORR is finalizing that it will assess any individualized needs of the unaccompanied child, including those related to disabilities or other medical or behavioral/mental health issues, and under § 410.1202(h)(1) will assess the sponsor's understanding of the child's needs as a part of determining the sponsor's suitability. ORR notes that § 410.1311(e)(2) as proposed in the NPRM states that ORR will affirmatively assist sponsors in accessing PRS to support the disability-related needs of a child upon release (88 FR 68952). ORR believes that a child's disability is not a reason to delay or deny release to a sponsor unless there is a significant risk to the health or safety of the child that cannot be mitigated through the provision of services and reasonable modifications, and ORR has documented its efforts to educate the sponsor about the child's disability-related needs and coordinated PRS. Additionally, unaccompanied children with disabilities should have an equal opportunity for prompt release, and for

that reason ORR proposed under § 410.1311(c)(3) that release will not be delayed solely because PRS is not in place. ORR also agrees that consideration must be given to the explicit benefits of community-based settings and is therefore modifying § 410.1311(e)(1) to state that ORR must consider the potential benefits to the child of release to a community-based setting.

Final Rule Action: After consideration of public comments, ORR is finalizing its proposal as proposed, with amendments to § 410.1202(c), clarifying that ORR's suitability assessment of potential sponsors ''shall include taking all needed steps to determine that the potential sponsor is capable of providing for the unaccompanied child's physical and mental well-being;'' and § 410.1202(d), clarifying that lack of a pre-existing relationship with the child does not categorically disqualify a potential sponsor, but the lack of such relationship will be a factor in ORR's overall suitability assessment. ORR will use its discretion to review the totality of the evidence.

Section 410.1203 Release Approval Process

ORR proposed in the NPRM under § 410.1203 a process for approving an unaccompanied child's release (88 FR 68929 through 68930). ORR proposed in the NPRM at § 410.1203(a) to codify the FSA requirement that ORR make and record timely and continuous efforts towards safe and timely release of unaccompanied children. These efforts include intakes and admissions assessments and the provision of ongoing case management services to identify potential sponsors.

ORR proposed in the NPRM at § 410.1203(b), that if a potential sponsor is identified, ORR would provide an explanation to both the unaccompanied child and the potential sponsor of the requirements and procedures for release.

ORR proposed in the NPRM at § 410.1203(c) the information that a potential sponsor must provide to ORR in the required sponsor application package for release of the unaccompanied child. ORR proposed in the NPRM that information requirements include supporting information and documentation regarding: the sponsor's identity; the sponsor's relationship to the child; background information on the potential sponsor and the potential sponsor's household members; the sponsor's ability to provide care for the child; and the sponsor's commitment to fulfill the sponsor's obligations in the Sponsor Care Agreement. ORR noted that the Sponsor Care Agreement, which ORR proposed in the NPRM shall be made available in a potential sponsor's native or preferred language pursuant to § 410.1306(f), requires a potential sponsor to commit to (1) provide for the unaccompanied child's physical and mental well-being; (2) ensure the unaccompanied child's compliance with DHS and immigration courts' requirements; (3) adhere to existing Federal and applicable State child labor and truancy laws; (4) notify DHS, EOIR at the Department of Justice, and other relevant parties of changes of address; (5) provide notice of initiation of any dependency proceedings or any risk to the unaccompanied child as described in the Sponsor Care Agreement; and (6) in the case of sponsors other than parents or legal guardians, notify ORR of a child moving to another location with another individual or change of address. ORR also proposed that in the event of an emergency (for example, a serious illness or destruction of the sponsor's home), a sponsor may transfer temporary physical custody of the unaccompanied child, but the sponsor must notify ORR as soon as possible and no later than 72 hours after the transfer. ORR noted that this departs from the 2019 Final Rule and the FSA to the extent that ORR did not propose to require the sponsor to seek ORR's permission to transfer custody of the unaccompanied child. ORR further noted that this departure reflects that ORR does not retain legal custody of an unaccompanied child after the child is released to a sponsor. However, ORR retains an interest in knowing this information for the provision of post-release services, tracking concerns related to potential trafficking, and for potential future sponsor assessments should the child's sponsor step forward to sponsor a different child.[141]

ORR proposed in the NPRM at § 410.1203(d), to conduct a sponsor suitability assessment consistent with the requirements of § 410.1202.

ORR proposed in the NPRM at § 410.1203(e), consistent with existing policies, to not release an unaccompanied child to any person or agency it has reason to believe may harm or neglect the unaccompanied child, or that it has reason to believe will fail to present the unaccompanied child before DHS or the immigration courts when requested to do so. For example, ORR stated that it would deny release to a potential sponsor if the potential sponsor is not willing or able to provide for the unaccompanied child's physical or mental well-being; the physical environment of the home presents risks to the unaccompanied child's safety and well-being; or the release of the unaccompanied child to that potential sponsor would present a risk to the child or others.

Furthermore, ORR proposed in the NPRM at § 410.1203(f), that ORR shall educate the potential sponsor about the needs of the unaccompanied child as part of the release process and would also work with the sponsor to develop an appropriate plan to care for the unaccompanied child if the child is released to the sponsor. ORR stated that such plans would cover a broad range of topics including providing the unaccompanied child with adequate care, supervision, access to community resources, housing, and education. Regarding education, ORR understands that under the laws of every State, children up to a certain age must attend school and have a right to attend public school. Public schools may not refuse to enroll children, including unaccompanied children, because of their (or their parents or sponsors') immigration status or race, color, or national origin.[142] ORR also understands that school districts may not insist on documentation requirements that effectively prevent enrollment of an unaccompanied child.[143]

For purposes of this final rule, ORR notes that it typically begins to identify and assess potential sponsors for unaccompanied children as soon as they are physically transferred to ORR custody. But consistent with current policies,[144] in some exceptional circumstances (*e.g.,* when ORR takes part in interagency humanitarian missions and other similar special operations), when notified by another federal agency with custody of the child that that the child will likely be determined to be unaccompanied, ORR may begin vetting potential sponsors for a child before the child is physically transferred to ORR custody. In these cases, ORR would not wait for the child to be placed in an ORR care provider facility to begin the release process. Nevertheless, the release process for these unaccompanied children would continue to be governed by the TVPRA and HSA.

Comment: A few commenters expressed concerns and made recommendations regarding the release approval timeframe. A few commenters expressed concern that the proposed rule does not specify how long an unaccompanied child can stay in ORR custody before being released to a sponsor or another appropriate placement. The commenters stated that this creates uncertainty and

inconsistency in the release process, which could potentially prolong the detention of some children who could be safely released sooner, and that the rule should establish a clear and reasonable timeframe for the release of unaccompanied children from ORR custody. One commenter specified that the timeframe should consider children's best interests, safety, and well-being, and should also provide for exceptions and extensions to the timeframe in certain circumstances, such as when there are delays in identifying or verifying a sponsor, when there are pending legal proceedings, or when there are individualized needs or circumstances of the child. This commenter suggested adding a new paragraph to § 410.1203 that would specify requirements regarding the timeframe for release approval.

Response: Under proposed § 410.1203(a), which ORR is finalizing in this final rule, ORR or the care provider facility providing care for the unaccompanied child must make and record the prompt and continuous efforts on its part toward family unification and release of the child. ORR notes that transfer of physical custody of the child must occur as soon as possible once an unaccompanied child is approved for release. ORR acknowledges that the final rule does not specify how long an unaccompanied child can stay in ORR custody before being released to a sponsor or another appropriate placement. However, ORR makes every effort to quickly and safely release unaccompanied children to a sponsor determined by ORR to be suitable pursuant to the procedures in subpart C. Rather than specifying a particular timeframe for release, ORR believes that flexibility is necessary to consider the individual circumstances of each case, including delays in identifying or verifying a sponsor, pending legal proceedings, or individualized needs or circumstances of the child, including any individualized needs of a child with a disability, to ensure that children are placed with suitable sponsors who are capable of providing for their physical and mental well-being. ORR notes that on average, most releases occur much earlier than 90 days from ORR gaining custody with an average time of a 27-day length of stay in ORR's custody prior to release in fiscal year 2023.[145] ORR notes that, in the interest of the timely and efficient placement of unaccompanied children with sponsors, § 410.1207, as revised in this final rule, requires ORR supervisory staff who supervise field staff to conduct automatic review of all pending sponsor applications. The first automatic review shall occur within 90 days of an unaccompanied child entering ORR custody to identify and resolve the reasons that a sponsor application remains pending in a timely manner, as well as to determine possible steps to accelerate the children's safe release.

Comment: Many commenters recommended that the final rule include a provision specifically requiring that ORR and care provider facilities engage in release planning for youth who will age out of ORR custody at age 18 beginning on their 17th birthday, or if they enter custody after that time, as soon as they enter custody. The commenters stated that prompt and timely age-out planning is important because children in ORR custody who age out face the possibility of being transferred to adult detention in an ICE facility, and abrupt transitions out of a child welfare setting without sufficient planning and support can further traumatize children and leave them vulnerable to homelessness, exploitation, and trafficking.

Response: ORR agrees that prompt and timely age out planning is important. ORR's existing requirements in subregulatory guidance include after care planning to prepare unaccompanied children for post-ORR custody. Under current ORR policies, care provider facilities create long term plans to address the individualized needs of each unaccompanied child following release from ORR, and whenever possible, this involves releasing an unaccompanied child to the care of a family member. However, in some situations, release to a family member is not an option for the child. In those instances, the care provider facility must explore other planning options for the future. These include planning for teenagers turning 18 years of age, and ''aging out'' of ORR custody. ORR, however, has not designated a specific timeframe within which such planning must start as it believes that flexibility is necessary based on the individualized needs and circumstances of each child. ORR will consider commenters' recommendations and may further address them in future policymaking.

Comment: A few commenters stated that the final rule should further clarify that a child's disability is not a reason to delay or deny release to a sponsor unless there is a significant risk to the health or safety of the child that cannot be mitigated through the provision of services and reasonable modification. The commenters emphasized that this assistance must be directly tied to the sponsor evaluation process to make clear that sponsors should not be denied prior to such support being offered.

Response: ORR agrees that a child's disability is not a reason to delay or deny release to a sponsor unless there is a significant risk to the health or safety of the child that cannot be mitigated through the provision of services and reasonable modifications. Thus, under § 419.1202(f)(5), ORR is finalizing that it will evaluate any individualized needs of the unaccompanied child, including those related to disabilities or other medical or behavioral/mental health issues, and under § 410.1202(h)(1) will assess the sponsor's understanding of the child's needs as a part of determining the sponsor's suitability. ORR notes that § 410.1311(e)(2) as proposed in the NPRM states that ORR will affirmatively assist sponsors in accessing PRS to support the disability-related needs of a child upon release. ORR agrees that unaccompanied children with disabilities should have an equal opportunity to be promptly released, and for that reason proposed under § 410.1311(c)(3) that release will not be delayed solely because PRS is not in place.

Comment: Many commenters did not support the proposal in the NPRM at § 410.1203(c) that the sponsor application must include background information on the potential sponsor's household members because ORR has stated previously this is not mandatory. In addition, the commenters did not support the proposal that the sponsor application must include information regarding the sponsor's identity, because commenters believe that ORR does not impose requirements for a standard form of identity or accept expired documents.

Response: ORR is required under the TVPRA to verify the sponsor's identity and the sponsor application is a means for ORR to collect standard forms of identification that can be verified by the issuing agency. With respect to information about an individual's household members, ORR is required to establish the number and identity of individuals in the household in order to perform background checks and to evaluate the environment into which the unaccompanied child may be placed. With respect standardization of documentation of identity, ORR notes Government-issued identification is consistent with international standards and since it may come in various forms from a multitude of countries, ORR does not believe it is practical to require standardization of identity documents if

they serve to identify the individual in their country of origin.

Comment: A few commenters expressed concern that there is insufficient oversight of sponsors after an unaccompanied child is released and that the proposed rule does not require ORR to terminate custody agreements when sponsors fail to adhere to them. Specifically, commenters stated that ORR should be required to terminate custody agreements where it is determined that the child's safety or well-being is at risk (*e.g.,* in cases where the sponsor has abused or trafficked a child) or the potential sponsor has committed fraud to acquire custody.

Response: ORR notes that although its custody terminates when a child is released to a sponsor, ORR may assist children after release by providing post-release services (PRS) as mandated or authorized by the TVPRA for children who can benefit from ongoing assistance from social service providers in their community. At § 410.1210(b)(1) as proposed in the NPRM and finalized, ORR will require that PRS providers work with sponsors to address challenges in parenting and caring for unaccompanied children. This may include guidance about maintaining a safe home; supervision of unaccompanied children; protecting unaccompanied children from threats by smugglers, traffickers, and gangs; and information about child abuse, neglect, separation, grief and loss, and how these issues affect unaccompanied children. ORR notes that custody determinations involving released children fall within the jurisdiction and applicable law of the state in which the released child resides.

Comment: Many commenters strongly supported the proposed regulation at § 410.1203(c)(3) requiring potential sponsors to adhere to existing Federal and State child labor laws as part of the Sponsor Care Agreement, stating that this was a much-needed step toward ensuring that unaccompanied children and their sponsors are informed of their rights with respect to safe and appropriate work for children.

Response: ORR thanks the commenters for their support.

Comment: A few commenters expressed concern regarding proposed § 410.1203(c)(5) which requires sponsors to provide notice of initiation of any dependency proceedings. One commenter believed that ORR has no authority to mandate ongoing updates by sponsors, particularly given that ORR has acknowledged in the preamble that once a child is released from care, they are no longer in ORR custody and ORR has not placed a time limit after which sponsors would no longer be required to make such notifications. This commenter recommended that ORR strike paragraph (c)(5) from § 410.1203, or at a minimum require notifications only within a specified, reasonable time limit, such as 30 days, or only require them of children receiving PRS mandated by the TVPRA. Another commenter stated that the proposed notification requirement would be burdensome to sponsors because custody or dependency proceedings are often started to seek the judicial determinations required for Special Immigrant Juvenile (SIJ) classification. The commenter further noted that while ORR states that it has an interest in this information for PRS, to address any trafficking concerns, or for potential future sponsor assessments regarding the same sponsor, to accomplish this goal, it should be sufficient for the sponsor to notify ORR if a case has been opened regarding the unaccompanied child with the State's child welfare agency due to allegations of abuse, abandonment, or neglect.

Response: ORR believes that, although it does not retain custody of a child post-release, it has authority under the TVPRA to ask that sponsors provide notice on an ongoing basis of the initiation of any dependency proceedings involving the child in order to provide PRS if needed, to address any trafficking concerns, or for potential future sponsor assessments regarding the same sponsor. ORR does not believe there is enough of a distinction between the burden of notifying ORR if a case has been opened with the State's child welfare agency and the initiation of proceedings in family court to require one but not the other. With respect to requiring notifications only with a specified, reasonable limit, ORR believes that this would result in an undue delay in addressing any potential concerns if such a case moves forward within whatever timeframe ORR were to specify before ORR has knowledge of it.

Comment: Many commenters expressed concern regarding the requirements at proposed § 410.1203(c)(6) for a sponsor to notify ORR post-release that a child is moving to another location with another individual or of a change of address. Many commenters opposed proposed § 410.1203(c)(6) because the proposed notification requirements do not go far enough to protect unaccompanied children. Some of these commenters expressed concern that, in their view, ORR assumes no role or responsibility in preventing a child's sponsor from transferring responsibility for the child's care after placement. Another commenter expressed concern specifically regarding the proposed 72-hour notification requirement at § 410.1203(c)(6) when a sponsor transfers physical custody of the unaccompanied child in the event of an emergency. The commenter stated that by providing the sponsor three days to notify ORR of the transfer, ORR may lose the child's location and lose the ability to prevent the re-trafficking of the child and noted that there may be little recourse against the sponsor. In contrast, a few commenters expressed concern that the notification requirements at proposed § 410.1203(c)(6) go too far. One commenter sought clarification regarding the purpose, scope, and penalty for non-compliance with the requirement at § 410.1203(c)(6), expressing concern that the proposed notification requirements amount to unwarranted Government intrusion where there is no evidence of a safety concern to justify continued oversight or monitoring. The commenter further stated that this proposed policy is inconsistent with ORR's past statements that its obligation to the unaccompanied child ends with the release of that child to a sponsor. Another commenter opposed proposed § 410.1203(c)(6), stating that ORR has no authority to mandate ongoing updates by sponsors, particularly given that ORR has acknowledged in the preamble that once a child is released from its care, they are no longer in ORR legal custody and that ORR has not placed a time limit after which sponsors would no longer be required to make such notifications. The commenter further stated that the proposed change of address notifications are duplicative, given that children and their sponsors have an independent responsibility to notify EOIR and the DHS of any change of address under proposed § 410.1203(c)(4). Thus, the commenter recommended that ORR strike paragraph (c)(6) from § 410.1203, or at a minimum require notifications only within a specified, reasonable time limit, such as 30 days, or only require them of children receiving PRS mandated by the TVPRA.

Response: ORR disagrees that it has no authority to specify, as a condition of release, that a sponsor agree to a 72-hour notification requirement when transferring custody of a child. Furthermore, ORR believes 72 hours is a reasonable time in which to inform ORR of a transfer of custody and that it is sufficient for maintaining an ability to contact the child to initiate or continue to provide PRS. ORR notes that while

certain cases mandate PRS, all released children are still eligible to receive PRS. ORR does not consider this notification part of monitoring as it does not propose to impose penalties or take specific action related to the transfer of custody. ORR acknowledges that it cannot require sponsors to seek permission to transfer custody of a child from the sponsor to someone else because ORR no longer has custody over children after they are discharged from its care. However, ORR needs to maintain and update records of the child's location in order to be able to provide PRS on a mandatory or discretionary basis while the child remains eligible for such services during the pendency of their removal proceedings.

Comment: Many commenters recommended that the proposed rule include a provision codifying ORR's ability to keep families together by expediting the release of unaccompanied children to relatives with whom they are traveling who qualify as close relative sponsors. Specifically, the commenters stated that instead of separating families and causing additional trauma, ORR staff could meet with children and relatives at the border and begin the process of qualifying the adult family member as a close relative sponsor, including verifying family relationships and ensuring that adult relatives do not pose a risk of trafficking or other immediate danger to the child. The commenters recommended that if the adult relative is approved as a close relative sponsor, CBP would release the adult and ORR would release the child into the custody of the family member (with the child designated as unaccompanied, which the commenter stated provides critical protections to children during their immigration case).

Response: ORR notes that it is not an immigration enforcement agency, and its statutory authority is limited to the care and placement of unaccompanied children transferred by other Federal departments or agencies to ORR custody. ORR, therefore, cannot evaluate sponsors or relatives the child has traveled with upon the child's entry to the United States at the border before the child has been identified as an unaccompanied child within the definition of this rule. ORR agrees that if a parent or adult relative is in the United States and able, willing and qualified to sponsor a child, they are first in the order of priority for those eligible to be sponsors. ORR also notes that its policy is not to separate family members that arrive at the border together; DHS refers children to ORR within the parameters of the TVPRA but the vetting process for sponsorship is not immediate. Further, ORR notes that it has a pilot project with DHS under which it attempts to quickly reunify unaccompanied children with accompanying relatives, consistent with both agencies' authorities. However, it is outside the scope of ORR's statutory authority to codify in this final rule practices that pertain to DHS operations.

Comment: One commenter noted that the proposed rule does not specify what the best interests of the child are when there are conflicting claims from different sponsors, which could lead to putting the child back into a potentially dangerous situation.

Response: ORR notes that when there are multiple potential sponsors, ORR observes the following order of priority: parent, legal guardian, adult relative, or another adult designated by the parent or legal guardian as capable and willing to care for the minor's well-being, as is consistent with the FSA paragraph 14. ORR notes that at § 410.1001 contains a non-exhaustive list of factors that ORR considers when evaluating what is in a child's best interests. Included on this list are the unaccompanied child's expressed interests, in accordance with the unaccompanied child's age and maturity; the unaccompanied child's mental and physical health; the wishes of the unaccompanied child's parents or legal guardians; the intimacy of relationship(s) between the unaccompanied child and the child's family, including the interactions and interrelationship of the unaccompanied child with the child's parents, siblings, and any other person who may significantly affect the unaccompanied child's well-being. ORR would therefore balance these and additional factors stated at § 410.1001 and in this section when considering sponsor suitability, including when there are multiple potential sponsors. ORR further notes that pursuant to § 410.1203(e), ORR shall not be required to release an unaccompanied child to any person or agency it has reason to believe may harm or neglect the unaccompanied child or fail to facilitate the unaccompanied child's appearance before DHS or the immigration courts when required to do so.

Final Rule Action: After consideration of public comments, ORR is finalizing this section as proposed.

Section 410.1204 Home Studies

The TVPRA requires a home study be performed for the release of an unaccompanied child in certain circumstances.[146] Therefore, ORR proposed in the NPRM both required and discretionary home studies depending upon specific circumstances, including when the safety and well-being of the child is in question (88 FR 68930 through 68931).

ORR proposed in the NPRM at § 410.1204(a), that, as part of its sponsor suitability assessment, it may require a home study which includes an investigation of the living conditions in which the unaccompanied child would be placed, the standard of care the child would receive, and interviews with the potential sponsor and others in the sponsor's households. If ORR requires a home study, it shall take place prior to the child's physical release.

ORR proposed in the NPRM at § 410.1204(b), three circumstances in which a home study shall be required. First, ORR proposed that a home study be required under the conditions identified in the TVPRA at 8 U.S.C. 1232(c)(3)(B) which include, '' . . . a child who is a victim of a severe form of trafficking in persons, a special needs child with a disability (as defined in section 12102 of title 42), a child who has been a victim of physical or sexual abuse under circumstances that indicate that the child's health or welfare has been significantly harmed or threatened, or a child whose proposed sponsor clearly presents a risk of abuse, maltreatment, exploitation, or trafficking to the child based on all available objective evidence.''

Second, ORR proposed that a home study be required before releasing any child to a non-relative sponsor who is seeking to sponsor multiple children, or who has previously sponsored or sought to sponsor a child and is seeking to sponsor additional children. Third, ORR proposed that a home study be required before releasing any child who is 12 years old or younger to a non-relative sponsor. ORR believes that these latter two categories are consistent with the statutory requirement that HHS determine that a potential sponsor ''is capable of providing for the child's physical and mental well-being,'' [147] and to ''establish policies and programs to ensure that unaccompanied alien children in the United States are protected from traffickers and other persons seeking to victimize or otherwise engage such children in criminal, harmful, or exploitative activity.'' [148]

ORR proposed in the NPRM at § 410.1204(c), to have the discretion to initiate home studies if it determines that a home study is likely to provide additional information which could assist in determining that the potential sponsor is able to care for the health, safety, and well-being of the unaccompanied child.

ORR proposed in the NPRM at § 410.1204(d), that the care provider would inform a potential sponsor whenever it plans to conduct a home study, explain the scope and purpose of the study to the potential sponsor, and answer questions the potential sponsor has about the process. ORR also proposed that it would provide the home study report to the potential sponsor if the request for release is denied, as well as any subsequent addendums, if created.

Finally, ORR proposed in the NPRM at § 410.1204(e) that an unaccompanied child for whom a home study is conducted shall receive post-release services as described at § 410.1210. This requirement would be consistent with 8 U.S.C. 1232(c)(3)(B), which states that ''The Secretary of Health and Human Services shall conduct follow-up services, during the pendency of removal proceedings, on children for whom a home study was conducted and is authorized to conduct follow-up services in cases involving children with mental health or other needs who could benefit from ongoing assistance from a social welfare agency.''

Comment: A number of commenters strongly supported proposed § 410.1204(b), which requires home studies under conditions specified in the TVPRA at 8 U.S.C. 1232(c)(3)(B) and codifies existing ORR policy to conduct home studies for children in additional vulnerable situations as specified at § 410.1204(b)(2) and (3), stating that such provisions would provide additional safeguards and care for unaccompanied children. One commenter specifically commended the requirement at § 410.1204(b)(2) to conduct a home study prior to releasing a child to a non-relative sponsor who intends to sponsor multiple children, or has previously sponsored or sought to sponsor a child and is seeking to sponsor additional children, and for tender age children, noting that this not only ensures a suitable environment for multiple children but also promotes sponsor compliance with the child welfare standards of ORR and State jurisdictions and helps to prevent trafficking and other exploitative situations.

Response: ORR thanks the commenters for their support.

Comment: A number of commenters expressed concern regarding various aspects of proposed § 410.1204(b), recommending that home studies be mandated in additional situations. A number of commenters recommended that ORR be required to conduct home studies for all potential sponsor placements, not just those set forth in proposed § 410.1204(b), with one commenter recommending an automated process for home studies. A number of commenters recommended that home studies should be required for all potential placements with sponsors who are not parents, legal guardians, or close relatives. Several commenters stated that a home study should be required whenever a child is being released to a non-parent or non-family member. One commenter stated that although some discretion regarding waiver of home studies may be appropriate where the potential sponsor is a close relative of the child, any stranger or potential sponsor not previously approved for placement should always be subject to a home study to reduce the risk of an abusive sponsorship and the re-exploitation of the child. One commenter stated that a home study should be required before releasing any child who is 12 years old or younger regardless of the relationship to the sponsor.

Response: At § 410.1204(b), ORR is finalizing circumstances that would mandate home studies that are authorized under the TVPRA (*i.e.,* § 410.1204(b)(1)) or that ORR believes are consistent with the statutory requirement that HHS determine that a potential sponsor ''is capable of providing for the child's physical and mental well-being,'' [149] and to ''establish policies and programs to ensure that unaccompanied alien children in the United States are protected from traffickers and other persons seeking to victimize or otherwise engage such children in criminal, harmful, or exploitative activity.'' [150]

Additionally, ORR is finalizing at § 410.1204(c) a provision providing ORR with the discretion to initiate home studies if it determines that a home study is likely to provide additional information which could assist in determining that the potential sponsor is able to care for the health, safety, and well-being of the unaccompanied child. ORR believes that this requirement provides ORR the flexibility to determine whether there are additional circumstances that warrant a home study to ensure the unaccompanied child's safety and well-being post-release, which may encompass some of the circumstances commenters described. Finally, as ORR implements the regulations, it will take into consideration the commenters' recommendations and determine whether additional policymaking is needed. Therefore, ORR declines to finalize additional circumstances beyond what it proposed in the NPRM.

Comment: A number of commenters noted that § 410.1204(b)(1)(i) in the NPRM does not clearly define ''severe'' human trafficking and recommended that this qualifier be removed since, in their view, all forms of human trafficking are inherently severe. The commenter further noted that if the intention is to align with the TVPRA, they believed the existing proposed provisions adequately cover these requirements, making the specification of ''severe'' redundant.

Response: ORR clarifies in the final rule that it intends for the meaning of ''severe form of trafficking'' to have the same meaning as defined at 22 U.S.C. 7102(11) (''severe form of trafficking'' means ''(A) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or (B) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.'').

Comment: Some commenters expressed concern that children will be released to persons who will exploit them since ORR has no mechanism to determine if a child has been sexually abused other than question-answer testimony.

Response: ORR disagrees that it has no mechanisms in place to determine if a child has been a victim of sexual abuse and harassment and may be exploited by a potential sponsor(s). ORR has long screened all unaccompanied children for potential sexual abuse and harassment concerns, including during intake, assessments, sponsor assessments, and Significant Incident Reports. Under § 410.1204(b)(1)(ii), if the unaccompanied child has been a victim of sexual abuse under circumstances that indicate that the child's health or welfare has been significantly harmed or threatened, ORR requires a home study to assess the suitability of the sponsor. Additionally, as part of the sponsor suitability assessment under § 410.1202(c), and further described in ORR polices, ORR vets potential sponsors by conducting background checks of all potential sponsors and adult household members to determine if they have engaged in any activity that would indicate a potential risk to the child's safety and well-being, and these background checks include searches of State child abuse and neglect registries. Further, while ORR does not retain legal custody post-release, ORR notes that for a child receiving PRS, the PRS provider

assesses the child's risk factors, including sexual abuse and/or harassment, and educates the child and sponsor on these risks, and will submit a NOC to ORR and report to the appropriate State and local authorities if the PRS provider becomes aware of any sexual abuse. Based on the above, ORR has mechanisms in place to evaluate whether the unaccompanied child may have been a victim of sexual abuse and/or harassment or is at risk of being a victim, and to evaluate whether a sponsor may pose a risk to the child's safety and well-being.

Comment: A number of commenters recommended that ORR limit the circumstances in which home studies would be mandated. A number of commenters recommended that home studies required by the TVPRA due to trafficking concerns be limited to cases where there has been a formal designation by OTIP, expressing concern that care provider facilities and ORR staff have an overly broad perspective of trafficking, which may lead to home studies that derail sponsorships for reasons not related to the safety of the child. In addition, these commenters stated that the rule should not require home studies in circumstances beyond those identified in the TVPRA, stating that home studies should be recommended but not mandatory in circumstances where a child may be released to a non-relative sponsor who is seeking to sponsor multiple children, or who has previously sponsored or sought to sponsor a child and is seeking to sponsor additional children; or where the child is 12 years old or younger and being released to a nonrelative sponsor. These commenters expressed concern that ORR defines ''non-relative'' very broadly, including for example, godparents or close family friends, to the detriment of the child's well-being, and recommended that the proposed rule leave space for ORR to make common sense decisions based on the individual circumstances of the child in situations where home studies are not mandatory under the TVPRA. Furthermore, a number of commenters recommended limiting the use of home studies to the most serious circumstances, stating that while home studies can be valuable in certain limited circumstances, they should be used relatively rarely because they are intrusive and risk causing unnecessary delays in release and unification which may exacerbate a child's trauma. These commenters recommended that the proposed regulations include an explicit requirement that decision-making around home studies take into consideration the effect that prolonged custody and separation from family will have on the well-being of the child, noting that it is often the traumatizing effects of detention and detention fatigue that cause the mental or behavioral health issues that trigger the home study.

Response: ORR notes that it has been its policy since 2015 to require a home study before releasing any child to a non-relative sponsor who is seeking to sponsor multiple children, or who has previously sponsored or sought to sponsor a child and is seeking to sponsor additional children, or before releasing any child who is 12 years old or younger to a non-relative sponsor. ORR proposed in the NPRM to codify these factors at § 410.1204(b)(2) and (3) because it believes they are consistent with HHS's authority under the TVPRA and HSA.[151] Based on ORR's experience under current policy, the circumstances under § 410.1204(b)(2) and (3) are important circumstances where there may be potential risk to the unaccompanied child if released to these types of potential sponsors, and ORR requires additional information to determine that the sponsor is able to care for the health, safety, and well-being of the child. Accordingly, ORR declines in this final rule to limit the situations mandating a home study to only those required under the TVPRA.

Comment: A number of commenters generally expressed concern with the limited circumstances in which home studies are mandated under proposed § 410.1204(b) and ORR's proposed discretionary approach under proposed § 410.1204(c), suggesting that under the proposed rule there may be potential gaps in ensuring the welfare of unaccompanied children. A number of commenters further noted that ORR is not an investigative agency, recommending that responsibility for home studies be assigned to an agency equipped for this purpose.

Response: As stated above, at § 410.1204(b), ORR is finalizing circumstances that would mandate home studies that are authorized under the TVPRA (*i.e.,* § 410.1204(b)(1)) or that it has determined are consistent with HHS's authority under the TVPRA and HSA.[152] Similarly, ORR is exercising this authority under § 410.1204(c) to specify that ORR would have the discretion to initiate home studies if it determines that a home study is likely to provide additional information which could assist in determining that the potential sponsor is able to care for the health, safety, and well-being of the unaccompanied child. ORR believes that this requirement provides ORR the flexibility to determine whether a home study is warranted if additional information could be gathered to ensure the unaccompanied child's safety and well-being post-release. ORR will take into consideration the commenters' recommendations and determine whether future policymaking is needed.

Lastly, ORR acknowledges the commenters' recommendation that ORR is not an investigative agency and another agency should perform the home studies. However, ORR disagrees with this recommendation since it is ORR's statutory duty under the TVPRA at 8 U.S.C. 1232(c)(3)(B) to perform home studies in certain circumstances. ORR also notes that it engages with qualified home study providers to conduct home studies.[153]

Comment: A number of commenters expressed concern that proposed § 410.1204(c) uses language on discretionary home studies that is overly expansive and recommended that ORR adopt more limiting language. Specifically, the commenters noted that the language, ''is likely to provide additional information which could assist in determining'' sponsor suitability, is too broad. The commenters stated that home studies should only be used in the most serious circumstances due to their intrusive nature and the risk of causing unnecessary delays to release and unification.

Response: ORR declines to finalize more limiting language. As stated above, it is ORR's statutory duty under the TVPRA at 8 U.S.C. 1232(c)(3)(B) to perform home studies in certain circumstances to protect the health and welfare of unaccompanied children. ORR's policy is that even in circumstances where a home study is not required, a home study may be conducted if it is likely to provide additional information to determine that the sponsor is able to care for the health, safety and well-being of the child. Based on ORR's experience, ORR believes that it is necessary for it to have the flexibility to determine whether a home study is likely to provide additional information, which could assist in assessing the sponsor's suitability and sponsor suitability assessments vary by each assessment.

Additionally, ORR declines to limit § 410.1204(c) to the ''most serious circumstances'' as recommended by commenters. ORR believes this language is too limiting and may result in some potential sponsors not receiving a home study when they should have.

Comment: A number of commenters expressed concern with ORR's proposal

at § 410.1204(d) to inform the potential sponsor whenever it plans to conduct a home study and explain the scope and purpose of the study. Specifically, the commenters expressed concern that this notification may negatively impact the validity of some home studies by allowing sponsors time to prepare.

Response: ORR declines to update its long-standing policy under which it informs the sponsor when it plans to conduct a home study. ORR believes it is important to inform the sponsor that a home study will be conducted so that it can be timely scheduled and completed expeditiously. Additionally, it is important that the sponsor is informed about the home study's scope and purpose because the sponsor may not have previously participated in a home study nor understand what it entails.

Comment: A number of commenters expressed concern about sharing home study reports with sponsors who were denied because such reports may contain confidential information related to the child's history, noting that sharing such information with a denied sponsor without the child's consent is in violation of ORR's own policies. Commenters expressed concern that children often are referred for home studies due to past abuse, neglect, or trauma, and that, depending on their age, they may not consent to having their information shared with the potential sponsor in the home study report. These commenters recommended that the child's wishes always be considered when it comes to sharing confidential information with sponsors, particularly with nonparent sponsors; and in the case of a parent or relative, these commenters recommended ORR provide a summary with general reasoning as to why the release request was denied to assist parents/family in understanding what has occurred while also protecting the child's information. Other commenters stated that sponsors should receive an explanation as to why they were denied, but that ORR should protect the child's right to confidentiality, and in cases where it is determined that the sponsor's intentions may be malicious, the report should not be shared at all.

Response: ORR is revising § 410.1204(d) to remove that the home study report, as well as any subsequent addendums if created, will routinely be provided to the potential sponsor if the release request is denied, although in some cases it may need to be disclosed in whole or in part, subject to legally required redactions or child welfare considerations, as a part of the evidentiary record.

Comment: A number of commenters recommended limiting the scope of home studies and setting time limits for completing them. These commenters recommended that ORR adopt policies that tailor the scope of the home study to the reason that it is required, providing, as an example, that if a home study is required based on a child's disability, the home study should be limited in scope to uncover only information relevant to what services, supports, referrals, or information that ORR and PRS providers can give to the sponsor to meet the child's disability-related needs (noting that ORR should not require FBI fingerprint background checks of other adults in the home in home studies related to disability). These commenters also recommended placing time limits on the home study process to mitigate the tendency of home studies to prolong the unification process and the child's time in custody, recommending that, at a minimum, ORR should codify the time limits in the current version of the ORR Policy Guide, which require the home study report to be completed within 10 days. The commenters further recommended that the regulations include an explicit provision stating that a delay in completing a home study will not delay the release of a child to a sponsor. A number of commenters also noted that the proposed rule does not include information regarding ORR's existing time limits related to completing a home study and the 3-day deadline for accepting a case and requested clarification regarding why this provision was omitted.

Response: ORR disagrees with the commenters' recommendation to tailor the home study to the reason requiring a home study. In the commenter's example that an unaccompanied child and potential sponsor who are mandated to receive a home study because the child has a disability, the home study may uncover other risks that impact whether the sponsor is able to care for the health, safety, and well-being of the child. Additionally, ORR declines to limit the background check process for adult household members because this requirement provides important additional information related to the home environment post-release, to help ensure the child's safety and well-being after release.

ORR did not finalize a time limit on the home study and is choosing to leave such requirement as subregulatory guidance which will allow ORR to make more appropriate, timely, and iterative updates to its policies. This allows ORR to keep with best practices and be responsive to the needs of unaccompanied children.

Lastly, the TVPRA requires a home study be performed for the release of an unaccompanied child in certain circumstances. ORR does not believe it is appropriate to release these unaccompanied children before a home study is performed due to the other circumstances described in § 410.1204(b)(2) and (c) because the home study is an important safeguard to ensure the potential sponsor is able to take care of the health, safety, and well-being of the child.

Final Rule Action: After consideration of public comments, ORR is making the following modifications to regulatory language at §§ 410.1204(b) and 410.1204(e). ORR is revising § 410.1204(b) to state that ORR ''shall require'' home studies in order to clarify the mandatory nature of its obligation under this section. Additionally, ORR is revising § 410.1204(b)(1)(ii) to remove ''special needs'' and add at the end of the sentence ''who needs particular services or treatment.'' ORR notes that this revision is consistent with ORR's update to § 410.1001 removing the term ''special needs unaccompanied child.'' ORR is revising § 410.1204(d) to remove the following language from the proposed regulatory text: ''In addition, the home study report, as well as any subsequent addendums if created, will be provided to the potential sponsor if the release request is denied.'' Finally, ORR is revising § 410.1204(e) to state ''An unaccompanied child for whom a home study is conducted shall receive an offer of post-release services as described at § 410.1210.'' This update is consistent with ORR's modified language at § 410.1210(a)(3), which clarifies that PRS are voluntary for the unaccompanied child and sponsor and is revised to state in its discretion, ORR may offer PRS for all released children. ORR is otherwise finalizing this section as proposed.

Section 410.1205 Release Decisions; Denial of Release to a Sponsor

ORR proposed in the NPRM under § 410.1205 to address the situations in which ORR denies the release of an unaccompanied child to a potential sponsor (88 FR 68931). ORR proposed in the NPRM at § 410.1205(a), that a sponsorship would be denied if, as part of the sponsor assessment process described at § 410.1202 or the release process described at § 410.1203, ORR determines that the potential sponsor is not capable of providing for the physical and mental well-being of the unaccompanied child or that the placement would result in danger to the

unaccompanied child or the community.

ORR proposed in the NPRM at § 410.1205(b), that if ORR denies release of an unaccompanied child to a potential sponsor who is a parent or legal guardian, ORR must notify the parent or legal guardian of the denial in writing. ORR stated that such Notification of Denial letter would include (1) an explanation of the reason(s) for the denial; (2) evidence and information supporting ORR's denial decision, including the evidentiary basis for the denial; (3) instructions for requesting an appeal of the denial; (4) notice that the potential sponsor may submit additional evidence, in writing before a hearing occurs, or orally during a hearing; (5) notice that the potential sponsor may present witnesses and cross-examine ORR's witnesses, if such witnesses are willing to voluntarily testify; and (6) notice that the potential sponsor may be represented by counsel in proceedings related to the release denial at no cost to the Federal Government. Relatedly, ORR proposed in the NPRM in § 410.1205(c), that if a potential sponsor who is the unaccompanied child's parent or legal guardian is denied, ORR shall inform the unaccompanied child, the child advocate, and the unaccompanied child's attorney of record or DOJ Accredited Representative (or if the unaccompanied child has no attorney of record or DOJ Accredited Representative, the local legal service provider) of that denial.

ORR proposed in the NPRM at § 410.1205(d) that if the sole reason for denial of release is a concern that the unaccompanied child is a danger to self or the community, ORR must send the unaccompanied child a copy of the Notification of Denial letter, in a language that the child understands, described at § 410.1205(b). ORR also proposed that if the potential sponsor who has been denied is the unaccompanied child's parent or legal guardian and is not already seeking appeal of the decision, the unaccompanied child may appeal the denial.

ORR proposed in the NPRM at § 410.1205(e) to recognize that unaccompanied children may have the assistance of counsel, at no cost to the Federal Government, with respect to release or the denial of release to a potential sponsor.

ORR noted that as part of the *Lucas R.* litigation, it is currently subject to a preliminary injunction that includes certain requirements regarding notification and appeal rights for individuals who have applied to sponsor unaccompanied children, including certain potential sponsors who are not an unaccompanied child's parent or legal guardian. ORR noted that it is complying with the requirements of applicable court orders and has issued subregulatory policy guidance to do so. ORR stated that once the *Lucas R.* litigation is resolved, ORR would evaluate whether further rulemaking is warranted.

Comment: As to providing written notice to potential close relative sponsors, a number of commenters criticized the provisions in proposed § 410.1205 because they did not fully incorporate the terms of the *Lucas R.* preliminary injunction and recommended that the final rule require full written notice to not only parents or legal guardians but also close relative sponsors. In particular, commenters expressed concern that § 410.1205(b) does not afford full written notice of a sponsorship denial to potential close relative sponsors, which is inconsistent with the *Lucas R.* preliminary injunction.

Response: ORR agrees with the commenters that potential close relative sponsors should be afforded full written notice of a denial decision. The court in *Lucas R.* found that these additional procedures ''would reduce the risk that [unaccompanied children] will be erroneously deprived of their interest in (1) familial association with parents and close family members and (2) being free from physical restraint in the form of unnecessarily prolonged detention, when a sponsor is available.'' [154] Accordingly, ORR has revised § 410.1205(c) (redesignated) to require the ORR Director or their designee who is a neutral and detached decision maker to promptly notify a potential sponsor who is a parent or legal guardian or close relative of a denial in writing via a Notification of Denial Letter. ORR notes that consistent with existing policy and the *Lucas R.* preliminary injunction, ORR is finalizing at § 410.1001 the following definition of ''close relative'': ''*Close relative* means a brother, sister, grandparent, aunt, uncle, first cousin, or other immediate biological relative, or immediate relative through legal marriage or adoption, and half-sibling.''

While ORR also agrees that the denial letter to parents, legal guardians, and close relatives should contain the information specified in § 410.1205(c), ORR has also modified § 410.1205(c)(2) (redesignated) to advise the potential sponsor that they have the opportunity to examine the evidence upon request but to recognize that ORR may not provide evidence and information, or part thereof, to the potential sponsor if ORR determines that providing such evidence and information would compromise the safety and well-being of the unaccompanied child or is not permitted by law. ORR has encountered instances where a child requests not to be released to a close relative due to prior sexual abuse (*e.g.,* by the close relative's children). As the court in *Lucas R.* noted, ''[d]enials of sponsorship applications can be based on sensitive grounds . . . that could cause distress to the minor. Release of such information . . . may . . . cause unnecessary pain to all parties involved.'' [155] In those instances, ORR will nevertheless notify the unaccompanied child and the unaccompanied child's attorney of the denial and will provide them with the opportunity to request to inspect the evidence, so the child's ''interests are sufficiently protected.'' [156]

Comment: Commenters also noted that proposed § 410.1205(d) did not provide the notice required by the *Lucas R.* preliminary injunction to an unaccompanied child denied release solely on the basis of danger to self or others, and also fails to provide notice to the unaccompanied child's attorneys.

Response: ORR acknowledges that the *Lucas R.* preliminary injunction also requires that if the sole reason for denial of release is a concern that the unaccompanied child is a danger to self or others, ORR must provide the child and their counsel full written notice of the denial and the right to appeal, regardless of the relationship between the potential sponsor and child. ORR agrees with the commenters and is clarifying at § 410.1205(f) (as redesignated in this final rule) that if a denial is solely due to a concern that the unaccompanied child is a danger to self or others, ORR will provide the child and their counsel, if the child is represented by counsel, a copy of the Notification of Denial Letter, and that the child may seek an appeal of the denial.

Comment: Some commenters stated that ORR should do more than the minimum required by the *Lucas R.* preliminary injunction to extend the notification and appeal procedures to all unaccompanied children. These commenters recommended that ORR provide full written notice of sponsorship denials to all affected potential sponsors and unaccompanied children because all unaccompanied children, regardless of the type of potential sponsor, have a constitutional liberty interest, and a significant liberty interest derived from the TVPRA in family placement and freedom from

institutional restraints. Some commenters stated that, for unaccompanied children seeking release to any sponsor irrespective of the sponsor's relationship with the child, written justification of sponsorship denial is particularly important since the unaccompanied child may have few, if any, other release options. Commenters noted that providing written justifications of sponsorship denials to all sponsors aligns with the principle that ORR, unaccompanied children, and their potential sponsors share a strong interest in preventing erroneous sponsorship denials. These commenters stated that unaccompanied children and potential sponsors should receive formal notice of sponsorship denials and the reasons underlying the decisions, unless there are particularized child welfare reasons to withhold specific information, because unaccompanied children often are uncertain about the status of their sponsorship applications or lack clear understanding of why it is delayed or denied, which can severely impact the unaccompanied child's mental health. Commenters noted that there is minimal burden on ORR to provide written notice of denial to all affected sponsors and unaccompanied children compared to the importance of adequate notice and accurate release decisions.

Response: ORR is committed to ensuring that unaccompanied children are promptly released to sponsors who are capable of providing for their physical and mental well-being, as required by the TVPRA and other authorities. ORR has affirmed at § 410.1205 and § 410.1206 its longstanding commitment to providing potential parent and legal guardian sponsors full written notification of a denial and the right to appeal a denial decision. ORR has also affirmed its commitment at § 410.1205 and § 410.1206 to extending those same rights to close relative sponsors. At this time, ORR is not incorporating into this rulemaking the same requirements for other potential sponsors, such as distant relatives and unrelated adult individuals, which the court in *Lucas R.* did not require, because ORR continues to assess the administrative burden and appropriateness of providing full written notice and appeal rights to potential sponsors who may have an attenuated relationship with the unaccompanied child they are seeking to sponsor. Notably, the court in *Lucas R.* found that unaccompanied children with potential sponsors who are distant relatives or unrelated individuals designated by parents, and children without any identified sponsors, ''require little or no additional procedural protection.'' [157]

Comment: Some commenters stated that § 410.1205(b) does not meet the requirements in the *Lucas R.* preliminary injunction because it only provides a deadline for adjudicating parent and legal guardian sponsorship applications but fails to provide a deadline for adjudicating close relative sponsorship applications, which the commenters stated can result in delays in release that violate due process. Commenters noted that the preliminary injunction requires that completed sponsorship applications for parents or legal guardians, siblings, grandparents, or other close relatives who previously served as the child's primary caregiver be processed within 10 days and that sponsorship applications for other immediate relatives who have not previously served as the child's primary caregiver be processed within 14 days. These commenters recommended ORR adopt in the final rule the sponsorship application adjudication timeframes set forth in the *Lucas R.* preliminary injunction.

Response: ORR agrees with the commenters that providing timeframes for adjudicating completed sponsorship applications ensures timely releases of unaccompanied children to parents, legal guardians, and other close family members. Accordingly, consistent with the *Lucas R.* preliminary injunction, ORR is finalizing revisions to § 410.1205(b) to include that it will adjudicate the completed sponsor application of a potential parent or legal guardian or brother, sister, or grandparent, or other close relative sponsor who has been the child's primary caregiver within 10 calendar days of receipt of that application. ORR will also adjudicate the completed sponsor application for other close relatives who were not previously the child's primary caregiver within 14 calendar days of receipt of that application. If there are unexpected delays such as a case that requires the completion of a home study, background checks, or other required assessments, ORR is not required to complete its adjudication in the timeframes provided. Furthermore, a completed application is one in which a sponsor has submitted the application along with all required supporting documentation.

Comment: Commenters also recommended the final rule require that the ORR Director, or a designee who is a neutral and detached decision maker, automatically review all denials of sponsorship applications submitted by parents or legal guardians and close relative potential sponsors, which they stated is an important safeguard to protect against erroneous release denials, avoid the need for appeal, and prevent any consequential delays in the unaccompanied child's release to a suitable sponsor.

Response: ORR agrees and is adding § 410.1205(d) to require automatic review of those sponsor application denials by the ORR Director or a neutral and detached designee.

Comment: Commenters expressed concern that § 410.1205(c) does not provide unaccompanied children the right to inspect the evidence underlying ORR's release denial decisions as required by the *Lucas R.* preliminary injunction. These commenters recommended ORR update the final rule with this notice provision.

Response: ORR agrees and has included at § 410.1205(e) (redesignated) new language that requires ORR to inform an unaccompanied child, the unaccompanied child's child advocate, and the child's counsel (or if the unaccompanied child has no attorney of record or DOJ Accredited Representative, the local legal service provider) of a denial of release to a potential parent or legal guardian or close relative sponsor and inform them that they have the right to inspect the evidence underlying ORR's decision upon request unless ORR determines that providing the evidence is not permitted by law.

Comment: Many commenters expressed concern that it is infeasible and problematic to expect an unaccompanied child to retain counsel at no cost to the Government.

Response: Under proposed § 410.1205(e), which ORR is finalizing in this rule as § 410.1205(g), ORR must permit an unaccompanied child to have the assistance of counsel, at no expense to the Federal Government, with respect to release or the denial of release to a potential sponsor. This provision was not intended to set forth an expectation that the child retain counsel, but rather to require ORR to permit the child to retain counsel if the child chooses to do so at no expense to the Federal Government. ORR refers readers to the discussion of § 410.1309 for additional information regarding legal services.

Final Rule Action: After consideration of public comments, ORR is finalizing § 410.1205 with the following modifications. ORR is revising the beginning of § 410.1205(a) to state: ''A potential sponsorship shall be denied . . .'' ORR is finalizing revisions to § 410.1205(b) to require ORR to adjudicate the completed sponsor

application of a parent or legal guardian; brother, sister or grandparent; or other close relative who has been the child's primary caregiver within 10 calendar days of receipt of that application, absent an unexpected delay (such as a case that requires completion of a home study) and to require ORR to adjudicate the completed sponsor application of other close relatives who were not the unaccompanied child's primary caregiver within 14 calendar days of receipt of that application, absent an unexpected delay (such as a case that requires completion of a home study). ORR is adding a new § 410.1205(c), which includes portions of proposed § 410.1205(b), to recognize that if ORR denies release of an unaccompanied child to a potential parent or legal guardian or close relative sponsor, the ORR Director or their designee who is a neutral and detached decision maker shall promptly notify the potential sponsor of the denial in writing via a Notification of Denial Letter. ORR is also finalizing revisions to § 410.1205(c)(2) (redesignated) to recognize that it shall provide the potential parent or legal guardian or close relative sponsor the evidence and information supporting ORR's denial decision and shall advise the potential sponsor that they have the opportunity to examine the evidence upon request, unless ORR determines that providing the evidence and information, or part thereof, to the potential sponsor would compromise the safety and well-being of the unaccompanied child or is not permitted by law. ORR is also revising § 410.1205(c)(3) to clarify that sponsors will receive notice that they may request an appeal of a denial to the Assistant Secretary for Children and Families, or a designee who is a neutral and detached decision maker, as well as instructions for doing so, in order to be consistent with the *Lucas R.* preliminary injunction. ORR is also revising § 410.1205(c)(5) (redesignated) to clarify that both the potential sponsor's and ORR's witnesses must be willing to voluntarily testify. This paragraph now states that the Notification of Denial letter must include notice that the potential sponsor may present witnesses and cross-examine ORR's witnesses, if such sponsor and ORR witnesses are willing to voluntarily testify. Additionally, ORR is adding a new § 410.1205(d) to specify that the ORR Director, or a designee who is a neutral and detached decision maker, shall review denials of completed sponsor applications submitted by parent or legal guardian or close relative potential sponsors. ORR is also clarifying at § 410.1205(e) (as redesignated in the final rule) that it will inform the unaccompanied child, the unaccompanied child's child advocate, and the unaccompanied child's counsel (or if the unaccompanied child has no attorney of record or DOJ Accredited Representative, the local legal service provider) of a denial of release to the unaccompanied child's parent or legal guardian or close relative potential sponsor and inform them that they have the right to inspect the evidence underlying ORR's decision upon request unless ORR determines that disclosure is not permitted by law. Finally, ORR is finalizing revisions to § 410.1205(f) (as redesignated in this final rule) to state that if the sole reason for denial of release is a concern that the unaccompanied child is a danger to self or others, ORR shall provide the child and their counsel (if represented by counsel) full written notice of the denial (regardless of the relationship of the child to the sponsor), and to state that the child has the right to appeal the denial. ORR is also redesignating proposed § 410.1205(e) as § 410.1205(g).

Section 410.1206 Appeals of Release Denials

ORR proposed in the NPRM at § 410.1206 to establish procedures for parents and legal guardians of unaccompanied children to appeal a release denial (88 FR 68931). As discussed above, ORR is responsible for making and implementing placement determinations for unaccompanied children and must do so in a manner that protects the best interest of the unaccompanied children.[158] Further, the TVPRA requires HHS, among other agencies, to establish policies and programs to ensure that unaccompanied children in the United States are protected from traffickers and other persons seeking to victimize or otherwise engage such children in criminal, harmful, or exploitative activity.[159] ORR also recognized the strong interest of parents and legal guardians in custody of their children. Consistent with its statutory responsibilities and existing policy, ORR proposed in the NPRM to create an administrative appeal process for parents and legal guardians who are denied sponsorship of an unaccompanied child. Subject to the availability of resources, as determined by ORR, ORR stated that it may consider providing language services to parents and legal guardians during the appeals process, if the parent or guardian is unable to obtain such services on their own.

ORR proposed in the NPRM at § 410.1206(a) that parents and legal guardians of unaccompanied children who are denied sponsorship by ORR may seek an appeal of ORR's decision by submitting a written request to the Assistant Secretary of ACF or the Assistant Secretary's neutral and detached designee.

ORR proposed in the NPRM at § 410.1206(b), that parents and legal guardians of unaccompanied children who are denied sponsorship by ORR may seek an appeal either with or without a hearing and pursuant to processes described by ORR in agency guidance. ORR proposed in the NPRM that the Assistant Secretary or their neutral and detached designee will acknowledge the request for appeal within a reasonable time.

Additionally, ORR proposed in the NPRM at § 410.1206(c) to establish a procedure for the unaccompanied child to also appeal a release denial if the sole reason for denial is a concern that the unaccompanied child poses a danger to self or others. In such a case, ORR proposed in the NPRM that the unaccompanied child may seek an appeal of the denial as described in § 410.1206(a), and if the unaccompanied child expresses a desire to appeal, the unaccompanied child may consult with their attorney of record or a legal service provider for assistance with the appeal. ORR also proposed that the unaccompanied child may seek such appeal at any time after denial of release while still in ORR custody.

Comment: A few commenters expressed concern that limiting the potential sponsor's right to appeal a sponsorship denial to parents and legal guardians directly conflicts with the *Lucas R.* preliminary injunction which extended notice and appeal procedures to other immediate relative sponsors, and these commenters recommended the final rule clarify that immediate relative sponsors have a right to appeal a sponsorship denial. Additionally, the commenters stated that ORR has not identified any administrative burden from broadening eligibility to appeal sponsorship denials to close relative sponsors, and the commenters stated that extending the appeals process to unaccompanied children with potential close relative sponsors will not result in substantial additional burden to ORR.

Response: ORR is revising § 410.1206 to provide that parents and legal guardians and close relative potential sponsors to whom ORR's Director or their designee, who is a neutral and detached decision maker, must send Notification of Denial letters pursuant to § 410.1205 may seek an appeal of ORR's

denial decision by submitting a written request to the Assistant Secretary of ACF, or their neutral and attached designee.

Comment: A number of commenters recommended that ORR expand the ability to appeal a release denial to all other potential sponsors including distant relatives and unrelated adult individuals, expressing that essential procedural protections must be available to all unaccompanied children in the unification process, with the assistance of their potential sponsors if desired.

Response: ORR is finalizing this rule to provide potential parent and legal guardian and close relative sponsors the right to appeal a denial decision, which is incorporated at § 410.1206 and is consistent with the *Lucas R.* preliminary injunction. At this time, ORR is not incorporating additional procedures related to other potential sponsors because ORR continues to assess the administrative burden and appropriateness of providing appeals to potential sponsors who may have an attenuated relationship, or no relationship at all, with the unaccompanied child they are seeking to sponsor.[160]

Comment: A few commenters stated that § 410.1205(c) omits three critical procedural protections required under the *Lucas R.* preliminary injunction to ensure a meaningful sponsor appeal process that complies with due process. First, the commenters stated that § 410.1205(c) does not fully incorporate the *Lucas R.* preliminary injunction because it does not contain deadlines for appeal processing and casefile delivery consistent with ORR's legal obligations under the injunction and stated that these timing requirements are meant to avoid prolonged delays in adjudication, which can constitute a deprivation of due process. The commenters noted that § 410.1206(c) requires only that the Assistant Secretary, or their neutral and detached designee, ''acknowledge the request for appeal within a reasonable time'' and does not provide any timeline to complete the appeal process.

Next, these commenters expressed concern that § 410.1205(c) does not fully incorporate the *Lucas R.* preliminary injunction because it does not contain the obligation for ORR to deliver an unaccompanied child's casefile, apart from legally required redactions, to the potential sponsor's or the unaccompanied child's counsel within a reasonable timeframe, and the commenters believed this requirement is critical ''to effectuate'' an unaccompanied child's right to counsel and facilitate their due process rights. The commenters noted that § 410.1309(c)(2) provides for release of a child's casefile to their counsel, but it does not specify a reasonable timeframe for delivery. The commenters recommended that at a minimum, a child's casefile must be provided to counsel a reasonable time before the hearing.

Lastly, the commenters stated that § 410.1205(c) does not fully incorporate the *Lucas R.* preliminary injunction because the proposed rule does not provide for a written decision or any notice at all to the potential sponsor and the child of the outcome of the appeal process.

Response: ORR thanks the commenters for their concerns and recommendations. ORR notes that the commenters' concerns and recommendations related to § 410.1205(c) have been addressed by ORR in § 410.1206, which relates to the appeals process for denials of releases to parents and legal guardians and close relative potential sponsors.

To address the commenters' concerns that the proposed rule did not contain deadlines for appeal processing at § 410.1206(b), ORR is specifying that the Assistant Secretary, or their neutral and detached designee, will acknowledge a request for an appeal within five (5) business days of receipt. Further, to be consistent with the *Lucas R.* preliminary injunction, ORR is specifying at § 410.1206(c) that the unaccompanied child may consult with their attorney of record at no cost to the Federal Government when the child expresses a desire to seek an appeal.

Additionally, under new § 410.1206(d), ORR is codifying that it will deliver the evidentiary record, including any countervailing or otherwise unfavorable evidence, apart from any legally required redactions, to a denied parent or legal guardian or close relative potential sponsor within a reasonable timeframe to be established by ORR, unless ORR determines that providing the evidentiary record, or part(s) thereof, to the potential sponsor would compromise the safety and well-being of the unaccompanied child. Although the *Lucas R.* preliminary injunction states that ORR ''shall deliver a minor's complete case file'' to the parent or legal guardian or close relative potential sponsor, ORR is instead incorporating a requirement that it will automatically provide to the potential sponsor the evidentiary record including any countervailing or otherwise unfavorable evidence, and not the complete case file. ORR is adopting this approach because it has become clear to ORR that automatically providing a child's entire case file—which may include records related to mental health, medical decisions, sensitive family information, sexual abuse, and other sensitive information—to a potential sponsor is not only unnecessary but also presents potential safety and well-being concerns for the unaccompanied child and does not provide additional procedural protections for the unaccompanied child or the potential sponsor. For instance, in many cases a denial is due to a potential sponsor's criminal history. Automatically providing the child's complete case file to those potential sponsors is unnecessary and offers them no additional procedural protections as the only document at issue is the potential sponsor's criminal history report (which would be provided as part of the evidentiary record). Additionally, ORR believes that automatically providing the evidentiary record to denied parent or legal guardian or close relative potential sponsors is consistent with the *Lucas R.* Court's holding that ''[s]o long as a minor and minor's counsel are notified of the denial and have the opportunity to request to inspect the evidence, minor's interests are sufficiently protected.'' For those reasons, ORR will automatically provide the evidentiary record to parent or legal guardian or close relative potential sponsors, but not the child's entire case file, which includes many records that are sensitive and often irrelevant to the hearing and disclosure would be potentially damaging to the child. Notably, ORR has committed to ensuring that the potential sponsor has all information and evidence related to ORR's denial decision including information that may be considered countervailing information and that may support the denied potential sponsor's argument on appeal, as stated at § 410.1206(d).

Consistent with the *Lucas R.* preliminary injunction, in the case of a parent or legal guardian potential sponsor, ORR is codifying at § 410.1206(e) that it will provide the parent or legal guardian potential sponsor with the child's complete case file, but only upon request and within a reasonable timeframe to be established by ORR. In many cases, it is unnecessary for a parent or legal guardian potential sponsor to review the child's entire case file in order to effectively challenge a release denial. Therefore, ORR is codifying that it will only provide the unaccompanied child's complete case file, apart from any legally required redactions, to a parent

or legal guardian potential sponsor if requested, unless providing the complete case file, or part(s) thereof, would compromise the safety and well-being of the unaccompanied child. For the reasons noted above, ORR will not provide upon request a child's complete case file to a potential close relative sponsor since case files contain many records that are sensitive and irrelevant to the hearing and disclosure of the entirety of the case file would be potentially damaging to the child. Also, consistent with the *Lucas R.* preliminary injunction, ORR is codifying that it will provide the unaccompanied child and their counsel the unaccompanied child's complete case file, apart from any legally required redactions, but only upon request. ORR recognizes that delivery of the evidentiary record and complete case file (if requested, and as applicable) must occur to provide sufficient time for review of the materials in advance of the hearing.

Further, at § 410.1206(f), ORR is codifying that the appeal process, including the notice of the decision on appeal sent to the potential sponsor, shall be completed within 30 calendar days of the potential sponsor's request for an appeal, unless an extension of time is granted by the Assistant Secretary or their designee for good cause. Under § 410.1206(g), ORR is codifying that the appeal of a release denial shall be considered, and any hearing shall be conducted, by the Assistant Secretary, or their neutral and detached designee. Further, ORR is codifying at § 410.1206(g) that upon making a decision to reverse or uphold the decision denying release to the potential sponsor, the Assistant Secretary or their neutral and detached designee, shall issue a written decision, either ordering release to the potential sponsor or denying release to the potential sponsor within the timeframe described in § 410.1206(f). Additionally, at § 410.1206(g), ORR is codifying that if the Assistant Secretary, or their neutral and detached designee, denies release to the potential sponsor, the decision shall set forth detailed, specific, and individualized reasoning for the decision. ORR is also codifying at § 410.1206(g) that ORR shall notify the unaccompanied child and the child's attorney of the denial. At § 410.1206(g), ORR is codifying that ORR shall inform the potential sponsor and the unaccompanied child of any right to seek review of an adverse decision in the United States District Court. ORR is codifying at § 410.1206(i) that if a child is released to another sponsor during the pendency of an appeal under this section, the appeal will be deemed moot. At § 410.1206(j)(1), ORR is codifying that a denied parent or legal guardian or close relative potential sponsor to whom ORR must send Notification of Denial letters pursuant to § 410.1205, has the right to be represented by counsel in proceedings related to the release denial, including at any hearing, at no cost to the Federal Government, which is consistent with the *Lucas R.* preliminary injunction. Lastly, at § 410.1206(j)(2), ORR is codifying that the unaccompanied child has the right to consult with counsel during the potential sponsor's appeal process at no cost to the Federal Government.

Comment: A few commenters recommended that ORR guarantee access to interpreters in the final rule for unaccompanied children and their potential sponsors during sponsorship appeals and provide written decisions translated into the sponsors' and the unaccompanied children's preferred language(s). These commenters stated that the additional cost of providing interpretation and translation services during sponsorship appeals is unlikely to create undue burden on ORR because it is already providing these services to unaccompanied children. Commenters further asserted that, in their view, the minimal burden on ORR to provide interpretation and translation services to unaccompanied children and sponsors during sponsorship appeals outweighs the significant due process concerns if they are unable to meaningfully engage in the appeals process. These commenters stated that ORR's decision-makers will also be deprived of relevant information if potential sponsors and children cannot communicate during the appeals process.

Response: ORR thanks the commenters for their recommendations. ORR agrees that unaccompanied children and their potential sponsors should have language access services during the appeal process and that language access is a critical component of procedural due process. Accordingly, ORR is adding § 410.1206(h) to require that ORR shall make qualified interpretation and/or translation services available to unaccompanied children and denied parent or legal guardian or close relative potential sponsors upon request for the purpose of appealing denials of release. Such services shall be available to unaccompanied children and denied parent or legal guardian or close relative potential sponsors in enclosed, confidential areas.

Final Rule Action: After consideration of public comments, ORR is finalizing § 410.1206 with modifications. ORR is revising the beginning of § 410.1206(a) to state ''Denied parents and legal guardians and close relative potential sponsors to whom ORR's Director or their designee, who is a neutral and detached decision maker, must send Notification of Denial letters . . .'' ORR is revising § 410.1206(b) to remove ''will'' and replace with ''shall'' and to remove ''a reasonable time'' and replace with ''five business days of receipt.'' ORR is revising the second sentence of § 410.1206(c) to add ''at no cost to the Federal Government'' after ''attorney of record.'' ORR is adding § 410.1206(d) to state ''ORR shall deliver the full evidentiary record including any countervailing or otherwise unfavorable evidence, apart from any legally required redactions, to the denied parent or legal guardian or close relative potential sponsor within a reasonable timeframe to be established by ORR, unless ORR determines that providing the evidentiary record, or part(s) thereof, to the potential sponsor would compromise the safety and well-being of the unaccompanied child.'' ORR is adding at § 410.1206(e) to state ''ORR shall deliver the unaccompanied child's complete case file, apart from any legally required redactions, to a parent or legal guardian potential sponsor on request within a reasonable timeframe to be established by ORR, unless ORR determines that providing the complete case file, or part(s) thereof, to the parent or legal guardian potential sponsor would compromise the safety and well-being of the unaccompanied child. ORR shall deliver the unaccompanied child's complete case file, apart from any legally required redactions, to the unaccompanied child and the unaccompanied child's attorney on request within a reasonable timeframe to be established by ORR.''

ORR is adding § 410.1206(f) to state ''The appeal process, including notice of decision on appeal sent to the potential sponsor, shall be completed within 30 calendar days of the potential sponsor's request for an appeal, unless an extension of time is granted by the Assistant Secretary or their designee for good cause.'' ORR is adding § 410.1206(g) to state ''The appeal of a release denial shall be considered, and any hearing shall be conducted, by the Assistant Secretary, or their neutral and detached designee. Upon making a decision to reverse or uphold the decision denying release to the potential sponsor, the Assistant Secretary or their neutral and detached designee, shall issue a written decision, either ordering release or denying release to the

potential sponsor within the timeframe described in § 410.1206(f). If the Assistant Secretary, or their neutral and detached designee, denies release to the potential sponsor, the decision shall set forth detailed, specific, and individualized reasoning for the decision. ORR shall also notify the unaccompanied child and the child's attorney of the denial. ORR shall inform the potential sponsor and the unaccompanied child of any right to seek review of an adverse decision in the United States District Court.'' ORR is adding § 410.1206(h) to state ''ORR shall make qualified interpretation and/or translation services available to unaccompanied children and denied parent or legal guardian or close relative potential sponsors upon request for the purpose of appealing denials of release. Such services shall be available to unaccompanied children and denied parent or legal guardian or close relative potential sponsors in enclosed, confidential areas.'' ORR is adding § 410.1206(i) to state ''If a child is released to another sponsor during the pendency of the appeal process, the appeal will be deemed moot.'' ORR is adding § 410.1206(j)(1) to state ''Denied parent or legal guardian or close relative potential sponsors to whom ORR must send Notification of Denial letters pursuant to § 410.1205 have the right to be represented by counsel in proceedings related to the release denial, including at any hearing, at no cost to the Federal Government.'' Lastly, ORR is adding § 410.1206(j)(2) to state ''The unaccompanied child has the right to consult with counsel during the potential sponsor's appeal process at no cost to the Federal Government.'' ORR is otherwise finalizing the proposals as proposed.

Section 410.1207 Ninety (90)-day Review of Pending Sponsor Applications [161]

In the interest of the timely and efficient placement of unaccompanied children with vetted and approved sponsors, ORR proposed in the NPRM, at § 410.1207, a process to review sponsor applications that have been pending for 90 days (88 FR 68931 through 68932). Consistent with existing policy, ORR proposed in the NPRM that § 410.1207(a) would require ORR Federal staff, who supervise case management services performed by ORR grantees and contractors, to review all pending sponsor applications for unaccompanied children who have been in ORR custody for 90 days after submission of the completed sponsor application or in order to identify and resolve the reasons that a sponsor application remains pending in a timely manner, as well as to determine possible steps to accelerate the children's safe release.

ORR proposed in the NPRM at § 410.1207(b) that, upon completion of the review, UC Program case managers or other designated agency or care provider staff must update the potential sponsor and unaccompanied child on the status of the case and explain the reasons that the release process is incomplete. ORR proposed in the NPRM that UC Program case managers or other designated agency or care provider staff would work with the potential sponsor, relevant stakeholders, and ORR to address the portions of the sponsorship application that remain unresolved.

Further, to ensure that timeliness of placement remains a priority, for cases that are not resolved after the initial 90-day review, ORR proposed in the NPRM that ORR Federal staff supervising the case management process would conduct additional reviews at least every 90 days until the pending sponsor application is resolved as described in § 410.1207(c).

Comment: A few commenters expressed concern that § 410.1207(a) does not meet the requirements in the *Lucas R.* preliminary injunction because by requiring the FFS with responsibility for the child's case to conduct a 90-day review, this provision fails to meet the injunction's requirement to elevate problems to more senior officials and is wholly inconsistent with the need for supervisory review in the first place. These commenters recommended that ORR clarify in the final rule that the 90-day review will be conducted by ORR staff with supervisory responsibilities over the program's regularly assigned FFS.

Response: ORR agrees with the commenters that ORR supervisory staff, not the FFS, should conduct the 90-day review because it affords neutral and detached review by senior staff. ORR also notes that this is consistent with the *Lucas R.* preliminary injunction. Accordingly, ORR is revising §§ 410.1207(a) and (c) to require ORR supervisory staff who supervise field staff to perform the 90-day review of pending sponsor applications.

For consistency with both the *Lucas R.* preliminary injunction and ORR's current policy,[162] ORR is finalizing additional revisions to § 410.1207(a) to clarify when the first automatic review occurs after the potential sponsor submits a sponsor application. ORR is finalizing at § 410.1207(a) that ORR supervisory staff who supervise field staff shall conduct an automatic review of all pending sponsor applications. Although the *Lucas R.* preliminary injunction states that the ''first automatic review shall occur 90 days after the [sponsor application] is submitted . . .,'' ORR is instead incorporating a requirement that the first automatic review shall occur within 90 days of an unaccompanied child entering ORR custody to identify and resolve in a timely manner the reasons that a sponsor application remains pending and to determine possible steps to accelerate the unaccompanied child's safe release. ORR notes that this requirement means that the first automatic review will usually occur earlier than what the *Lucas R.* preliminary injunction requires—but in no case later than what the preliminary injunction requires.

Comment: One commenter recommended updates to the 90-day review of pending sponsor applications, including reviewing the unaccompanied child's case to determine whether there are any barriers to release and actions to be taken to expedite a child's release. The commenter also recommended ongoing reviews every 90 days until release.

Response: ORR thanks the commenter for the recommendations to update the 90-day review of pending sponsor applications. ORR agrees with the recommendation to review an unaccompanied child's case to determine whether there are any barriers to release and actions to be taken to expedite a child's release. Accordingly, at § 410.1207(c), ORR is finalizing a cross-reference to § 410.1207(a) to require that for cases that are not resolved after the initial 90-day review, ORR supervisory staff who supervise field staff shall conduct additional reviews at least every 90 days to resolve in a timely manner the reasons that a sponsor application remains pending and to determine possible steps to accelerate the unaccompanied child's safe release until the pending sponsor application is resolved. ORR also notes that this requirement is consistent with the *Lucas R.* preliminary injunction. Finally, ORR notes that the final rule provides for additional reviews ''at least'' every 90 days, which ORR believes addresses the commenter's recommendation, and ORR intends to provide reviews more frequently than 90 days when appropriate.

Final Rule Action: After consideration of public comments, ORR is finalizing § 410.1207 with modifications. ORR is making technical corrections to the heading and regulation text of § 410.1207 by replacing ''release application(s)'' with the term ''sponsor

application(s).'' ORR is revising § 410.1207(a) to state ''ORR supervisory staff who supervise field staff shall conduct an automatic review of all pending sponsor applications. The first automatic review shall occur within 90 days of an unaccompanied child entering ORR custody to identify and resolve in a timely manner the reasons that a sponsor application remains pending and to determine possible steps to accelerate the unaccompanied child's safe release.'' ORR is revising § 410.1207(b) and (c) to remove ''or FRP.'' ORR is revising § 410.1207(c) to remove ''ORR Federal staff supervising the case management process'' and replace with ''ORR supervisory staff who supervise field staff.'' ORR is also revising § 410.1207(c) to add ''as provided in § 410.1207(a)'' after ''additional reviews.'' ORR is otherwise finalizing its proposal as proposed.

Section 410.1208 ORR's Discretion to Place an Unaccompanied Child in the Unaccompanied Refugee Minors Program

ORR proposed in the NPRM, at § 410.1208, specific eligibility criteria for release of an unaccompanied child to the Unaccompanied Refugee Minors (URM) Program (88 FR 68932). The TVPRA permits ORR to place unaccompanied children in a URM Program, pursuant to section 412(d) of the INA, if a suitable family member is not available to provide care.[163] ORR proposed in the NPRM, at § 410.1208(a), that unaccompanied children may be eligible for services through the ORR URM Program, including unaccompanied children in the following categories: (1) Cuban and Haitian entrant as defined in section 501 of the Refugee Education Assistance Act of 1980, 8 U.S.C. 1522 note, and as provided for at 45 CFR 400.43; (2) an individual determined to be a victim of a severe form of trafficking as defined in 22 U.S.C. 7105(b)(1)(C); (3) an individual DHS has classified as a Special Immigrant Juvenile (SIJ) under section 101(a)(27)(J) of the INA, 8 U.S.C. 1101(a)(27)(J), and who was either in the custody of HHS at the time a dependency order was granted for such child or who was receiving services pursuant to section 501(a) of the Refugee Education Assistance Act of 1980, 8 U.S.C. 1522 note, at the time such dependency order was granted; (4) an individual with U nonimmigrant status under 8 U.S.C. 1101(a)(15)(U), as authorized by TVPRA, pursuant to section 1263 of the Violence Against Women Reauthorization Act of 2013, which amends section 235(d)(4) of the TVPRA to add individuals with U nonimmigrant status who were in ORR custody as unaccompanied children eligible for the URM Program; or (5) other populations of children as authorized by Congress.

ORR proposed in the NPRM that with respect to unaccompanied children described in proposed paragraph (a) of this section, under § 410.1208(b), ORR would evaluate each case to determine whether it is in an unaccompanied child's best interests to be referred to the URM Program.

ORR noted in the NPRM that under § 410.1208(c), when it discharges an unaccompanied child pursuant to this section to receive services through the URM Program, relevant requirements of the ORR Refugee Resettlement Program regulations would apply, including the requirement that the receiving entity establish legal responsibility of the unaccompanied child, including legal custody or guardianship, under State law.[164] ORR proposed in the NPRM at § 410.1208(c), that until such legal custody or guardianship is established, the ORR Director would retain legal custody of the child.

Comment: Many commenters requested that ORR retain legal custody of children released under the URM Program out of concern for and to ensure protection of unaccompanied children.

Response: ORR appreciates the concern for the well-being of unaccompanied children; however, ORR does not retain legal custody of children placed in the URM program in accordance with the URM program's statutory design. Pursuant to 8 U.S.C. 1522(d)(2)(B)(ii), ''[t]he Director [of ORR] shall attempt to arrange for the placement under the laws of the States of such unaccompanied refugee children, who have been accepted for admission to the United States, before (or as soon as possible after) their arrival in the United States. During any interim period while such a child is in the United States or in transit to the United States but before the child is so placed, the Director shall assume legal responsibility (including financial responsibility) for the child, if necessary, and is authorized to make necessary decisions to provide for the child's immediate care.''

At § 410.1208(c), ORR clarifies that the ORR Director shall retain legal custody of an unaccompanied child until the required legal custody or guardianship is established under State law. ORR believes that it protects and benefits the child to clarify ORR's ongoing responsibility as the child's custodian during the transition into the URM Program until the State or its designee establishes legal responsibility. ORR evaluates each case to determine whether it is in the child's best interest to be placed in the URM Program. This best interest determination involves the consideration of a variety of factors, including, among others, the child's mental and physical well-being and individualized needs, to ensure they are protected from traffickers and other persons seeking to victimize or otherwise engage them in criminal, harmful, or exploitative activity.[165]

For further clarity, ORR is revising § 410.1208 to replace ''release and ''discharge'' with ''place'' to better reflect how those terms are defined at § 410.1001 and the requirements finalized at § 410.1208. ORR is also revising ''referred to'' with ''placed in'' at § 410.1208(b) to reflect this clarification.

Comment: One commenter expressed concern that the use of the term ''dependency order'' in proposed § 410.1208(a)(3) will cause confusion because there are other types of orders in cases involving SIJ classification, and recommended that ORR update the language to ''dependency and/or custody order'' to align with SIJ classification regulations and other Government resources such as the United States Citizenship and Immigration Services' (USCIS) Policy Manual and to clarify URM eligibility for SIJ-classified noncitizens.

Response: ORR notes that the TVPRA, at 8 U.S.C. 1232(d)(4)(A), uses the term ''dependency order'' in describing categories of children who are eligible for placement and services in the URM Program under 8 U.S.C. 1522(d). ORR appreciates the commenter's recommendation but believes that the term ''dependency order'' is sufficiently clear to identify the children that may be eligible for services through the URM Program.

Final Rule Action: After consideration of public comments, ORR is finalizing § 410.1208 as proposed with the following modifications. ORR is revising the heading of § 410.1208 by replacing ''release'' with ''place,'' and ''to'' with ''in.'' ORR is revising § 410.1208(b) by replacing ''will'' with ''shall'' and ''referred to'' with ''placed in.'' ORR is revising § 410.1208(c) by replacing ''discharges'' with ''places'' and adding ''shall'' after ''ORR Director.'' ORR is revising § 410.1208(a)(2) to replace ''22 U.S.C. 7105(b)(1)(C)'' with ''22 U.S.C. 7102(11).'' The definitions used within 28 U.S.C. Chapter 78, including 22 U.S.C. 7105(b)(1)(C), are set forth at 22 U.S.C. 7102. As such, ORR determined that 22 U.S.C. 7102(11), which sets forth the definition of ''severe forms of

trafficking in persons,'' is a more appropriate citation for what constitutes a victim of a severe form of trafficking as the term is used at § 410.1208(a)(2).

Section 410.1209 Requesting Specific Consent From ORR Regarding Custody Proceedings

ORR proposed in the NPRM at § 410.1209 to address the specific consent process as informed by the TVPRA. Specific consent is a process through which an unaccompanied child in ORR custody obtains consent from HHS to have a State juvenile court make decisions concerning the unaccompanied child's placement or custody (88 FR 68932 through 68933). As relevant to this section, ORR noted that the TVPRA modified section 101(a)(27)(J) of the INA, concerning SIJ classification.[166] To obtain SIJ classification under the TVPRA modifications, a child must be declared dependent or legally committed to, or placed under the custody of, an individual or entity by a State juvenile court. However, an unaccompanied child in ORR custody who seeks to invoke the jurisdiction of a State juvenile court to determine or alter their custody status or placement must first receive ''specific consent'' from HHS to such jurisdiction. For example, if an unaccompanied child wishes to have a State juvenile court of competent jurisdiction, not HHS, move them out of HHS custody and into a State-funded foster care home, the unaccompanied child must first receive ''specific consent'' from HHS to go before the State juvenile court. If the unaccompanied child wishes to go to State juvenile court to be declared dependent in order to petition for SIJ classification (*i.e.,* receive an ''SIJ-predicate order'') in accordance with applicable statutory eligibility requirements, the unaccompanied child does not need HHS's consent. Although the TVPRA transferred authority to grant specific consent from DHS to ORR, DHS retains sole authority over the ultimate determination on SIJ classification. ORR notes that although the TVPRA refers to special immigrant ''status,'' [167] in this final rule ORR uses the term special immigrant ''classification,'' consistent with current USCIS policy.[168] For this reason, ORR will use ''SIJ classification'' in its discussion for consistency even where commenters used the synonymous terms Special Immigrant Juvenile Status or SIJS.

ORR proposed in the NPRM at § 410.1209(a) that an unaccompanied child in ORR custody is required to request specific consent from ORR if the unaccompanied child seeks to invoke the jurisdiction of a State juvenile court to determine or alter the child's custody status or release from ORR custody.

ORR proposed in the NPRM that under § 410.1209(b), if an unaccompanied child seeks to invoke the jurisdiction of a State juvenile court for a dependency order so that they can petition for SIJ classification or to otherwise permit a State juvenile court to establish jurisdiction regarding placement, but does not seek the State juvenile court's jurisdiction to determine or alter the child's custody status or release, the unaccompanied child would not need to request specific consent from ORR.

ORR proposed in the NPRM at § 410.1209(c) through (g) the process to make a specific consent request to ORR. ORR proposed in the NPRM at § 410.1209(c), that prior to a State juvenile court determining or altering the unaccompanied child's custody status or release from ORR, attorneys or others acting on behalf of an unaccompanied child would be required to complete a request for specific consent. ORR proposed in the NPRM at § 410.1209(d) to acknowledge receipt of the request within two business days.

ORR proposed in the NPRM at § 410.1209(e) that it will consider whether ORR custody is required to (1) ensure a child's safety; or (2) ensure the safety of the community. ORR noted in the NPRM that, as ORR does not consider runaway risk for purposes of release, it did not intend to do so here for purposes of adjudicating specific consent requests (88 FR 68932). ORR noted that such requirements would be consistent with 8 U.S.C. 1232(c)(2)(A) (stating that when making placement determinations, HHS ''may consider danger to self, danger to the community, and risk of flight.'').

ORR proposed in the NPRM at § 410.1209(f), that ORR shall make determinations on specific consent requests within 60 business days of receipt. ORR proposed in the NPRM that it shall attempt to expedite urgent requests when possible.

ORR proposed in the NPRM at § 410.1209(g), that it shall inform the unaccompanied child, the unaccompanied child's attorney, or other authorized representative of the unaccompanied child of the decision on the specific consent request in writing, along with the evidence used to make the decision.

Finally, ORR proposed in the NPRM at § 410.1209(h) and (i) detailed procedures related to a request for reconsideration in the event ORR denies specific consent. ORR proposed in the NPRM at § 410.1209(h), that the unaccompanied child, the child's attorney of record, or other authorized representative would be able to request reconsideration of ORR's denial with the Assistant Secretary for ACF within 30 business days of receipt of the ORR notification of denial of the request. The unaccompanied child, the child's attorney, or the child's authorized representative may submit additional (including new) evidence to be considered with the reconsideration request.

ORR proposed in the NPRM at § 410.1209(i), that the Assistant Secretary for ACF or designee would consider the request for reconsideration and any additional evidence and send a final administrative decision to the unaccompanied child, the child's attorney, or the child's other authorized representative, within 15 business days of receipt of the request.

Comment: In response to ORR stating in the preamble for § 410.1209 that specific consent is a process through which an unaccompanied child in ORR custody obtains consent from HHS to have a State juvenile court make decisions concerning the unaccompanied child's placement or custody, a number of commenters recommended that ORR should demonstrate to all 50 States a quantified analysis before finalizing any changes proposed to this section.

Response: ORR appreciates the commenters' recommendation and thinks it is important to codify the existing process into the final rule. ORR will continue to study its policies and propose future changes to this section if it determines changes are necessary.

Comment: A few commenters recommended revising proposed § 410.1209(b) to prevent unintended immigration consequences for a child in ORR custody who is petitioning for SIJ classification. Specifically, the commenters recommended replacing the proposed language at § 410.1209(b) with the following: ''An unaccompanied child in ORR custody need not request ORR's specific consent before a juvenile court exercises jurisdiction to enter findings or orders that do not alter the child's custody status or placement with ORR.''

Response: ORR appreciates the commenters for their recommended revisions to § 410.1209(b). The language proposed at § 410.1209(b) is consistent with the language ORR uses in its current policy guidance, such as ORR's Program Instruction ''Specific Consent Requests,'' [169] which was issued on December 24, 2009. In this final rule,

ORR declines to revise § 410.1209(b) and will consider whether revisions are needed in future policymaking. Accordingly, ORR is finalizing § 410.1209(b) as proposed.

Comment: One commenter recommended ORR revise § 410.1209(b) and (c) to remove the term ''determining'' and only use the term ''altering'' because the term ''altering'' is consistent with § 410.1209(a) and the SIJ classification regulations, and use of ''determining'' may cause confusion and prevent a State court from making a factual determination that the child is in ORR custody. Additionally, to clarify that specific consent is only required when there is a request to alter the child's custody status or release from ORR, the commenter recommended ORR add a subsection requiring that when ORR is considering whether specific consent is required, it must make an assessment taking into account the proposed alternative custody arrangement, if any, specified in the request for specific consent that the child would be seeking from the juvenile court.

Response: ORR appreciates the commenters' recommendation, however, ORR notes that the current language reflects its longstanding policy in this area.[170] ORR also notes that the INA, at 8 U.S.C. 1101(a)(27)(J)(iii)(I), uses ''determine,'' providing: ''[N]o juvenile court has jurisdiction to determine the custody status or placement of an alien in the custody of the Secretary of Health and Human Services unless the Secretary of Health and Human Services specifically consents to such jurisdiction.'' ORR declines to change the language it has used for so long without thoroughly reviewing the need to do so, which will require additional ORR time and resources. Accordingly, ORR is finalizing § 410.1209(b) and (c) as proposed.

ORR notes that its proposal in the NPRM at § 410.1209(a) to only use the term ''alter'' was a technical error. As explained in the preamble to the NPRM, ORR intended § 410.1209(a) to state that an unaccompanied child in ORR custody is required to request specific consent from ORR if the unaccompanied child seeks to invoke the jurisdiction of a State juvenile court to determine or alter the child's custody status or release from ORR custody (88 FR 68932). ORR is codifying in the final rule at § 410.1209(a) the language ''to determine or alter'' and not only ''to alter.'' Additionally, ORR appreciates the commenter's recommendation to add that when ORR considers whether specific consent is required, ORR should make an assessment taking into account the proposed alternative custody arrangement. At § 410.1209(f), ORR is finalizing that it will make a determination on specific consent. ORR clarifies that when making the determination, ORR would assess the specific consent, including any proposed alternative custody arrangement, before it issues its determination. ORR does not believe it is necessary to codify this as a new paragraph under § 410.1209. ORR will consider whether to issue additional subregulatory guidance, as needed, to provide more detail.

Comment: A few commenters recommended ORR narrow the timeframe in § 410.1209(f) within which ORR must determine whether to provide specific consent to 30 business days of receipt of a request to do so. Additionally, the commenters recommended that, for children expected to age out of ORR care and custody in 14 days or less, ORR must make a determination within 72 hours of the specific consent request. Lastly, the commenters recommended ORR add language to § 410.1209(f) to explicitly state that ORR must make its best efforts to expedite urgent requests.

Response: ORR thanks the commenters for their recommendations. ORR believes that 60 days is a reasonable timeframe for it to make determinations on specific consent requests. The 60-day timeframe allows time for thorough review, to make any requests for additional information if needed, and for the unaccompanied child, the child's attorney, or others acting on the child's behalf, to submit such additional information. Additionally, ORR notes that 60 days is the maximum amount of time that ORR would take to review a specific consent request, and ORR may make a determination in less than 60 days.

Additionally, ORR explains that under § 410.1209(f), an unaccompanied child expected to age out of ORR care and custody within 14 days or less may ask ORR to expedite their request. ORR believes this standard is appropriate to ensure it makes an immediate determination for unaccompanied children expected to age out of ORR care and custody when ORR has the resources to do so. As ORR implements the requirements under § 410.1209(f), it will monitor for any unintended consequences and consider the commenters' recommendations for future policymaking, as needed.

Comment: One commenter recommended a technical correction to proposed § 410.1209(i) to update the numbering to § 410.1209(h)(1).

Response: ORR appreciates the commenter's recommendation and clarifies that it intentionally numbered the section as § 410.1209(i) and not § 410.1209(h)(1) because it intended for it to be the lower-case letter ''i'' and not the roman numeral ''i.''

Comment: A few commenters recommended ORR add a new paragraph to § 410.1209 stating: ''A child who has been released by ORR to a sponsor is no longer in the actual or constructive custody of ORR, and therefore, ORR's specific consent is not required before a juvenile court exercises jurisdiction over the child's custody or placement.''

Response: ORR thanks the commenter for their recommendation and believes it is unnecessary to codify that ORR's specific consent is not required once the child is released from ORR custody. ORR believes that § 410.1209(a) is clear that the specific consent request requirements only apply when the unaccompanied child is in ORR's custody (*e.g.,* § 410.1209(a) states ''[a]n unaccompanied child in ORR custody is required to request specific consent from ORR. . .'').

Final Rule Action: After consideration of public comments, ORR is finalizing § 410.1209 as proposed with the following changes. ORR is making a technical correction to add ''determine or'' to § 410.1209(a) to codify the rule as explained in the preamble to the NPRM at § 410.1209(a) to state: ''An unaccompanied child in ORR custody is required to request specific consent from ORR if the unaccompanied child seeks to invoke the jurisdiction of a State juvenile court to determine or alter the child's custody status or release from ORR custody.'' ORR is revising the beginning of § 410.1209(i) to state: ''The Assistant Secretary, or their designee, shall consider . . .''.

Section 410.1210 Post-Release Services.

ORR proposed in the NPRM at § 410.1210 the requirements for post-release services (PRS) (88 FR 68933 through 68936). The TVPRA authorizes, and in some cases requires, HHS to provide follow-up services during the pendency of removal proceedings for certain unaccompanied children.[171] ORR provides PRS by funding providers to facilitate access to relevant services. ORR believes that providing necessary services after an unaccompanied child's release from ORR care is essential to promote the child's safety and well-being.

As further discussed below, ORR notes that since it published the NPRM, ORR revised its policies regarding

PRS.[172] ORR's updated PRS policies are consistent with the description of potential updates described in the NPRM and with the provisions of this final rule. Additionally, ORR's updated PRS policies are consistent with ORR's discussion of expanded PRS as described in the preamble to the NPRM (*e.g.,* with respect to updating ''levels'' of PRS). ORR refers to the policies in several places below to indicate existing practices that respond to concerns expressed in various comments. Further, ORR is incorporating various updates to § 410.1210 to align with its updated PRS policies—notably at §§ 410.1210(a)(2) and (3); (e); (g)(1) and (2); (h)(1) and (2); and (i)(5)—and its statutory authority.[173] In some instances, updates in this final rule further clarify provisions described in the NPRM or respond to comments received in response to the NPRM. ORR also notes that the expansion of PRS described in this final rule are responsive to concerns raised by multiple commenters about the importance of improving and strengthening PRS. Finally, ORR notes that updates expressed in this final rule will not adversely affect any third party's reliance interests because all PRS providers have followed ORR's updated policies since January 2024.

ORR proposed in the NPRM at § 410.1210(a)(1), that consistent with existing policy, care provider facilities would work with sponsors and unaccompanied children to prepare them for an unaccompanied child's safe and timely release, to assess the sponsors' ability to access community resources, and to provide guidance regarding safety planning and accessing services (88 FR 68933).

ORR proposed in the NPRM at § 410.1210(a)(2) and (3), circumstances when ORR would be required to provide PRS to unaccompanied children (88 FR 68933). Consistent with 8 U.S.C. 1232(c)(3)(B), under § 410.1210(a)(2), ORR proposed in the NPRM to conduct follow-up services, or PRS, during the pendency of removal proceedings for unaccompanied children for whom a home study was conducted. ORR proposed in the NPRM to apply this requirement to any case where a home study is conducted, including home studies that are explicitly required by the TVPRA and those that ORR performs under other circumstances as described at § 410.1204. ORR proposed in the NPRM, at § 410.1210(a)(3), that it would have the discretion, to the extent ORR determines that appropriations are available, to provide PRS to unaccompanied children with mental health or other needs who would benefit from the ongoing assistance of a community-based service provider, even if their case did not involve a home study pursuant to § 410.1204. ORR noted that § 410.1210(c) further lists certain situations where ORR may, within its discretion, refer unaccompanied children for PRS. ORR proposed in the NPRM to expand upon the situations whereby ORR may provide PRS. ORR stated in the NPRM that ORR's then current practice, described in the ORR Policy Guide at section 6.2,[174] required ORR to provide PRS for an unaccompanied child whose sponsor required a home study[175] or for whom ORR determines the release is safe and appropriate but the unaccompanied child and sponsor would benefit from ongoing assistance from a community-based service provider. ORR also proposed in the NPRM that PRS furnished to these unaccompanied children may include home visits by the PRS provider. ORR sought public comment on proposed § 410.1210(a)(2) and (3), particularly with respect to the possible expansion of PRS to additional unaccompanied children.

ORR is aware of concerns that, in some cases, release of unaccompanied children to sponsors may be unduly delayed by a lack of available PRS providers and services near the sponsor. Accordingly, ORR proposed in the NPRM in § 410.1210(a)(4) that ORR would not delay the release of an unaccompanied child if PRS are not immediately available (*e.g.,* due to a referral delay or waitlist for PRS). ORR noted that § 410.1210(g) specifies the timeframes in which PRS providers are required to start PRS for unaccompanied children once they are released from ORR care.

ORR proposed in the NPRM at § 410.1210(b), the types of services that would be available as part of PRS, and stated the services were as described in ORR policies (88 FR 68933).[176] ORR proposed in the NPRM that PRS providers would be required to ensure PRS are furnished in a manner that is sensitive to the individual needs of the unaccompanied child and in a way the child effectively understands regardless of spoken language, reading comprehension, or disability to ensure meaningful access for all eligible children, including those with limited English proficiency. ORR proposed in the NPRM that the comprehensiveness of PRS shall depend on the extent appropriations are available. Specifically, ORR proposed in the NPRM to codify the availability of PRS to support unaccompanied children and sponsors in accessing services in the following areas: placement and stability; immigration proceedings; guardianship; legal services; education; medical services; individual mental health services; family stabilization and counseling; substance use; gang prevention; education about employment laws and workers' rights; and other specialized services based on need and at the request of unaccompanied children. In addition, ORR believed that PRS should specifically include service areas such as: assisting in school enrollment, including connecting unaccompanied children and sponsors to educational programs for students with disabilities where appropriate; ensuring access to family unification and medical support services, including support and counseling for the family and mental health counseling; supporting sponsors in obtaining necessary medical records and necessary personal documentation; and ensuring that sponsors of unaccompanied children with medical needs receive support in accessing appropriate medical care. ORR noted in the NPRM that it proposed to codify at § 410.1210(b) services areas as covered in its policies.[177] As stated in the NPRM, in conducting PRS, ORR and any entities through which ORR provides PRS shall make reasonable modifications in their policies, practices, and procedures if needed to enable released unaccompanied children with disabilities to live in the most integrated setting appropriate to their needs, such as with a sponsor. ORR is not required, however, to take any action that it can demonstrate would fundamentally alter the nature of a program or activity. Additionally, ORR is aware of the importance of health literacy for unaccompanied children to increase awareness of health issues and to ensure continuity of care after their release, and so proposed at § 410.1210(b)(7) that PRS providers would be required to provide unaccompanied children and sponsors with information and services relevant to health-related considerations for the unaccompanied child. In the NPRM, ORR sought public comment on this paragraph, specifically on how to protect the comprehensiveness of PRS against significant reductions in funding allocated to PRS while still balancing the need to maintain funding for capacity during emergencies and influxes. ORR also sought public comment on what other services should be within the scope of PRS.

ORR proposed in the NPRM at § 410.1210(c) to require that unaccompanied children with specific

needs receive additional consideration of those needs and may be referred for PRS to address those needs (88 FR 68934). Consistent with 8 U.S.C. 1232(c)(3)(B), ORR proposed in the NPRM that unaccompanied children who would receive additional consideration include those who are especially vulnerable, such as unaccompanied children in need of particular services or treatment; unaccompanied children with disabilities; unaccompanied children with LGBTQI+ status or identity; unaccompanied children who are adjudicated delinquent or have been involved in, or are at high risk of involvement with, the juvenile justice system; unaccompanied children who entered ORR care after being separated from a parent or legal guardian by DHS; unaccompanied children who are victims of human trafficking or other crimes; unaccompanied children who are victims of worker exploitation; unaccompanied children who are at risk of labor trafficking; unaccompanied children enrolled in school who are chronically absent or retained at the end of their school year; and certain parolees. ORR typically considers certain parolees who are also unaccompanied children to include unaccompanied Afghan children, unaccompanied Ukrainian children, and other children who are in the UC Program (such as those eligible for humanitarian parole). ORR noted that it may refer unaccompanied children for PRS, based on these concerns, even after they have been released. Such referrals may be made pursuant to ORR becoming aware of the situations listed above—*e.g.,* through post-release Notifications of Concern (NOC) or calls to the NCC. In that event, ORR would require the relevant PRS provider to follow up with the child and assess whether PRS would be appropriate.

ORR proposed in the NPRM, at § 410.1210(d), that the PRS provider assigned to a particular unaccompanied child's case would assess the released unaccompanied child and sponsor for services needed and document the assessment (88 FR 68934). The assessment would be developmentally appropriate for the unaccompanied child, meaning the PRS provider would be required to tailor it to the released unaccompanied child's level of cognitive, physical, and emotional ability. Further, ORR proposed that the assessment be trauma-informed, as defined in § 410.1001, and consistent with the *6 Guidelines To A Trauma-Informed Approach* developed by the CDC in collaboration with the SAMHSA.[178] ORR proposed that during the assessment, PRS providers would also identify any traumatic events and symptoms by using validated screening measures developed for use when screening and assessing trauma in children.

In the preamble to the NPRM, ORR noted that under existing policy, ORR provides Safety and Well-Being Follow Up Calls (SWB calls) for all unaccompanied children who are released to sponsors. The purpose of SWB calls is to determine whether the child is still residing with the sponsor, is enrolled in and/or attending school, is aware of upcoming court dates, and is safe. ORR understands that these calls are authorized under 8 U.S.C. 1232(c)(3)(B), as a form of follow-up service. Although ORR proposed in the NPRM to continue conducting SWB calls, ORR did not propose to codify them, so as to preserve its flexibility in making continuous improvements to the reach and nature of the SWB calls, and in integrating them into the suite of available PRS. ORR sought public comment on whether it should codify SWB calls in this final rule or in future rulemaking and whether it should integrate SWB call into PRS, and if so, what factors ORR should consider in integrating SWB calls into PRS. ORR notes that in this final rule, it is not codifying SWB calls.

ORR considered codifying a requirement that the PRS provider's assessment include a recommendation regarding the ''level'' of PRS to be provided in direct response to the unaccompanied child's and the sponsor's needs, based on regular and repeated assessments. In the NPRM at § 410.1210(b), ORR proposed that PRS include a range of services (88 FR 68933). But ORR noted that unaccompanied children and sponsors receiving PRS do not necessarily require follow-up services in every service area, but rather have individual needs reflecting their own circumstances. Similarly, ORR believes that the appropriate level of involvement by the PRS provider in coordinating the delivery of those services should accord with the unaccompanied child's and/or sponsor's individual needs. Consistent with this approach, in the NPRM, ORR stated that at the time, it provided two ''levels'' of PRS—Level One and Level Two.[179] Level One services included assessments of the needs of unaccompanied children and their sponsors in accessing community services, including enrolling in school. Further, unaccompanied children and their sponsors received Level One services if they did not require intensive case management as provided with Level Two PRS. Unaccompanied children and their sponsors received Level Two services if they received Level One Services, and the PRS providers assessed them to need more intensive case management, or the unaccompanied children required a higher level of services as assessed during the unaccompanied children's release from ORR care (*e.g.,* during the sponsor suitability assessment). Level Two services provided a higher level of engagement between the PRS provider and the unaccompanied child and sponsor and included regularly scheduled home visits (at least once a month), ongoing needs assessments of the unaccompanied child, comprehensive case management, and access to therapeutic support services. In the NPRM, ORR considered updating the levels of PRS available to unaccompanied children and sponsors, from a framework that contains two levels of PRS to a framework that contains three levels, and stated further, that ORR was considering codifying this PRS level framework. To that end, ORR sought input from the public on one potential way to update its policies to incorporate additional levels, as described below.

ORR considered requiring the PRS provider's assessment to include the level of PRS recommended to be provided in direct response to the unaccompanied child's and the sponsor's needs, based on regular and repeated assessments. Under a revised framework for PRS levels, ORR considered an option in which Level One PRS would include safety and well-being virtual check-ins; [180] Level Two PRS would cover case management services; and Level Three PRS would include intensive home engagements. Additionally, ORR considered requiring that a released unaccompanied child may receive one or more levels of PRS depending on the needs and circumstances of the unaccompanied child and sponsor. ORR considered codifying a requirement that PRS providers would be required to furnish specific levels of PRS to unaccompanied children required to receive PRS under the TVPRA to ensure the safety and well-being of these unaccompanied children post-release and their successful transition into the community. ORR noted that it was considering time limits on the availability of PRS at each level that the PRS provider would furnish to the unaccompanied child and sponsor, which at a minimum would be furnished for six months after release.

For example, an unaccompanied child and sponsor referred to Level Three PRS would receive this level of service for at least six months after release, and ORR would subsequently assess every 30 days thereafter whether services are still needed. Further, ORR considered requiring PRS providers to furnish levels of PRS to unaccompanied children required to receive PRS under the TVPRA and their sponsors for timeframes that may continue beyond the timeframes to be established for the levels. ORR noted that the timeframes for providing PRS would not extend past the circumstances in which PRS would be terminated as specified in § 410.1210(h).

ORR notes, however, that this final rule does not codify these updates. ORR believes it is more appropriate for this final rule to establish general standards for the provision of PRS, rather than specific methods of implementing PRS. As with other topics not codified in this rule, ORR believes that this approach will enable it to make more frequent, iterative policy updates, in keeping with best practices and to allow continued responsiveness to the needs of unaccompanied children and PRS providers, as informed by the implementation of its updated policies and this final rule.

ORR proposed in the NPRM at § 410.1210(e)(1), that the PRS provider would, in consultation with the unaccompanied child and sponsor, decide the appropriate methods, timeframes, and schedule for ongoing contact with the released unaccompanied child and sponsor based on the level of need and support needed (88 FR 68935). PRS providers would be required in § 410.1210(e)(2) to make, at a minimum, monthly contact with their assigned released unaccompanied children and their sponsors, either in person or virtually for six months after release. ORR considered limiting the minimum monthly contact to unaccompanied children and sponsors receiving Level Two and/or Level Three PRS. ORR sought public comment on this proposal including consideration of applicable factors that should be included in determining how often PRS providers would be required to contact their assigned unaccompanied children and sponsors after release. ORR proposed in the NPRM at § 410.1210(e)(3), that PRS providers would be required to document all ongoing check-ins and in-home visits as well as the progress and outcomes of those home visits.

ORR proposed in the NPRM at § 410.1210(f)(1), that PRS providers would work with released unaccompanied children and their sponsors to ensure they can access community resources (88 FR 68935). ORR opted not to enumerate ways that PRS providers could comply with this requirement, because the nature of such assistance would vary by case. ORR anticipates that PRS providers could assist unaccompanied children and sponsors with issues such as making appointments; communicating effectively with their service provider; requesting interpretation services, if needed; understanding a service's costs, if applicable; enrollment in school, or where accessible and needed, preschool or daycare; and other issues relevant to accessing relevant services. ORR also anticipated that PRS providers would assist released unaccompanied children and sponsors in accessing the following community-based resources: legal services; education and English classes; youth- and community-based programming; medical care and behavioral healthcare; services related to the unaccompanied children's cultural and other traditions; and supporting unaccompanied children's independence and integration.

ORR proposed in the NPRM at § 410.1210(f)(2), that PRS providers would be required to document any community resource referrals and their outcomes (88 FR 68935).

ORR proposed in the NPRM at § 410.1210(g) to codify timeframes for when PRS providers would be required to start PRS (88 FR 68935). ORR noted that although the TVPRA mandates PRS in certain cases, it does not address the timing of providing PRS. In the NPRM, ORR proposed in the NPRM at § 410.1210(g)(1) to codify its policies specifying a timeframe for the delivery of PRS to released unaccompanied children who are required to receive PRS pursuant to the TVPRA at 8 U.S.C. 1232(c)(3)(B).[181] Upon finalization, PRS providers would be required, to the greatest extent practicable, to start services within two (2) days of the unaccompanied children's release from ORR care. Further, as proposed in the NPRM, PRS shall start no later than 30 days after release if PRS providers are unable to start services within two (2) days of release. At § 410.1210(g)(2) of the NPRM, ORR proposed to codify its policy [182] that for released unaccompanied children who are referred to PRS but who are not mandated to receive PRS following a home study, PRS providers would be required, to the greatest extent practicable, to start services within two (2) days of accepting a referral.

ORR proposed in the NPRM at § 410.1210(h) the circumstances required for termination of PRS, which ORR stated in the NPRM were based on ORR's policies (88 FR 68935).[183] At § 410.1210(h)(1), ORR proposed in the NPRM to require that PRS for an unaccompanied child required to receive PRS pursuant to the TVPRA at 8 U.S.C. 1232(c)(3)(B) would continue until the unaccompanied child turns 18 or the unaccompanied child is granted voluntary departure or lawful immigration status, or the child receives an order of removal. In the event an unaccompanied child is granted voluntary departure or receives an order of removal, PRS would be discontinued until the child is repatriated, and PRS would end once the unaccompanied child's case is closed. ORR proposed in the NPRM at § 410.1210(h)(2), to require that PRS for an unaccompanied child receiving PRS, but who is not required to receive PRS following a home study, would continue for not less than six months or until the unaccompanied child turns 18, whichever occurs first; or until the PRS provider assesses the unaccompanied child and determines PRS are no longer needed, but in that case for not less than six months.

Finally, at § 410.1210(i) of the NPRM, ORR proposed records and reporting requirements for PRS providers (88 FR 68935 through 68936). Keeping accurate and confidential records is important to ensure the security of all information the PRS provider documents about the unaccompanied child and sponsor. Accordingly, ORR proposed in the NPRM at § 410.1210(i)(1)(i), to require PRS providers to maintain comprehensive, accurate, and current case files that are kept confidential and secure, and that are accessible to ORR upon request. PRS providers would be required to keep all case file information together in the PRS provider's physical and electronic files. Section 410.1210(i)(1)(ii) would also require PRS providers to upload all documentation related to services provided to unaccompanied children and sponsors to ORR's case management system, as available, within seven (7) days of completion of the services.

To prevent unauthorized access to electronic and paper records, ORR proposed in the NPRM at § 410.1210(i)(2)(i) to require PRS providers establish and maintain written policies and procedures for organizing and maintaining the content of active and closed case files (88 FR 68936). Under § 410.1210(i)(2)(ii), prior to providing PRS, PRS providers would be required to have established administrative and physical controls to prevent unauthorized access to the records that include keeping sensitive

health information in a locked space when not in use. ORR believes that any information collected from the unaccompanied child or sponsor should not be shared for any other purposes except for coordinating services for them. ORR therefore proposed at § 410.1210(i)(2)(iii) to codify a requirement that PRS providers may not release records to any third party without the prior approval of ORR. If a PRS provider is no longer providing PRS for ORR, ORR proposed in the NPRM that the PRS provider would be required to provide all active and closed case file records in their original format to ORR according to ORR's instructions.

ORR proposed in the NPRM at § 410.1210(i)(3) requirements to protect the privacy of all unaccompanied children receiving PRS (88 FR 68936). Under § 410.1210(i)(3)(i), PRS providers would be required to have a written policy and procedure that protects the sensitive information of released unaccompanied children from access by unauthorized users, such as encrypting electronic communications (including, but not limited to, email and text messaging) containing sensitive healthcare or identifying information of released unaccompanied children. PRS providers would be required under § 410.1210(i)(3)(ii) to explain to released unaccompanied children and their sponsors how, when, and under what circumstances sensitive information may be shared during the course of their PRS. PRS providers would also be required to have appropriate controls on information sharing within the PRS provider network. ORR believes these controls are necessary to ensure that sensitive information is not exploited by unauthorized users to the detriment of the released unaccompanied children.

ORR proposed in the NPRM that if a PRS provider is concerned about the unaccompanied child's safety and well-being, it must notify ORR and other appropriate agencies of such concerns (88 FR 68936). Section 410.1210(i)(4)(i) covers the procedures and requirements regarding such NOCs. A PRS provider concerned about an unaccompanied child's safety and well-being would be required to document and report a NOC to ORR and, as applicable, to other investigative agencies (*e.g.,* law enforcement or child protective services). ORR stated in the NPRM, consistent with current policies,[184] that it anticipated that situations when PRS providers would submit a NOC would include: an emergency; a current case of human trafficking; abuse, abandonment, neglect, or maltreatment; a possible exploitative employment situation; kidnapping, disappearance, or a runaway situation; alleged criminal activity; involvement of child protective services; potential fraud, such as document fraud or the charging of unlawful fees; a behavioral incident involving the unaccompanied child that raises safety concern; media attention; a sponsor declines services; contact or involvement with organized crime; the PRS provider is unable to contact the unaccompanied child within 30 days of release; or when the PRS provider loses contact with a child who is receiving PRS, and there are safety concerns. Consistent with ORR's PRS policies,[185] it clarifies in this final rule that PRS providers would also submit a NOC if they suspect: human trafficking; abuse abandonment, or maltreatment; or contact or involvement with organized crime.

Additionally, under § 410.1210(i)(4)(ii) of the NPRM, ORR proposed that a PRS provider would be required to submit a NOC to ORR within 24 hours of first knowledge or suspicion of events raising concerns about the unaccompanied child's safety and well-being, and to document the NOC (88 FR 68936).

ORR proposed in the NPRM at § 410.1210(i)(5) to codify requirements for PRS providers regarding case closures (88 FR 68936). ORR proposed that a case file be formally closed when the PRS are terminated by ORR, and that ORR would supply instructions, including relevant forms, that the PRS provider would be required to follow when closing out a case. For example, similar to current practice, ORR anticipates that it may require PRS providers to complete a case closure form and upload it to ORR's online case management system within 72 hours of a case's closure.

Comment: A few commenters supported ORR codifying requirements for PRS because these services support the unaccompanied children's successful transition into their community. Additionally, a few commenters supported ORR's proposal at §§ 410.1210(a)(2) and 410.1204(e) that all children for whom a home study was conducted would receive PRS. Notably, a commenter stated these unaccompanied children present a high level of risk and need continued services after release to maintain their safety and well-being. A few commenters also supported the proposal at § 410.1210(a)(4) that ORR would not delay release if PRS were not immediately available for the child.

Response: ORR thanks the commenters for their support.

Comment: A commenter expressed concern that the language at § 410.1210(a)(2) where ORR proposed that an unaccompanied child who receives a home study and PRS ''may'' also receive home visits by a PRS provider, seemingly makes home visits optional and recommended making home visits required.

Response: ORR clarifies that the use of the word ''may'' in this sentence does not mean that home visits are optional for children receiving PRS. ORR uses the term ''may'' to accommodate children who receive virtual visits, such as those that receive Level One PRS under ORR's revised PRS policies. ORR clarifies that under existing policies, Level One PRS includes virtual visits and Level Two and Three PRS includes in-home visits.

Comment: Several commenters urged that PRS should always be voluntary and not required of the child and sponsor. Further, another commenter recommended changing the language from ''shall'' to ''may'' or ''as needed'' throughout § 410.1210(b) to allow PRS providers to assist based on their discretion, resources, and the children's and sponsors' needs.

Response: ORR agrees, and notes that it lacks statutory authority to make PRS mandatory. It was not ORR's intent in the NPRM to suggest that PRS be mandatory. Further, ORR notes that although it is statutorily required to provide follow-up services to unaccompanied children in certain circumstances,[186] it cannot force children or their sponsors to accept PRS. Accordingly, ORR is not finalizing § 410.1210(a)(2) as proposed and is revising this section to state that ORR shall offer PRS for unaccompanied children for whom a home study was conducted pursuant to § 410.1204. Additionally, ORR is revising § 410.1210(g)(1), (g)(2), (h)(1), and (h)(2) to reflect that PRS are voluntary by adding ''an offer of PRS,'' and ORR is clarifying at § 410.1210(h)(1) and (h)(2) that PRS are offered until one of the termination conditions are met. Further, ORR is removing the proposed language ''during the pendency of removal hearings'' at § 410.1210(a)(2) to align with the language used in § 410.1204.

Because ORR is updating § 410.1210(a)(2) to reflect that PRS services are voluntary for sponsors and unaccompanied children, ORR does not agree with the commenter's recommendations to also update § 410.1210(b) from ''shall'' to ''may'' and clarifies that § 410.1210(b) lists the minimum service areas that PRS includes but does not require all unaccompanied children and sponsors to receive these services. During the PRS provider's assessment of the

unaccompanied child and sponsor, ORR intends under this final rule that the PRS provider will determine which specific PRS are appropriate based on the unaccompanied child's and sponsor's needs.[187]

Comment: A number of commenters supported ORR expanding access to PRS to all unaccompanied children after release from ORR care and custody because PRS would benefit all children. Specifically, a few commenters stated that expanding access to all unaccompanied children fosters their safe integration into their local communities by assisting them in obtaining critical services, including education, legal services, health insurance, mental health services and counseling. Another commenter stated that PRS are vital to ensure children and sponsors have access to services after release because they support safe and stable home placements.

Additionally, a few commenters supported extending PRS home visits to children with mental health or other needs who could benefit from ongoing assistance from a community-based provider. A few other commenters recommended ORR clarify that children with mental health or other needs who did not receive a home study are eligible for PRS.

Lastly, one commenter expressed concern that ORR proposed in the NPRM to limit additional consideration for PRS to vulnerable and/or high-risk unaccompanied children at § 410.1210(c), and the commenter recommended not limiting PRS to this population of children and expanding access to all children who need PRS.

Response: ORR thanks the commenters and agrees that PRS can benefit all unaccompanied children by assisting them with obtaining critical services to support their safe integration into their local communities and safe and stable home placements. Further, ORR believes the TVPRA authorizes it to offer PRS to all released unaccompanied children, because in its experience all releases from ORR custody ''involve[e] children with mental health or other needs who could benefit from ongoing assistance from a social welfare agency.'' [188] Accordingly, ORR is not finalizing § 410.1210(a)(3) as proposed in the NPRM, and is instead revising this section to state that to the extent that ORR determines appropriations are available, and in its discretion, ORR may offer PRS for all released children.

Additionally, ORR clarifies that all unaccompanied children, even if they did not receive a home study, are eligible for PRS, subject to available appropriations.

Finally, ORR acknowledges the commenter's concern regarding limiting PRS to unaccompanied children who require additional consideration under § 410.1210(c). ORR believes that expanding PRS to all children, to the extent appropriations are available, addresses the commenter's concern. To the extent appropriations are unavailable, ORR is clarifying at § 410.1210(a)(3) that it may give additional consideration, consistent with § 410.1210(c), for PRS cases involving unaccompanied children with mental health needs or other needs who could particularly benefit from ongoing assistance from a community-based service provider, to prioritize cases as needed.

Comment: A few commenters also recommended that ORR create a publicly accessible plan for achieving universal PRS by 2025 due to concerns about ORR's funding levels and PRS provider capacity. Another commenter recommended the public plan include guidelines to ensure children can make meaningful decisions about receiving PRS where the sponsor decides not to participate. A separate commenter recommended the public plan explain how ORR plans to expand PRS providers' capacity to meet that goal. Further, a few commenters had recommendations on ORR expanding its network of PRS providers to provide universal PRS and reduce delays. One commenter recommended ORR leverage its existing networks with national, State, and community-based providers to expand access to PRS for all unaccompanied children and their sponsors. Another commenter recommended PRS providers that are easily accessible, available in various locations, and able provide culturally appropriate services.

Response: ORR does not believe a regulatory mandated plan is necessary to move forward efforts to expand PRS to the extent appropriations allow. However, it will take these recommendations into consideration as needed as it develops future policies in this area.

ORR also appreciates the recommendation to leverage existing networks but notes that detailing specific plans to leverage existing networks of organizations and providers to broaden access to PRS is outside the scope of this rule. ORR will take the recommendation into consideration for future policymaking in this area.

Comment: A commenter recommended that ORR use a standardized assessment to assess an unaccompanied child's mental and behavioral health prior to release and use the information gathered in the assessment to make evidence-informed decisions to determine the level of need and whether PRS are necessary.

Response: Under current policy, ORR determines the appropriate level for which to refer all children to PRS depending on the needs and the circumstances of the case. Although the design of a standardized assessment is outside the scope of this rule, ORR will take the recommendation into consideration for future policymaking in this area.

Comment: A few commenters expressed concern about ORR not delaying release if PRS are not immediately available for an unaccompanied child. One commenter asserted that ORR's sole focus is speed of release. Another commenter expressed concern that the unavailability of PRS combined with a policy to not postpone release due to such unavailability could mean that thousands of unaccompanied children will be released to sponsors with no PRS.

Response: ORR does not agree that ORR's sole focus is speed nor that this will increase the number released children without PRS. ORR prioritizes the safety and well-being of all unaccompanied children when releasing them to sponsors, consistent with its statutory responsibilities, and notes that pursuant to subpart C, ORR is explicitly codifying measures to protect the safety of children it releases from custody (*e.g.,* to support children being released to thoroughly vetted sponsors who can take care of children's safety and well-being post-release).

Further, in the NPRM, ORR acknowledged that it was aware of concerns that, in some cases, release of unaccompanied children to sponsors may be unduly delayed by a lack of available PRS providers and services near the sponsor and therefore proposed at § 410.1210(a)(4), that it would not delay release if PRS are not immediately available (88 FR 68933).

Comment: A few commenters had recommendations for how PRS providers should furnish PRS. One commenter recommended updating the language in § 410.1210(b) that states ''in a way they effectively understand regardless of spoken language, reading comprehension, or disability to ensure meaningful access for all eligible children, including those with limited English proficiency'' to read, ''in a developmentally, culturally, and trauma-informed way that ensures effective understanding, regardless of

age, reading comprehension, or disability to ensure meaningful access for all eligible children, including those with limited English or Spanish proficiency.'' This commenter recommended the changed language to recognize that many children may speak an Indigenous language as their preferred language. Further, a separate commenter recommended that ORR guarantee language access in PRS so that PRS take place in the child and the sponsor's preferred language(s).

Another commenter recommended PRS be furnished in a manner sensitive to the individual needs of the sponsor in addition to the individual needs of the unaccompanied child. This commenter also recommended that PRS be furnished in a way that sponsors effectively understand regardless of spoken language, reading comprehension, or disability to ensure meaningful access for sponsors. Additionally, this commenter recommended adding ''or preferred languages other than English'' after ''with limited English proficiency.''

Response: As previously stated, ORR is articulating here the broad policies governing PRS and not all of the operational specifics of PRS implementation. With respect to more detailed requirements for PRS providers, ORR notes that many of the commenters' recommendations are reflected in its revised PRS policies. For example, under current ORR policy, which is consistent with this final rule, PRS providers must use evidence-based child welfare best practices that are culturally- and linguistically-appropriate to the unique needs of each child and are grounded in a trauma-informed approach. Additionally, under ORR policy, PRS providers must make every effort to conduct PRS in the preferred language of the released child, which would include languages other than English as recommended by the commenter. If the PRS provider is not highly proficient in the child's preferred language, they must use an interpreter. ORR policy also requires that PRS case managers may help connect children with communities, groups, and activities that foster the growth of their personal beliefs and practices and that celebrate their cultural heritage.[189]

ORR recognizes its obligation under applicable laws, regulations, and guidance from the Department, and as set forth in Executive Order 13166, *Improving Access to Services for Persons with Limited English Proficiency,* to ensure meaningful access to its programs and services for individuals with limited English proficiency (LEP); this obligation extends to LEP sponsors when communicating with PRS providers and participating in PRS. As noted above, ORR did not intend for this section to describe all of the specific requirements of implementation of PRS requirements. ORR appreciates and will consider the recommendations received for further improving access to and participation by sponsors with respect to PRS in future policymaking in this area.

Comment: One commenter recommended ORR revise § 410.1210(b)(1) through (12) to require PRS providers to deliver education, information, and assistance to unaccompanied children and sponsors and not just sponsors. This commenter stated that the children may be responsible for many aspects of their care or need the information provided to the sponsors. Another commenter recommended ORR revise § 410.1210(b)(12) to make additional service areas at the request of the sponsor in addition to the unaccompanied child.

Response: ORR agrees that PRS providers should deliver education, information, and assistance to unaccompanied children in addition to the sponsors when appropriate. Accordingly, ORR is revising § 410.1210(b)(1), (b)(3) through (6), and (b)(8) through (11) to state that the PRS provider will deliver education, information, and assistance, where appropriate, to the unaccompanied children in addition to the sponsors.

ORR declines to add ''children'' into the PRS services listed at § 410.1210(b)(2) and (7) because these service areas focus on the sponsor to ensure the unaccompanied child's safety and well-being after release. Specifically, the PRS services at § 410.1210(b)(2) and (7) address legal related actions the sponsor may have to take regarding the unaccompanied child's immigration status and actions the sponsor must take to ensure the child receives medical services. ORR notes that it is finalizing at § 410.1210(b)(7), as proposed in the NPRM, that PRS providers shall provide the child and sponsor with information and referrals to services relevant to health-related considerations for the unaccompanied child (88 FR 68934). ORR also notes that it provides additional guidance regarding the delivery of certain education, information, and assistance to children after release in its revised PRS policies, which is consistent with this final rule.[190] ORR will monitor implementation of the regulations and consider the commenters' recommendations for future policymaking in this area.

Lastly, regarding the commenter's recommendation to revise § 410.1210(b)(12) to include the sponsor, ORR agrees with this recommendation and is revising § 410.1210(b)(12) to specify that the sponsor can also request the services.

Comment: A commenter recommended ORR develop standardized training for PRS grantees to ensure consistent provision of PRS that is sensitive to the child's individual needs, in a way the child understands (regardless of language or ability), and meets the child's needs.

Response: ORR will evaluate whether standardized training is needed, but believes it is neither necessary nor appropriate to specify such training in regulation.

Comment: A few commenters had recommendations for funding PRS. One commenter supported the PRS service areas and recommended that ORR allocate funds for specific services. For example, the commenter recommended that instead of PRS providers referring children for mental health services, ORR should fund mental health services for children who are most at-risk and ineligible or unable to access health insurance programs. Another commenter recommended that ORR not reduce funding for the PRS services listed at § 410.1210(b) based on the availability of appropriations.

Response: As discussed in section VI., funding for the UC Program's services is dependent on annual appropriations from Congress and accordingly, § 410.1210(b) specifically mentions that PRS are limited to the extent appropriations are available. ORR will consider the commenters' recommendations if funding for UC Program services changes.

Comment: Several commenters recommended that ORR include additional service areas that PRS should support, or requested that ORR clarify the PRS service areas described at § 410.1210(b). One commenter recommended that PRS providers should help sponsors apply for patient assistance or charity care programs, which the commenter stated is critical for children released to sponsors in States where the child does not qualify for medical insurance, such as Medicaid, due to immigration status. Another commenter recommended including dental services as a required PRS service area. Another commenter recommended clarifying § 410.1210(b)(3) to reflect that sponsors may need additional assistance to effectuate decision-making in addition

to guardianship, such as parental power of attorney and complying with education and medical consent laws. Additionally, a commenter expressed the importance of children receiving education and support so they can continue attending school and pursuing safe and healthy work opportunities appropriate for minors. This commenter recommended PRS include connection to legal service providers to ensure children and families receive assistance if a child is in an exploitive job, stating that this would help protect children from exploitive labor. One commenter recommended adding housing as a PRS area, stating that housing is often a significant area of stress for sponsors and a reason that children may need to work. Another commenter recommended PRS providers provide sponsors and unaccompanied children information about alternative temporary housing and emergency and crisis response resources. One commenter expressed concern that the list of PRS did not include services for children who go missing, cultural traditions, and supporting integration and independence, and requested that ORR clarify if these areas are no longer considered PRS. Another commenter recommended ORR expand the scope of PRS to explicitly include acculturation and integration services to help unaccompanied children cope with stressors by connecting them to organizations that offer culturally and linguistically responsive services. A few commenters recommended PRS include health care resources for LGBTQI+ youth.

Response: Section 410.1210(b) provides a non-exhaustive list of service areas that PRS providers may support, and ORR notes that § 410.1210(b)(12) states that PRS providers may assist the sponsor and unaccompanied child with accessing ''other services'' not specifically enumerated. ORR believes this language is sufficiently broad to cover services such as those recommended by commenters. Lastly, ORR notes that its revised PRS policies further describe some of the services recommended by commenters.[191]

Comment: A few commenters did not support guardianship as a PRS service. Specifically, a commenter did not support including guardianship because, the commenter suggested, it will likely create confusion in States where the term ''guardianship'' has different meanings and/or States use different terms to refer to an adult's legal responsibility to care and make decisions for a child. Further, this commenter stated that they have seen well-meaning community service providers advise children and their relatives to seek custody or guardianship without first consulting with an attorney to understand the impact that custody or guardianship might have on the child's eligibility for immigration relief. Additionally, another commenter did not support including guardianship and stated that ORR should not interfere with issues that arise with a state's child protective services agency when a sponsor is not a legal guardian or custodian. The commenter instead recommended that ORR provide training to child protective services workers on challenges faced by unaccompanied children, the family unification process, and the difference between sponsorship and legal guardianship or custody, and the commenter also recommended that ORR create a hotline for child protective services workers to call with questions related to unaccompanied children. Additionally, the commenter recommended legal service providers educate child protective services workers on immigration relief for unaccompanied children and how those workers can support these children. Another commenter recommended that instead of PRS providers educating sponsors on guardianship, PRS providers should advise sponsors to seek legal counsel to understand options and the legal requirements within the applicable State. This commenter stated that PRS providers providing sponsors recommendations on legal guardianship could be construed as providing legal advice and noted the variations in legal guardianship requirements and uses among States.

Response: ORR disagrees that PRS services should not include guardianship because this is an important service for unaccompanied children and sponsors who do not have legal guardianship of the children in their care. ORR acknowledges that guardianship has different meanings and requirements among the States, and accordingly proposed in the NPRM at § 410.1210(b)(3) that a PRS provider may assist the sponsor in identifying the legal resources to obtain guardianship, which would include legal service providers that could assist the sponsor on understanding the options and legal requirements in the applicable State (88 FR 68988).[192] ORR appreciates the commenters' recommendations to educate and train child protective services workers and have a hotline available for these workers. ORR notes that it has an existing hotline, the ORR NCC, that PRS providers, and any interested party caring for an unaccompanied child, may call to be connected with relevant information. With respect to training child protective services workers on various aspects of the post-release needs of unaccompanied children, although these recommendations are outside the scope of this final rule, ORR will take them into consideration for future policymaking in this area.

Lastly, ORR does not agree with the comment that a PRS provider educating the sponsor and child on guardianship could be construed as legal advice. As proposed at § 410.1210(b)(3), the PRS provider educates the sponsor and child on the benefits of obtaining legal guardianship and then refers the sponsor to legal resources if the sponsor is interested in pursuing legal guardianship. ORR notes that under § 410.1309(b), unaccompanied children would have access to legal services, to the extent funding is available, and children and their sponsors could consult with legal counsel about guardianship.

Comment: A few commenters recommended ORR provide a definition of ''additional consideration'' at § 410.1210(c) as proposed in the NPRM. These commenters also recommended ORR provide specifics regarding PRS eligibility for unaccompanied children requiring additional consideration should ORR have inadequate appropriations to achieve universal PRS by 2025.

Response: ORR clarifies that ''additional consideration'' means that ORR may prioritize referring unaccompanied children with certain needs listed at § 410.1210(c)(1) through (10) for PRS if appropriations are not available to offer PRS to all children. To clarify this in the regulation, ORR is finalizing revisions to § 410.1210(c) to state ''*Additional considerations for prioritizing provision of PRS.* ORR may prioritize referring unaccompanied children with the following needs for PRS if appropriations are not available for it to offer PRS to all children.'' ORR also notes that it is clarifying at § 410.1210(a)(3) that ORR may give additional consideration, consistent with § 410.1210(c), for cases involving unaccompanied children with mental health or other needs who could particularly benefit from ongoing assistance from a community-based service provider, to prioritize potential cases as needed. Additionally, ORR proposed the non-exhaustive list at this section of the NPRM to describe categories of unaccompanied children who, based on their particular needs or circumstances, would particularly benefit from PRS (88 FR 68934). ORR

notes this list is distinguishable from § 410.1210(b) in this final rule, which describes a non-exhaustive list of potential PRS service areas. Lastly, ORR appreciates the commenters' recommendation to provide specifics regarding PRS eligibility for unaccompanied children requiring additional consideration should ORR have inadequate appropriations to achieve universal PRS by 2025. ORR will take this recommendation into consideration for purposes of future policymaking in this area.

Comment: A commenter recommended ORR clarify that unaccompanied children with disabilities included children with developmental delays and mental/health behavioral health issues.

Response: ORR thanks the commenter for their recommendation and agrees that unaccompanied children with disabilities include children with developmental and mental health behavioral health issues. ORR is not codifying this clarification at § 410.1210(c)(2), but refers the commenter to the definition of disability, as used in this rule, at § 410.1001.

Comment: A few commenters supported the inclusion of unaccompanied children identifying as LGBTQI+ requiring additional consideration for PRS. One commenter recommended changing ''unaccompanied children with LGBTQI+ status'' to ''unaccompanied children who identify as LGBTQI+.''

Response: ORR thanks the commenters for their support. ORR has revised § 410.1210(c)(3) to ''unaccompanied children who identify as LGBTQI+,'' and is finalizing this revision at § 410.1210(c)(3).

Comment: A few commenters requested that ORR clarify how considering LGBTQI+ status or identity for PRS would impact faith-based organizations that provide PRS to unaccompanied children.

Response: ORR is committed to providing services described in this section to all unaccompanied children, including those who identify as LGBTQI+. Section 410.1210(c) provides a non-exhaustive list of unaccompanied children who may be referred by ORR to PRS based on their individual needs. ORR expects PRS providers, including faith-based organizations, to provide services listed in § 410.1210(b) to unaccompanied children, including those who identify as LGBTQI+. ORR wishes to make clear that it operates the UC Program in compliance with the requirements of Federal religious freedom laws, including the Religious Freedom Restoration Act, and applicable Federal conscience protections, as well as all other applicable Federal civil rights laws and applicable HHS regulations. HHS regulations state, for example: ''A faith-based organization that participates in HHS awarding-agency funded programs or services will retain its autonomy; right of expression; religious character; and independence from Federal, State, and local governments, and may continue to carry out its mission, including the definition, development, practice, and expression of its religious beliefs.'' [193] These regulations also make clear that HHS may make accommodations, including for religious exercise, with respect to one or more program requirements on a case-by-case basis in accordance with the Constitution and laws of the United States.[194] ORR will continue to conduct its work consistent with these protections.

Comment: A few commenters recommended additional privacy protections for unaccompanied children who require additional consideration under § 410.1210(c). A commenter recommended PRS care providers honor a child's privacy to allow the child to voluntarily access the services the child needs if they are unable or unwilling to obtain the sponsor's or guardian's consent to receive PRS.

Response: At § 410.1210(i)(3), ORR is finalizing privacy protections for unaccompanied children and their sponsors, which includes requiring the PRS providers to have in place policies and procedures to protect information from being released and appropriate controls for information sharing. ORR notes that it did not intend for 45 CFR part 410 to govern or describe the entire UC Program, and that its updated PRS policies provide additional guidance on privacy protections for unaccompanied children and sponsors receiving PRS. As ORR implements these regulations, ORR will monitor and evaluate whether additional policymaking is necessary with respect to privacy protections.

Additionally, ORR agrees that in certain circumstances, unaccompanied children should have access to PRS even if they are unable or unwilling to obtain the consent of their sponsors; however, ORR disagrees that this should apply to all sponsor types. Accordingly, ORR is codifying its policy at new § 410.1210(h)(3) that if an unaccompanied child's sponsor (not including a parent or legal guardian) chooses to disengage from PRS and the child wishes to continue receiving PRS, ORR may continue to make PRS available to the child through coordination between the PRS provider and a qualified ORR staff member.[195]

Comment: A few commenters recommended additional categories of unaccompanied children who should have additional consideration for PRS at § 410.1210(c). Specifically, a few commenters recommended ORR add pregnant and parenting unaccompanied children to the list of unaccompanied children who receive additional consideration for PRS. Another commenter recommended ORR add unaccompanied children (infants through 12 years of age) to the list.

Response: At § 410.1210(a)(3), ORR is finalizing that it may offer PRS to all unaccompanied children and this will include the categories of unaccompanied children recommended by commenters—children who are pregnant and parenting and children under 12 years of age. ORR also notes that § 410.1210 describes a non-exhaustive list. ORR does not think it is necessary to codify additional categories in the final rule but will monitor implementation of this regulation to determine whether future policymaking is appropriate in this area.

Comment: A few commenters recommended ORR clarify how an unaccompanied child and sponsor would be referred for PRS when ORR receives a call to the ORR NCC and the child and sponsor are the subjects of situations that would have necessitated a NOC if they were receiving PRS. This commenter noted that if ORR receives a NOC from the PRS provider, ORR requires the PRS provider to follow-up with the child and sponsor and assess whether PRS is appropriate.

Response: ORR notes that the comment is outside the scope of this rule, which does not codify the operation of the ORR NCC. But ORR notes that its updated PRS policies provide that ORR may, at its discretion, also refer a released child to PRS at any point during the pendency of the child's immigration case and while the child is under age 18, if it becomes aware (*e.g.,* through a NOC, or a call to the ORR NCC) of a situation warranting such referral. In that event, ORR would require the relevant PRS provider to follow up with the child and assess whether PRS would be appropriate.[196]

Comment: A few commenters supported developmentally appropriate assessments for children as described in the NPRM at § 410.1210(d). One of these commenters also supported the requirement that PRS providers use trauma-informed and child-focused assessments to determine the child's level of care needed, stating that this approach supports early intervention, is

consistent with best practices, and ensures the individual needs of the child and sponsor are met and that they receive appropriately tailored services.

Response: ORR thanks the commenters for their support.

Comment: One commenter had a recommendation for how ORR can improve assessments for PRS, as proposed in the NPRM at § 410.1210(d). Specifically, the commenter recommended the assessment indicate the child's current level of need or care to ensure PRS are appropriately tailored to their diverse and evolving needs and aligns with the child's specific challenges and strengths.

Response: ORR agrees with the commenter's recommendation that the assessment for PRS must indicate the unaccompanied child's current level of need or care to ensure PRS are tailored to the child's individualized needs. ORR is revising § 410.1210(a)(3) to require ORR to make an initial determination of the level and extent of PRS, if any, based on the needs of the unaccompanied child and the sponsor to the extent appropriations are available. Additionally, ORR is clarifying at § 410.1210(a)(3) that PRS providers may conduct subsequent assessments of the needs of the unaccompanied child and sponsor that may result in a modification to the level and extent of PRS assigned. As a result, ORR does not believe further revisions are needed at § 410.1210(d).

Comment: A few commenters recommended ORR require the assessment be culturally appropriate. Specifically, one commenter recommended that a culturally appropriate assessment would protect the child's right to preservation of culture and identity. Another commenter recommended the assessment also be linguistically appropriate. This commenter also recommended ORR issue guidance regarding the use of professional interpreters during assessments.

Response: ORR again notes that it does not intend 45 CFR part 410 to govern or describe the entire UC Program. However, with respect to the commenters' recommendations, ORR notes that its revised PRS policies, which are consistent with these final regulations, require the use of evidence-based child welfare best practices that are culturally and linguistically appropriate to the unique needs of each child and are grounded in a trauma-informed approach. ORR also thanks the commenter for their recommendation that ORR issue guidance regarding the use of professional interpreters during assessments. Although ORR also declines to codify this recommendation in this final regulation, it notes that under its updated PRS policies, if the PRS provider is not highly proficient in the child's preferred language, they must use a qualified interpreter.[197]

Comment: A few commenters recommended ORR collaborate with PRS providers to develop a standardized assessment for all PRS providers, stating that variations within assessments have caused complications and resulted in PRS providers experiencing issues with data collection and in how PRS providers assess the need for PRS, which may result in discrepancies and protection gaps. One commenter recommended ORR provide guidance on suggestions and/or examples of appropriate standardized or validated assessments and tools and examples of culturally adapted or cross-cultural assessments, mentioning as examples the Refugee Health Screener-15 [198] and the Trauma History Profile.[199]

Response: Although the development of specific screening tools is outside the scope of this rule, ORR will continue to assess the effectiveness of the regulations and take these recommendations into consideration for future policymaking in this area.

Comment: A few commenters either did not support or expressed concern about PRS providers identifying traumatic events and symptoms. One commenter stated that discussing traumatic events and symptoms with children risks re-traumatizing them and instead, mental health professionals or pediatricians with trauma-informed training should conduct trauma screening. Another commenter stated this is outside the scope of PRS case managers' work; PRS providers do not have the requisite experience, education, and training to assess childhood trauma; and they cannot provide support when screening measures uncover trauma, except in cases of Level Three PRS, as described in ORR's updated PRS policies, where support includes clinical services.

Response: ORR declines to remove ''trauma-informed'' from the assessment because it is important for PRS providers' assessments to include a trauma-informed approach to accurately assess the unaccompanied child and the sponsor for their individualized needs so they can receive appropriate services to address those needs and ensure the safety and well-being of the child post-release. For example, ORR's revised policies for PRS services state that the impact of childhood trauma, in addition to other factors, must be part of the PRS provider's assessment of the child's medical and behavioral health needs so that they can refer the child to community health centers and healthcare providers. If the assessment did not include a trauma-informed approach, the PRS provider may not refer the child to services appropriate to the child's individualized needs. ORR also notes that it did not intend for § 410.1210 to describe all requirements for PRS providers and the revised PRS policies provide more guidance to PRS providers on how to work with children who have experienced trauma.

ORR also acknowledges the recommendation that mental health professionals or appropriately trained pediatricians conduct trauma screening. Although not included in this final rule, ORR notes that its updated PRS policies, which are consistent with this final rule, provide that PRS case managers may connect children, along with their sponsor family, with specialized services and provide psychoeducation on trauma and on the short- and long-term effects of adverse childhood experiences on the children and family.[200] However, this is done after screening the child. As ORR implements these regulations, it will monitor for any unintended consequences and consider the commenter's recommendations if it determines that future policymaking in this area is needed.

Finally, ORR acknowledges the commenter's concern that PRS case workers do not have the requisite experience, education, and training to assess trauma. Although not codified in this final rule, ORR notes under its updated PRS policies, a core competency for PRS providers is having a foundational knowledge of trauma-informed care and initial training for PRS providers must include childhood trauma and its long-term effects.[201] ORR believes that this updated policy will result in PRS case managers being appropriately trained to perform trauma-informed assessments.

Comment: A few commenters requested that ORR release additional guidance related to on-going check-ins and in-home visits, including the structure of such check-ins and visits. One commenter requested that ORR provide guidance to PRS providers on what actions the providers must follow if they are unable to contact the child after the child's release.

Response: ORR notes that its updated PRS policies provide further guidance on the structure for ongoing check-ins and in-home visits, as well as the actions PRS providers must follow if they are unable to contact the child after release.[202] For example, ongoing contact with the unaccompanied child and sponsor should be determined by the

level of need and support required, in consultation with the child and sponsor. With respect to home visits provided for in Levels Two and Three PRS, after the first in-home visit, PRS case managers must make monthly visits for six (6) months. Monthly visits may occur in-person or if there are no safety concerns, virtually. Further, at minimum, in-person contact in the sponsor's home must be established every 90 calendar days for Level Two PRS and weekly for the first 45 to 60 calendar days for Level Three PRS. ORR's updated policies further provide that the nature of home visits may vary depending on the extensiveness or level of PRS provided. Finally, with respect to loss of contact, ORR's updated policies provide that if the PRS case manager is unable to reach the child or sponsor by phone through reasonable attempts or if the child or sponsor declines an in-home visit, the PRS case manager should document all attempts made and the reasons, if known, for why contact was not made or services were declined (*e.g.,* child is safe and secure and no longer requires services, sponsor's working schedule conflicts with case manager's schedule for an in-home visit, etc.). If the PRS provider is concerned about the child's safety (*i.e.,* potential child abuse, maltreatment, or neglect), the PRS provider must follow the mandated reporting guidelines for the locality in which they are providing service. Further, PRS providers must submit a NOC if they are unable to contact the released child within 30 days of release or referral acceptance.

Comment: One commenter expressed concern that involving a sponsor in determining the appropriate methods, timeframes, and schedule for ongoing contact with the released unaccompanied child gives too much power to the sponsor, and also expressed concern about the lack of an enforcement mechanism.

Response: ORR appreciates the commenter's concern and believes the final rule, read together with its updated PRS policies, appropriately balances the need for sponsor involvement in the delivery of PRS with the need for protective measures for children. Proposed § 410.1210(e)(1) requires the PRS provider, not the sponsor, to make a determination regarding the appropriate methods, timeframes, and schedule for ongoing contact with the released unaccompanied child and sponsor. Additionally, ORR notes that its revised PRS policies provide additional guidance for PRS providers regarding the required methods, timeframes, and schedule for ongoing contact.[203]

Comment: Several commenters had recommendations regarding the duration of PRS in response to ORR proposing in the NPRM at § 410.1210(e)(2) and (h)(2) that PRS continue for six (6) months after release. Specifically, one commenter recommended all children receive PRS for at least three (3) months to ensure their successful transition into the community with regular face-to-face visits to continuously reassess the children. This commenter recommended higher risk children, such as those released to non-relative sponsors, receive at least six months of PRS and extending services as needed. Another commenter recommended ORR clarify that PRS can be provided to a released child for a full six months from the time the child's case is accepted by a PRS provider because a child's case is not always immediately accepted by a PRS provider due to capacity issues. One commenter recommended ORR provide each child with a discharge plan and PRS for at least six months. Another commenter recommended ORR provide all children with PRS for one-year post-release because all children would benefit from PRS and waitlists for PRS can be six months or more. Additionally, one commenter recommended that ORR be flexible in the duration of PRS based on the needs of the child and sponsor, stating that some cases may require longer-term support and six months of PRS may be insufficient. Another commenter recommended unaccompanied children be eligible to receive PRS until they become 21 years of age, which the commenter stated is consistent with the definition of a child under INA § 101(b)(1)(A), or they are granted voluntary departure or issued an order of removal, whichever occurs first.

Response: ORR agrees with the commenters' recommendations to consider longer timeframes and be flexible in the duration of PRS based on the needs of the unaccompanied child and sponsor. Accordingly, ORR is not finalizing § 410.1210(e)(2) as proposed in the NPRM (88 FR 68989). To allow for flexibility in how long PRS are furnished to children and their sponsors, ORR is revising § 410.1210(h)(2) to remove ''PRS for the unaccompanied child shall presumptively continue for not less than six months'' and clarifying that PRS may be offered until the unaccompanied child turns 18 or the unaccompanied child is granted voluntary departure or lawful immigration status, or the child leaves the United States pursuant to a final order of removal.

Lastly, ORR declines to revise § 410.1210(h) to state that unaccompanied children are eligible to receive PRS until they turn 21 because this would be inconsistent with the definition of ''unaccompanied child'' that ORR is finalizing at § 410.1001 (''has not attained 18 years of age''), which is consistent with the definition under the HSA, 6 U.S.C. 279(g)(2).

Comment: A few commenters supported ORR's proposal to require PRS providers to make monthly contact with released children for up to six (6) months, as originally proposed in the NPRM at § 410.1210(e)(2). Additionally, a commenter further supported the use of technology to facilitate the check-ins, *i.e.,* virtual check-ins. This commenter stated the check-ins are crucial to ensure the sponsor is complying with ORR's requirements and properly caring for the child; prevent and detect any child labor, abuse, or trafficking; assess whether the child needs adjustment to the child's support; and ensure new PRS providers comply with ORR standards and provide timely and relevant support to the child and sponsor. Another commenter recommended a monthly in-person check-in with the child, which is confidential and outside the sponsor's presence, to assess the child's risk of abuse, neglect, trafficking, and other concerns. Lastly, a commenter recommended ORR set a standard timeframe and schedule of contact that would include, at a minimum, two check-ins for the first six months and then monthly for the next six months.

Response: ORR notes that in response to comment to consider longer timeframes and be flexible in the duration of PRS based on the needs of the unaccompanied child and sponsor, ORR is not finalizing § 410.1210(e)(2) as proposed in the NPRM (88 FR 68988 through 68989). To allow for flexibility in how long PRS are furnished to children and their sponsors, ORR is revising § 410.1210(h)(2) to remove ''PRS for the unaccompanied child shall presumptively continue for not less than six months'' and clarifying that PRS may be offered until the unaccompanied child turns 18 or the unaccompanied child is granted voluntary departure or lawful immigration status, or the child leaves the United States pursuant to a final order of removal. ORR will take the commenters' recommendations into consideration for future policymaking in this area.

Comment: A few commenters expressed concern about the requirement at § 410.1210(e)(3), as proposed in the NPRM, that PRS providers document ongoing check-ins and home visits as well as the progress

and outcomes of those visits. These commenters also expressed concern about PRS providers documenting community resource referrals and their outcomes as described in the NPRM at § 410.1210(f)(2). These commenters stated increased data gathering on children post-release is problematic for privacy reasons without objectives on such data and the infrastructure to support data gathering. Further, these commenters requested that ORR clarify why ORR wants this data and how ORR plans to use it.

Response: ORR proposed in the NPRM, documentation requirements at § 410.1210(e)(3) and (f)(2) to ensure PRS providers keep accurate and comprehensive records of the services they provide to unaccompanied children and their sponsors (88 FR 68935). ORR's updated PRS policies are consistent with this requirement as well.[204] Further, at § 410.1210(i)(3) in this final rule, ORR is codifying privacy protections for unaccompanied children and their sponsors, which includes requiring PRS providers have in place policies and procedures to protect information from being released and appropriate controls for information sharing. ORR notes that its revised PRS policies provide additional guidance on privacy protections for unaccompanied children and sponsors receiving PRS, which are consistent with this section.[205] ORR believes these privacy protections reasonably address the commenters' concerns regarding protection of unaccompanied children's information. Additionally, ORR is finalizing at § 410.1210(i)(1)(i) that PRS providers must upload information into ORR's online case management system within seven (7) days of completion of the services. ORR notes that it provides consistent oversight of all components of a PRS provider's program and clarifies for commenters that it plans to review information uploaded into ORR's online case management system to monitor the PRS providers' activities under ORR policies and § 410.1210 to ensure quality care for children.[206]

Comment: A few commenters supported ORR's proposal that PRS providers connect the sponsor and unaccompanied child to community resources for the child, as needed, following the child's release. Another commenter supported the requirement that PRS providers document the referral and outcome of community resources, stating documentation is essential for understanding the scope and uptake of services accessed by children and sponsors to help identify potential gaps in services, and better understand whether the services meet the children's and sponsors' needs.

Response: ORR thanks the commenters for their support.

Comment: A few commenters expressed concern that ORR did not propose to enumerate the ways PRS providers should work with children and their sponsors to access community resources. A commenter recommended ORR specify what PRS providers should assess and when needs are identified, provide support in those areas of need. This commenter further recommended ORR require a minimum standard of what PRS providers should ensure regarding school enrollment, connection to legal services, and medical, dental, and mental health services. Another commenter expressed concern that the requirement is inadequate to address the potential challenges and barriers children and sponsors face in accessing education, health care, social services, and legal assistance in their communities, which may impact the integration and well-being of children and their sponsors, and recommended ORR facilitate their access and participation in such services. This commenter further recommended PRS providers provide children and their sponsors with information on the availability of community resources to support unaccompanied children and their sponsors.

Response: As ORR stated in the NPRM preamble for proposed § 410.1210(f)(1), ORR has opted not to enumerate ways that PRS providers could comply with this proposed requirement in the regulation, because the nature of such assistance varies by case (88 FR 68935). ORR further notes that PRS can also vary by the community and/or State where unaccompanied children and their sponsors are located. To provide PRS providers with additional guidance on how to work with unaccompanied children and sponsors to access community resources, ORR has issued updated PRS policies that include many of the recommendations from commenters.[207] Nevertheless, ORR will monitor implementation of this final rule and take these recommendations into consideration with respect to potential future policymaking in this area.

Comment: A number of commenters requested clarity on why ORR is unable to collect data on what specific Government resources children access.

Response: ORR clarifies that at § 410.1210(i)(1)(i), ORR is finalizing requirements for PRS providers to upload information, including any referrals to community resources and their outcomes at § 410.1210(f)(2), into ORR's case management system.

Comment: Several commenters expressed concern that the requirement at proposed § 410.1210(g)(1), that TVPRA-mandated PRS begin within 30 days, is too long and recommended that ORR require PRS providers to start services no later than 14 days after release. A few other commenters expressed concern that PRS providers currently do not have capacity to access PRS cases in real time and recommended continued efforts to clear the existing backlog of waitlisted cases so that new cases could be accepted as close to release as possible. These commenters also recommended that care provider facilities make referrals for PRS prior to release, stating that facilities refer most cases for PRS the day of release. Lastly, a few commenters stated that the timeframes in which ORR proposes PRS providers start PRS are nearly fully dependent on appropriations and available providers, and if ORR cannot guarantee funding, these commenters requested ORR clarify how to mitigate the impacts on these timeframes.

Response: ORR agrees with the commenters' concerns about the capacity of PRS providers and is revising § 410.1210(g)(1) to state PRS shall, to the greatest extent possible, start no later than 30 days after release if PRS providers are unable, to the greatest extent practicable, start services within two (2) days of release. ORR believes that this strikes the appropriate balance of the PRS providers' capacity concerns while ensuring unaccompanied children who are legally-mandated under the TVPRA to be offered PRS receive such services in a timely manner to ensure the child's safety and well-being after release. ORR will monitor implementation of § 410.1210 and will take into consideration the commenters' recommendations for policymaking, as needed, to specify the timeframes for starting PRS.

Additionally, ORR acknowledges the commenter's concerns about clearing the backlog of PRS referrals and funding PRS. ORR notes that it is committed to pursuing additional capacity based on resources allocated by Congress.

Comment: One commenter recommended ORR clarify whether children who receive an order of removal have their PRS discontinued and recommended removing this clause if PRS continues after an order of removal.

Response: ORR's historic policy has been that PRS would end upon the receipt of an order of removal. However,

after considering the commenter's recommendation, ORR is revising § 410.1210(h)(1) and (h)(2) to state that PRS shall continue until the child is granted voluntary departure, granted immigration status, or leaves the United States pursuant to a final order of removal, whichever occurs first. Providing PRS until a child leaves the United States pursuant to a final order of removal will promote their safety and well-being post-release.

Comment: A few commenters supported the records and retention proposals for PRS providers and offered some additional recommendations. Specifically, one commenter supported requiring PRS providers to have established administrative and physical controls to prevent unauthorized electronic and physical access to records and recommended ORR update the terminology ''controls,'' as used at § 410.1210(i)(2) in the NPRM, to external, national standards describing best practices for securely handling and maintaining sensitive and restricted information. Additionally, a few commenters recommended ORR provide technical support for the submission and maintenance of files and to address any questions or complications that may arise. These commenters also requested ORR consider the additional burden of sharing hard files for the relevant record retention period.

Response: ORR thanks the commenters for their support and recommendations for ORR's record and retention proposals at § 410.1210(i). ORR declines to change the terminology used at § 410.1210(i)(2), ''controls,'' because it believes the existing term reasonably describes standards ORR may establish, including any relevant external, national standards in current or future policymaking. With respect to the recommendation that ORR provide technical support, ORR will take that recommendation into consideration for future policymaking in this area. Lastly, ORR acknowledges the request to consider the additional burden of sharing hard files and will take this into consideration for future policymaking.

Comment: Several commenters did not support the requirement for PRS providers to upload all PRS documentation on completed services provided to unaccompanied children and sponsors to ORR's case management system within seven (7) days of completion of the services, and recommended alternative timeframes. A few commenters noted that current ORR policy requires PRS providers to upload case closure reports to ORR's case management system within 30 days of case closure, and the commenters recommended ORR finalize the 30-day policy to allow PRS providers additional time. A separate commenter recommended fourteen (14) days from the completion of services to upload all PRS documentation, stating 14 days is more manageable and appropriate for PRS providers. Another commenter stated the current timing in § 410.1210(i)(1) is ambiguous and recommends ORR clarify that ''completion of the services'' means completion of individual service activities and not the overall completion of the PRS provider's services to a child, *i.e.,* when the PRS provider closes the child's case.

Response: ORR notes PRS providers are already operating under a 7-day timeframe, pursuant to its updated PRS policies.[208] ORR is thus codifying existing practice. ORR notes that the 30-day timeframe the commenter mentioned relates to closing a case and that this is also existing practice under ORR's revised PRS policies.[209] ORR is finalizing § 410.1210(i)(1) as it was originally proposed in the NPRM to ensure PRS providers upload information for individual services in a timely manner. ORR will monitor implementation of § 410.1210(i)(1) to determine if any unforeseen consequences necessitate further policymaking.

Additionally, ORR clarifies that ''completion of the services'' in § 410.1210(i)(1) means the individual service provision (*e.g.,* client case notes, referral summaries, assessments, etc.), and that this provision codifies existing practice under its revised PRS policies.[210]

Comment: A commenter requested that ORR clarify whether the record management and retention requirements apply only to PRS providers or to other types of ORR programs such as standard programs, restrictive, influx care facilities, and heightened supervisions facilities.

Response: ORR clarifies that the record management and retention requirements at § 410.1210(i) apply to PRS providers. ORR is finalizing recordkeeping requirements for care provider facilities at redesignated § 410.1303(h) and (i).

Comment: A few commenters did not support providing PRS record access to ORR upon request and sharing information regarding released children and their sponsors. Specifically, one commenter did not support ORR obtaining access to PRS files upon request, PRS providers uploading documentation into ORR's case management system, and PRS providers providing active or closed case files to ORR, stating that ORR has relinquished physical and legal custody of the child. Another commenter did not support information sharing between ORR and PRS providers due to concerns that it will discourage children and sponsors from using PRS. A separate commenter recommended that PRS providers provide only aggregated nonidentifying data to ORR and further recommended that ORR not consider PRS casefiles to be ORR property because PRS providers are subject to different laws and best practices regarding ownership of children's records that may prohibit sharing records with ORR.

Response: Although ORR does not retain custody of unaccompanied children after releasing them from its custody, ORR has the authority under the TVPRA at 8 U.S.C. 1232(c)(3)(B) to conduct follow-up services for unaccompanied children. ORR funds PRS providers to provide these follow-up services and because PRS providers are ORR grantees, under grant administration requirements, ORR is authorized to access grantee records. ORR also notes that requiring access to PRS records is consistent with HHS's Uniform Administrative Requirements, Cost Principles, and Audit Requirements for HHS Awards, codified at 45 CFR part 75.[211] ORR's updated PRS policies further clarify that PRS providers may not release these records without prior approval from ORR except for limited program administration purposes.[212] These privacy and confidentiality requirements implement the TVPRA requirement to protect children from victimization and exploitation.

Additionally, ORR acknowledges the commenter's concern regarding PRS providers uploading information into ORR's case management system. At § 410.1210(i)(1)(i), ORR is finalizing that PRS providers must upload information into ORR's online case management system within seven (7) days of completion of the services. ORR believes it is necessary for PRS providers to upload this information to keep an electronic record that is accessible to ORR to facilitate ORR's oversight and monitoring of PRS providers to ensure they comply with ORR policies and the requirements under § 410.1210.

Further, as discussed above, ORR is finalizing privacy protections for unaccompanied children and their sponsors at § 410.1210(i)(3), which includes requiring PRS providers to have policies and procedures in place to protect information from being released to unauthorized users and have appropriate controls in place for

information sharing. ORR refers the commenters to previous discussions of these protections.

Comment: A few commenters opposed the requirement for PRS providers to obtain prior ORR approval before releasing records to third parties. One commenter opposed ORR approval for release to third parties because PRS providers' security and confidentiality controls prevent release of records to potentially dangerous parties. Another commenter opposed ORR approval for release to third parties and stated all records must be available upon request by any law enforcement agency and susceptible to FOIA requests including third-party agencies.

Response: ORR notes that it funds PRS providers to provide these follow-up services. Because PRS providers are ORR grantees, the records of unaccompanied children are the property of ORR, whether in the possession of ORR or its grantees, and ORR grantees may not release these records without prior approval from ORR. ORR is revising § 410.1210(i)(2)(iii) to clarify that PRS providers may not release records to any third party without prior approval from ORR, except for program administration purposes, which is consistent with the revised PRS policies.[213] ORR has these protections in place to ensure information is not exploited by unauthorized users to the detriment of released unaccompanied children. ORR notes that it will continue to adhere to the Privacy Act, and its related System of Records Notice (SORN), under which it may release records to law enforcement and other entities for certain authorized uses.[214] Finally, ORR notes that it will evaluate requests to release information to determine if the request is appropriate and may approve the request.

Comment: A commenter recommended that ORR exclude parents or legal custodians from the term ''third party'' at § 410.1210(i)(3)(iii) due to the commenter's concern that ORR's approval prior to a PRS provider releasing records interferes with the custodial rights of sponsors, particularly parents. The commenter stated parents and legal custodians have the authority to obtain records related to their children and to determine what type of information should be shared with third parties.

Response: ORR notes that consistent with the definition of ''case file'' set forth at § 410.1001, all records of unaccompanied children are the property of ORR. Such requirement is essential to ORR's ability to provide care and custody to unaccompanied children pursuant to its statutory authorities, including appropriately managing disclosures of children's information to protect from potentially harmful disclosures. ORR notes, with respect to parents, however, that as established in its SORN, unaccompanied child case file information, including PRS records, are treated as ''mixed'' systems of record that are subject to the Privacy Act.[215] Consistent with the Privacy Act, the parents and legal guardians of minors may act on behalf of their children for purposes of the Act—including requesting their records from ORR.[216]

Comment: A commenter requested that ORR clarify how § 410.1210(i)(3)(i) and § 410.1210(i)(2)(ii), as proposed in the NPRM, differ substantively. On the one hand, as proposed in the NPRM, § 410.1210(i)(3)(i) requires PRS providers to have written policies and procedures to protect information from being accessed by unauthorized users. On the other hand, as proposed in the NPRM, § 410.1210(i)(2)(ii) requires PRS providers to have established ''administrative and physical controls'' to prevent unauthorized access to both electronic and physical records.

Response: ORR notes that proposed § 410.1210(i)(2)(ii) and (i)(3)(i) contain similar requirements because they both require PRS providers to have administrative controls in place to protect against unauthorized use of information. ORR clarifies that § 410.1210(i)(2)(ii) contains general records management and retention requirements for PRS providers and § 410.1210(i)(3) contains additional privacy protections that PRS providers shall have in their written policies and procedures to safeguard the unaccompanied child's information.

Comment: A few commenters recommended ORR strengthen the privacy protections for children and their sponsors. A few of these commenters recommended that the children's and sponsors' information and data may not be released to third parties, including law and immigration enforcement agencies, without the written request or consent of the child and/or sponsor who is subject to the information request or a judicial order. Another commenter expressed concern that PRS providers will use non-secure communication channels and recommended PRS providers conduct services in-person.

Response: ORR notes that its updated PRS policies require PRS providers to encrypt electronic communications (including, but not limited to, email and text messaging) containing healthcare or identifying information of released children.[217] ORR also notes that it will continue to adhere to the Privacy Act, under which it may release records to law enforcement for the purposes described in the Privacy Act,[218] and the UC Program SORN.

Comment: A few commenters had recommendations regarding § 410.1210(i)(4), as proposed in the NPRM, regarding NOCs. One commenter recommended including a short, exhaustive list of situations that require a NOC in the regulatory text. Further, a separate commenter recommended ORR clearly define the criteria for NOC to help identify risks and respond to the risk promptly to ensure the safety of released children. Another commenter recommended ORR clarify the language in the preamble discussing situations that require a NOC and specifically recommended updating ''potential fraud'' to mean ''being a victim of fraud'' and clarifying what ORR means by ''media attention.'' Finally, a commenter recommended elimination of the situations that require a NOC, stating several of the situations are vague and not connected to the imminent safety of the child. This commenter recommended ORR instead require PRS providers to issue NOCs exclusively for concerns, based on reliable evidence, about the imminent safety of the released child.

Response: ORR clarifies that it intentionally did not propose in the NPRM to codify a list of situations in which PRS providers would be required to submit NOCs, to allow ORR the flexibility to specify the reasons in subregulatory guidance. ORR notes that its updated PRS policies currently describe such guidance.[219] ORR believes it would be more appropriate to issue subregulatory guidance because it anticipates that the types of situations where NOCs would be appropriate may evolve over time and are highly fact-dependent. Delineating subregulatory guidance would allow ORR to make iterative updates that correspond to emerging issues in the UC Program.

Comment: A commenter requested that ORR clarify the PRS provider's obligations once the provider submits a NOC and recommended the PRS provider conduct increased home visits and follow-ups until the PRS provider is satisfied that the issue has been resolved.

Response: ORR notes that although it has not codified its requirements in the final rule, such requirements are described in its policies. These policies describe, for example, the PRS provider's obligations once it submits a NOC.[220] ORR may also refer a released child to PRS at any point during the pendency of the child's immigration

case and while the child is under age 18, if ORR becomes aware (*e.g.,* through a NOC, or a call to the ORR NCC) of a situation warranting such referral. ORR would then require the relevant PRS provider to follow up with the child and assess whether PRS would be appropriate. ORR will determine the appropriate level for which to refer all children to PRS depending on the needs and the circumstances of the case and will make PRS referrals accordingly. Under its updated PRS policies, ORR specifies the check-ins and home visits required depending on the level of PRS ORR determines appropriate.[221]

Comment: One commenter requested ORR to clarify the purpose of requiring PRS providers to submit NOCs after a child is released and requested ORR clarify what it intends to do with NOCs given ORR does not have custody of a child after release.

Response: Although ORR does not retain custody of unaccompanied children after releasing them from its custody, ORR has the authority under the TVPRA at 8 U.S.C. 1232(c)(3)(B) to conduct follow-up services for unaccompanied children. A significant reason for requiring NOCs is to promote the safety of unaccompanied children, even out of ORR's legal custody, consistent with its statutory obligations.[222] As further set forth in its policies, ORR may refer NOCs to appropriate authorities where a child's welfare may be at risk. It is also important for ORR to receive NOCs as a matter of responsible program administration, particularly with respect to services funded by the agency. Finally, ORR notes that its updated PRS policies further describe what ORR does with NOCs once received.[223]

Comment: A commenter recommended that PRS providers document NOCs within three (3) business days of first suspicion or knowledge of the event(s) instead of the proposed 24-hour turnaround time, stating this would allow PRS caseworkers to carry out an intervention with the child and family, report the event(s) to the appropriate investigative agencies, and document the event(s) for ORR in a case note.

Response: Due to the serious nature of the reasons for concern necessitating the PRS provider to submit a NOC, ORR does not agree with the commenter's recommendation to lengthen the amount of time for PRS providers to submit a NOC. ORR is finalizing at § 410.1210(i)(4)(ii) that PRS providers shall document and submit NOCs to ORR within 24 hours of first suspicion or knowledge of the event(s) to ensure the child's safety and well-being post-release.

ORR did not receive any comments regarding the amount of time PRS providers would have under the case closure proposal at § 410.1210(i)(5) and notes that in the NPRM, it notified interested parties that ORR anticipated that it may require PRS providers to complete a case closure form and upload it to ORR's online case management system within 72 hours of a case's closure (88 FR 68936). ORR is finalizing at § 410.1210(i)(5)(iii) a requirement that PRS providers must upload any relevant forms into ORR's case management system within 30 calendar days of a case's closure. Based on the feedback ORR received in response to the seven (7) day timeframe for submitting information under § 410.1210(i)(1), ORR believes 30 days is an appropriate amount of time to allow PRS providers to review and finalize documentation for case closures.

Comment: ORR sought public comment on whether it should consider codifying SWB calls in this final rule or in future rulemaking and whether ORR should integrate SWB calls into PRS, including the factors that should be considered in doing so. A few commenters supported ORR integrating SWB calls in PRS stating this could enhance their effectiveness because PRS providers work with children post-release and research and find resources, develop relationships and partnerships, and engage with community stakeholders where children are released.

In contrast, a few commenters opposed ORR integrating SWB calls into PRS because PRS providers lack capacity to provide these calls and instead, recommended ORR codify SWB calls and require ORR to be responsible for SWB calls. Several commenters expressed concern that due to current funding levels of PRS and limited provider capacity, integrating SWB calls into PRS would place additional strain on PRS providers and lengthen the waitlist for PRS, and the commenters recommended additional funding if SWB calls are integrated into PRS.

Several commenters had recommendations for how ORR could improve SWB calls. One commenter recommended ORR provide various means of communication for SWB calls, rename them ''SWB checks,'' and permit communication via SMS text or other texting services. This commenter recommended ORR continue to refine SWB checks to optimize accessibility, cultural competency, building trust, and connection to services. Another commenter recommended SWB calls provide an opportunity to children and/or sponsors to communicate with a neutral individual to request assistance, a change in PRS provider or services, or to decline services. Additionally, the commenter recommended personnel who conduct the SWB checks should have proficiency in languages other than English, access to qualified interpreters, experience working with youth and immigrant families, and training in child welfare and other relevant areas.

Another commenter recommended that SWB calls focus on the interim time between an unaccompanied child's release and the start of PRS. Lastly, a few commenters expressed concern regarding the rate of unanswered SWB calls, the unknown whereabouts of released children, and sponsors reporting children as runaways or missing while under their care. One of these commenters recommended ORR conduct an analysis of ways to address released minors who are reported missing by their sponsors.

Response: ORR thanks the commenters for their support, recommendations, and concerns. After considering the comments received, ORR is not codifying SWB calls into this final rule and will take into consideration the commenters' concerns and recommendations for future policymaking in this area.

Comment: ORR sought public comment on updating its policies to three levels of PRS, as described in the preamble above. Several commenters supported ORR updating its policies to provide three levels of PRS, stating the levels benefit children and address their needs, strengthen PRS providers' delivery and management of PRS, and foster standardization and consistency among PRS providers. Additionally, a few of these commenters also supported codifying PRS levels in this final rule. A few commenters supporting the three levels of PRS also expressed concern about each level having different levels of engagement, stating the language is vague and presumes the amount of contact rather than variation in service. These commenters recommended ORR specify the type and frequency of contact for each level. One commenter asked ORR to clarify how and when it determines levels, stating it was unclear whether levels are assigned prior to referring for PRS.

A few commenters expressed concern about PRS Level One SWB checks. Specifically, a commenter expressed concern about PRS providers conducting Level One PRS SWB check-ins virtually. Another commenter expressed concern with describing Level One services as SWB checks,

stating these are insufficient for all children, and recommended SWB checks be distinct from PRS because they do not align with the goals of PRS. Instead, the commenter recommended that Level One PRS allow for virtual case management due to the complexity of the child's case. This commenter also stated that more unaccompanied children would benefit from Level Two PRS.

Additionally, a few commenters had recommendations or requested clarity for Level Three PRS. A few commenters requested ORR clarify intensive home engagements and the desired outcome for Level Three PRS. One commenter recommended revising the current policy for Level Three providers and aligning requirements with available resources. This commenter also stated that ORR's updated PRS policies imply the preferred intervention for Level Three PRS is from PRS providers with Trauma-Focused Cognitive Behavioral Therapy (TFCBT) training. The commenter expressed concern that TFCBT training is unattainable for PRS providers due to lack of ORR funding and recommended ORR fund PRS providers to obtain this training and hire qualified clinical staff to supervise this level of intervention.

A few commenters had recommendations and concerns regarding assessments and re-evaluations for PRS. Specifically, one commenter supported the PRS provider's assessment including the level of PRS to be provided and stated this aligned with the international law requirement to integrate unaccompanied children in the community. The commenter recommended extra measures in the assessment to tailor PRS to address the child's needs. Another commenter recommended ORR outline in its subregulatory guidance the frequency with which ORR requires PRS providers to re-evaluate the child's level of care, stating monthly evaluations are adequate unless the PRS provider anticipates significant changes and recommended ORR provide examples of factors PRS providers should consider when deciding the frequency of contact. A few separate commenters expressed concern about having different assessments for PRS providers, stating each provider will have varying definitions of cases that merit Level One, Two, or Three PRS and recommended uniform assessments.

Further, a commenter recommended ORR require that Level Three PRS include weekly contact for 45–60 days, or longer if necessary. Another commenter recommended extending the proposal that PRS providers make at least monthly contact, either in-person or virtually, for six months after release to all unaccompanied children and their sponsors regardless of the PRS Level because it allows PRS providers to regularly assess level of care. One commenter recommended that all children and sponsors who would like a PRS case manager have access to one for at least six months, including in-home visits if desired.

Response: ORR thanks the commenters for their support, recommendations, and concerns. As stated above, in this final rule, ORR is not codifying standards related to differing levels of PRS. Rather, ORR has updated its PRS policies to describe three levels of PRS in alignment with ORR's discussion in the preamble to the NPRM (88 FR 68934 through 68935).

Additionally, in this final rule, ORR is revising § 410.1210(a)(3) to require ORR to make an initial determination of the level and extent of PRS, if any, based on the needs of the unaccompanied child and the sponsor and the extent appropriations are available. ORR is clarifying at § 410.1210(a)(3) that PRS providers may conduct subsequent assessments based on the needs of the unaccompanied child and the sponsor that may result in a modification to the level and extent of PRS assigned. ORR notes that these revisions are aligned with its updated PRS policies, which specify additional guidance on the assessment requirements. As ORR continues to make refinements to its PRS policies and will take into consideration the commenters' concerns and recommendations to inform that process.

Comment: One commenter recommended that when PRS providers discharge children and their sponsors from PRS, the PRS providers should connect the children and sponsors to local community-based organizations to ensure an established support network and readily accessible services if needed.

Response: ORR thanks the commenter for the recommendation and notes that PRS providers refer unaccompanied children and sponsors to community resources pursuant to § 410.1210(f), as recommended by the commenter. Further, ORR expects that even if ORR-funded PRS cease, unaccompanied children and sponsors referred to such community resources may continue receiving services from those resources. However, ORR will monitor implementation of this final rule and consider this recommendation for future policymaking in this area as appropriate.

Comment: A few commenters recommended non-parent sponsors have access to PRS. These commenters stated non-parent sponsors should receive PRS because they may need assistance with enrolling children into school or daycare, obtaining medical treatment for the children, securing signed power of attorney forms from parents, complying with educational and medical consent laws, and/or securing court orders of custody or guardianship.

Response: ORR clarifies that § 410.1210 does not limit PRS to only parent sponsors and uses the term ''sponsor'' to include all types of sponsors.

Comment: A number of commenters expressed concern that ORR does not know the whereabouts of a large number of unaccompanied children released from its care, with some recommending a formal audit and investigation into the children's whereabouts before finalizing the rule. Additionally, several commenters expressed concern about following up with released children to ensure their safety and well-being. A few commenters expressed concern about the lack of ORR follow-up after a child has been released to a sponsor, with some commenters emphasizing the need to hold sponsors accountable in cases where they violate the terms of the Sponsor Agreement or abuse, neglect, or traffic children. Another commenter expressed their view that ORR conducts minimal follow-up on releases and the proposed rule would make follow-up discretionary. A few commenters recommended the Government check in on children after release, and one commenter recommended more routine and frequent checks to ensure the safety and well-being of released children. Another commenter recommended the Government physically check on the children through unannounced visits several times per year and coordinate with local law enforcement. One commenter recommended ORR document follow-ups with children after they are released.

Response: ORR understands that concerns that ORR does not know the whereabouts of a large number of unaccompanied children was in reference to media reporting regarding children with whom ORR was unable to make direct contact during follow-up calls after they were released from ORR custody. Although ORR's custodial authority ends when a child is released from ORR care, ORR has the authority under the TVPRA at 8 U.S.C. 1232(c)(3)(B) to conduct follow-up services for unaccompanied children.

Pursuant to § 410.1203(c), a sponsor agrees to provide for an unaccompanied

child's physical and mental well-being, ensure the child's compliance with DHS and immigration court requirements, adhere to Federal and applicable State child labor and truancy laws, and notify appropriate authorities of a change of address, among other things. ORR has policies in place to promote unaccompanied children's safety and well-being after they have been released from ORR care to the sponsor. For example, as provided in § 410.1210(a)(2) and (3), ORR provides PRS to certain unaccompanied children, and subject to available funds, all unaccompanied children are eligible for PRS. Additionally, under existing ORR policies, ORR care provider facilities are required to make at least three SWB calls to speak with the child and sponsor individually to determine if the child is still residing with the sponsor, enrolled or attending school, aware of any upcoming court dates, and otherwise safe, as well as to assess if either the child or the sponsor would benefit from additional support or services. Although many sponsors and children may choose not to answer a call from an unknown phone number or because they may be fearful of Government entities, or they may simply miss the call, in FY 2022, ORR care provider facilities made contact with either the child, the sponsor, or both in more than 81 percent of households. Additionally, some children who have not answered a SWB call, have still been accounted for through the provision of PRS, legal services, or the ORR NCC.

Further, ORR notes that its revised PRS policies describe additional requirements for the frequency of on-going contact during PRS, which varies based on the level, with in-person visits required for Levels Two and Three PRS.[224] Additionally, pursuant to its updated PRS policies, if PRS providers are unable to reach the child and sponsor, and there is a safety concern related to potential child abuse, maltreatment, or neglect, PRS providers must follow the mandated reporting guidelines for the locality in which they are providing services, which may involve contacting local law enforcement and requesting a well-being check on the child, in addition to submitting a NOC. Finally, ORR will monitor the implementation of the regulations. If additional protections are needed for unaccompanied children after release, ORR will take the commenters' recommendations into consideration for future policymaking.

Comment: One commenter recommended ORR hold monthly listening sessions with at least one representative from each PRS provider so that providers could provide feedback on ORR policy changes and inform ORR on potential issues that could impact the proposed policies. Additionally, this commenter recommended ORR solicit feedback in formats such as surveys, questionnaires, and digital suggestion boxes, and ORR timely respond to this feedback.

Response: ORR regularly engages with PRS providers, including through ORR staff assigned to liaise with and oversee PRS providers. Further, although the recommendation that ORR hold monthly listening sessions with at least one representative from each PRS provider is outside the scope of this final rule, ORR will take it into consideration for future policymaking.

Comment: A commenter recommended ORR require a formal review conducted by an independent party within the first six months after release to assess the sponsor's ability and willingness to care for the released child until the child reaches age 18.

Response: This recommendation would represent a significant change from PRS as contemplated in the NPRM, and is outside the scope of this final rule. Nevertheless, ORR will take this into consideration for future policymaking regarding PRS.

Comment: A commenter supported ORR's updates to its PRS policies to allow children to continue to receive PRS if the child's sponsor chooses not to continue. This commenter recommended ORR create guidelines to ensure an unaccompanied child can make meaningful and confidential decisions about receiving PRS when the sponsor has decided not to participate and to include protections PRS providers will follow to ensure they safely and confidentially maintain contact with the child. Further, this commenter recommended ORR issue specific regulations requiring the recorded affirmative participation of unaccompanied children in the decision-making process to receive PRS. Lastly, the commenter recommended the guidelines be consistent with the applicable State and Federal law.

Response: ORR thanks the commenter for the support of its updated PRS policies. With respect to the recommendation that ORR create guidelines to ensure that unaccompanied children can make meaningful and confidential decisions about receiving PRS when the sponsor has decided not to participate, and to describe requirements on PRS providers in such situations, ORR wishes to clarify that unaccompanied children can continue to receive PRS even when sponsors, who are not parents or legal guardians, choose not to, and ORR is codifying this at § 410.1210(h)(3).

With respect to the recommendation that ORR issue specific regulations requiring the recorded affirmative participation of unaccompanied children in the decision-making process to receive PRS, and that such guidelines be consistent with applicable State and Federal law, ORR declines to implement the recommendation in this final rule. However, ORR will consider reviewing its revised PRS policies to determine how it would implement this recommendation, as well as the burden of implementing it, to inform future policymaking.

Comment: One commenter expressed concern that there are no penalties for PRS providers failing to meet the requirements in § 410.1210.

Response: ORR did not propose penalties in the NPRM, and has not incorporated them in this final rule, because it does not intend 45 CFR 410 to govern or describe the entire UC Program. ORR notes that all its grantees both agree to abide by ORR regulations and policies, but are also subject to requirements set forth at 45 CFR part 75.[225] Further, ORR notes that its revised PRS policies specify other follow-up and corrective actions that ORR may take if a PRS provider is found to be out of compliance with ORR policies or procedures, and ORR will communicate the concerns in writing to the Program Director or appropriate person through a written monitoring or site visit report, with corrective actions and child welfare best practice recommendations.[226]

Final Rule Action: After consideration of public comments, ORR is making the following modifications to § 410.1210. ORR is revising the first sentence of proposed § 410.1210(a)(2) to state, ''ORR shall offer post-release services (PRS) for unaccompanied children for whom a home study was conducted pursuant to § 410.1204.'' ORR is revising the end of the first sentence of § 410.1210(a)(3) to state, ''ORR may offer PRS for all released children.'' ORR is revising the second sentence of § 410.1210(a)(3) to state, ''ORR may give additional consideration, consistent with paragraph (c), for cases involving unaccompanied children with mental health or other needs who could particularly benefit from ongoing assistance from a community-based service provider, to prioritize potential cases as needed.'' ORR is revising the beginning of the third sentence of § 410.1210(a)(3) to state, ''ORR shall make an initial determination of the level . . .'' ORR is adding a sentence to

the end of § 410.1210(a)(3) to state, ''PRS providers may conduct subsequent assessments based on the needs of the unaccompanied children and the sponsors that result in a modification to the level and extent of PRS assigned to the unaccompanied children.'' ORR is revising § 410.1210(b)(1), (4), and (6) to add ''and unaccompanied children'' after ''sponsors.'' ORR is revising the first sentence of § 410.1210(b)(3) to add ''and unaccompanied child'' after ''sponsor.'' ORR is revising the first sentence of § 410.1210(b)(5) to add ''shall assist the sponsors and unaccompanied children'' after ''with school enrollment and . . .'' Due to a drafting error, ORR is revising the second sentence of § 410.1210(b)(5) to state ''exceed the State's maximum age requirement for mandatory school attendance.'' ORR is revising the first sentence of § 410.1210(b)(8) to add ''and unaccompanied child'' after ''sponsor.'' ORR is revising § 410.1210(b)(9), (10), and (11) to add ''and unaccompanied child'' after ''sponsor.'' ORR is revising § 410.1210(b)(12) to add at the end of the sentence ''or sponsor.'' ORR is revising the paragraph heading for § 410.1210(c) to state ''*Additional considerations for prioritizing the provision of PRS*.'' ORR is revising § 410.1210(c) to state ''ORR may prioritize referring unaccompanied children with the following needs for PRS if appropriations are not available for it to offer PRS to all children: . . .'' ORR is revising § 410.1210(c)(3) to state ''Unaccompanied children who identify as LGBTQI+.'' ORR is not finalizing § 410.1210(e)(2) as proposed in the NPRM, and as a result, is updating the numbering for proposed § 410.1210(e)(3) and finalizing it as § 410.1210(e)(2). ORR is revising § 410.1210(g)(1) to state ''For a released unaccompanied child who is required under the TVPRA at 8 U.S.C. 1232(c)(3)(B) to receive an offer of PRS . . . PRS shall, to the greatest extent possible, start no later than 30 days after release.'' ORR is revising § 410.1210(g)(2) to state ''. . . but is not required to receive an offer of PRS following a home study . . .'' ORR is revising § 410.1210(h)(1) to state ''For a released unaccompanied child who is required to receive an offer of PRS under the TVPRA at 8 U.S.C. 1232(c)(3)(B), PRS shall be offered for the unaccompanied child until the unaccompanied child turns 18 or the unaccompanied child is granted voluntary departure, granted immigration status, or the child leaves the United States pursuant to a final order of removal, whichever occurs first.'' ORR is revising § 410.1210(h)(2) to state ''For a released unaccompanied child who is not required to receive an offer of PRS under the TVPRA at 8 U.S.C. 1232(c)(3)(B), but who receives PRS as authorized under the TVPRA, PRS may be offered for the unaccompanied child until the unaccompanied child turns 18, or the unaccompanied child is granted voluntary departure, granted immigration status, or the child leaves the United States pursuant to a final order of removal, whichever occurs first.'' ORR is adding § 410.1210(h)(3) to state ''If an unaccompanied child's sponsor, except for a parent or legal guardian, chooses to disengage from PRS and the child wishes to continue receiving PRS, ORR may continue to make PRS available to the child through coordination between the PRS provider and a qualified ORR staff member.'' ORR is revising § 410.1210(i)(1) to remove ''keep'' and replace with ''maintain''. ORR is revising § 410.1210(i)(3)(i) to remove ''sensitive.'' ORR is revising § 410.1210(i)(3)(iii) to include at the end, ''except for program administration purposes.'' ORR is revising § 410.1210(i)(5) to add § 410.1210(i)(5)(iii) to state ''PRS providers must upload any relevant forms into ORR's case management system within 30 calendar days of a case's closure.'' ORR is otherwise finalizing the proposals as proposed.

Subpart D—Minimum Standards and Required Services

Section 410.1300 Purpose of This Subpart

In order to ensure that all unaccompanied children receive the same minimum services and a specified level of quality of those services, ORR proposed in the NPRM a set of minimum standards and required services (88 FR 68936 through 68952). ORR proposed in the NPRM to establish these standards and requirements consistent with its authorities at 6 U.S.C. 279(b)(1) (making ORR responsible for, among other things, ensuring that the interest of unaccompanied children are considered in decisions and actions relating to their care and custody, implementing policies with respect to the care and placement of unaccompanied children, and overseeing the infrastructure and personnel of facilities in which unaccompanied children reside), and 8 U.S.C. 1232(c) (requiring HHS to establish policies and programs to ensure that unaccompanied children are protected from certain risks, and requiring placement of unaccompanied children in the least restrictive setting that is in their best interest). As proposed at § 410.1300, the purpose of the subpart would be to establish the standards and services that care provider facilities must meet and provide in keeping with the principles of treating unaccompanied children in ORR care with dignity, respect, and special concern for their particular vulnerability. ORR welcomed public comment on this proposal.

Comment: Although a few commenters supported ORR setting standards for unaccompanied children, many commenters stated the standards in subpart D fall short in addressing the full scope of unaccompanied children's current needs and the standards do not align with present demographics and short stays in ORR care.

Response: Regarding concerns that the standards do not align with unaccompanied children's needs, in drafting the proposals, ORR reviewed its current policies that describe the services care provider facilities must provide to address the needs of unaccompanied children. Additionally, in this final rule, ORR has taken into consideration the additional feedback provided by commenters and finalized additional provisions based on that feedback.

Comment: One commenter expressed the need for additional funding to provide Indigenous language safeguards and assessment of minimum standards relevant to Indigenous unaccompanied children in ORR's care.

Response: ORR believes that it is important to provide language access services, including translation and interpretation for all unaccompanied children, including Indigenous children, as well as services designed to meet the individualized needs of unaccompanied children in its UC Program. For this reason, ORR is finalizing requirements at § 410.1306 that standard programs and restrictive placements must offer interpretation and translation services in an unaccompanied child's native or preferred language.

Final Rule Action: After consideration of public comments, ORR is finalizing § 410.1300 as proposed.

Section 410.1301 Applicability of This Subpart

ORR believes that care provider facilities serving unaccompanied children should be required to meet standards and requirements tailored to their particular placement setting so that children receive at least the same standard of care within a given placement setting. ORR proposed in the NPRM, at § 410.1301, to apply these

care provider facility standards to all standard programs and to non-standard programs where specified (88 FR 68936).

Comment: Many commenters recommended that secure facilities should be included within the scope of subpart D. These commenters believe that requiring secure facilities to meet the required minimum services proposed for other ORR care provider facilities will help to ensure that these facilities are held to the same minimum standards of care.

Response: Because ORR believes that all unaccompanied children should receive the same minimum services and at least a specified level of quality of those services, ORR proposed in the NPRM a set of minimum standards and required services tailored to particular placement settings (88 FR 68936). ORR notes, however, that its existing practice is to require secure facilities to apply the minimum standards required in the FSA at Exhibit 1, which are implemented in this final rule at subpart D. Therefore, in this final rule, ORR is revising § 410.1301 to state that subpart D is applicable to standard programs and secure facilities, as well as to other care provider facilities and PRS providers where specified. ORR notes that it is not changing any requirements that were proposed in the NPRM for PRS providers, and is merely adding ''PRS providers'' to reflect requirements that were previously specified. Notwithstanding this change to the final rule text, to make subpart D applicable to secure facilities as a general matter, ORR notes that under this final rule, secure facilities may be subject to other standards that do not apply to standard facilities. For example, as discussed in § 410.1304(d) and § 410.1304(e), secure facilities that are not RTCs are subject to different standards as compared to standard facilities and RTCs with respect to the use of restraints (88 FR 68942). ORR believes that establishing requirements in this way is consistent with its authorities under the TVPRA and HSA, as well as the requirements under the FSA.

Final Rule Action: After consideration of public comments, ORR modifying § 410.1301 to state ''This subpart applies to all standard programs and secure facilities. This subpart is applicable to other care provider facilities and to PRS providers where specified.''

Section 410.1302 Minimum Standards Applicable to Standard Programs and Secure Facilities

ORR proposed in the NPRM, at § 410.1302, minimum standards of care and services applied to standard programs (88 FR 68936 through 68939). These standards are consistent with the HSA and TVPRA, and meet, and in some cases, exceed the minimum standards of care listed in Exhibit 1 of the FSA, with the exception of considerations relating to State licensing discussed below.

ORR proposed in the NPRM at § 410.1302(a), to require that standard programs be licensed by an appropriate State or Federal agency, or meet other requirements specified by ORR if licensure is unavailable in a State to programs providing services to unaccompanied children, to provide residential, group, or foster care services for dependent children (88 FR 68937). As discussed above, however proposed § 410.1302(a) has been revised in this final rule to provide that if a standard program is located in a State that will not license care provider facilities that care or propose to care for unaccompanied children, such care provider facilities must nevertheless meet the licensing requirements that would apply in that State if the State was willing to license ORR facilities.

Additionally, because there are other State and local laws and other ORR requirements that are critical to ensuring safe and sanitary conditions at care provider facilities, ORR proposed in the NPRM at § 410.1302(b), to further require that standard programs comply with all applicable State child welfare laws and regulations and all State and local building, fire, health and safety codes, or other requirements specified by ORR if licensure is unavailable in their State to standard programs providing services to unaccompanied children (88 FR 68937). Again, in this final rule, even if a standard program is located in a State that will not license care provider facilities that care or propose to care for unaccompanied children, the facility must comply with all State and local building, fire, health and safety codes—in addition to other requirements if specified by ORR. The proposed rule provided that if there is a potential conflict between ORR's regulations and State law, ORR will review the circumstances to determine how to ensure that it is able to meet its statutory responsibilities. The NPRM also provided that if a State law or license, registration, certification, or other requirement conflicts with an ORR employee's duties within the scope of their ORR employment, the ORR employee is required to abide by their Federal duties.[227]

In order to ensure that each unaccompanied child receives the same minimum services that are necessary to support their safety and well-being for daily living while in ORR care, ORR proposed in the NPRM, at § 410.1302(c), to establish the services that standard programs must provide or arrange for each unaccompanied child in care (88 FR 68937). ORR proposed in the NPRM, at § 410.1302(c)(1), to establish minimum requirements related to the provision of proper physical care and maintenance, including suitable living accommodations, food, drinking water, appropriate clothing, personal grooming and hygiene items, access to toilets and sinks, adequate temperature control and ventilation, and adequate supervision to protect unaccompanied children from others. In the NPRM, ORR also proposed to require that food be of adequate variety, quality, and in sufficient quantity to supply the nutrients needed for proper growth and development according to the U.S. Department of Agriculture (USDA) Dietary Guidelines for Americans,[228] and appropriate for the child and activity level, and that drinking water always be available to each unaccompanied child.

ORR notes that access to routine medical and dental care, and other forms of healthcare described in the FSA at Exhibit 1 paragraph 2 were set forth at § 410.1307 of the NPRM, and will be codified in that section for purposes of this final rule.

ORR believes that the unique needs and background of each unaccompanied child should be assessed by standard programs to ensure that these needs are being addressed and supported by the standard program. Therefore, ORR proposed in the NPRM, under § 410.1302(c)(2), and consistent with ORR's existing policy and practice, to require that each unaccompanied child receive an individualized needs assessment that includes: various initial intake forms; essential data relating to identification and history of the unaccompanied child and their family; identification of any special needs the unaccompanied child may have, including any specific problems that appear to require immediate intervention; an education assessment and plan; whether an Indigenous language speaker; an assessment of family relationships and interaction with adults, peers and authority figures; a statement of religious preference and practice; assessment of personal goals, strengths, and weaknesses; and identifying information regarding immediate family members, other relatives, or friends who may be residing in the United States and may be able to assist in the safe and timely release of the unaccompanied child to a sponsor (88 FR 68937). ORR noted that the use of ''special needs'' in this

paragraph is being included to match Appendix 1 of the FSA; it was ORR's preference, for the reasons articulated in the preamble to §§ 410.1103 and 410.1106, to update the language to ''individualized needs,'' and ORR solicited comments on such substitution.

Access to education services for unaccompanied children in care from qualified professionals is critical to avoid lost instructional time while in care and ensure unaccompanied children are receiving appropriate social, emotional, and academic supports and services. ORR proposed in the NPRM, at § 410.1302(c)(3), to require standard programs to provide educational services appropriate to the unaccompanied child's level of development, communication skills, and disability, if applicable (88 FR 68937). ORR believes that this requirement helps ensure that educational services are tailored to meet the educational and developmental needs of unaccompanied children, including children with disabilities who may require program modifications (such as specialized instruction), reasonable modifications, or auxiliary aids and services. ORR also proposed that educational services be required to take place in a structured classroom setting, Monday through Friday, which concentrate primarily on the development of basic academic competencies and secondarily on English Language Training (ELT). The educational services must include instruction and educational and other reading materials in such languages as needed. Basic academic areas must include science, social studies, math, reading, writing, and physical education. The services must provide unaccompanied children with appropriate reading materials in languages other than English and spoken by the unaccompanied children in care for use during their leisure time. ORR noted that under 45 CFR 85.51, care provider facilities shall also ensure effective communication with unaccompanied children with disabilities. This means the communication is as effective as communication with children without disabilities in terms of affording an equal opportunity to participate in the UC Program and includes furnishing appropriate auxiliary aids and services such as qualified sign language interpreters, Braille materials, audio recordings, note-takers, and written materials, as appropriate for the unaccompanied child. ORR also specified additional staffing requirements inclusive of the provision of educational and other services proposed under § 410.1305.

ORR strongly believes that time for recreation is essential to supporting the health and well-being of unaccompanied children. ORR proposed in the NPRM, at § 410.1302(c)(4), to require standard programs to have a recreation and leisure time plan that includes daily outdoor activity, weather permitting, and at least 1 hour per day of large muscle activity and 1 hour per day of structured leisure time activities, which does not include time spent watching television (88 FR 68937). Activities must be increased to at least three hours on days when school is not in session.

Psychological and emotional well-being are important components of the overall health and well-being of unaccompanied children, and therefore, consistent with existing policy and practice, ORR proposed in the NPRM that these needs must be met by standard programs. ORR proposed in the NPRM at § 410.1302(c)(5) to require standard programs to provide counseling and mental health supports to unaccompanied children that includes at least one individual counseling session per week conducted by certified counseling staff with the specific objectives of reviewing the unaccompanied child's progress, establishing new short and long-term objectives, and addressing both the developmental and crisis-related needs of each unaccompanied child (88 FR 68937 through 68938). Group counseling sessions are another way that the psychological and emotional well-being of unaccompanied children can be supported while in ORR care. Therefore, ORR proposed in the NPRM to require under § 410.1302(c)(6) that group counseling sessions are provided at least twice a week. These sessions can be informal and can take place with all unaccompanied children present, providing a time when new unaccompanied children are given the opportunity to get acquainted with the staff, other children, and the rules of the program. Group counseling sessions can provide an open forum where each unaccompanied child has an opportunity to speak and discuss what is on their minds and to resolve problems. Group counseling sessions can be informal and designed so that unaccompanied children do not feel pressured to discuss their private issues in front of other children. Daily program management may be discussed at group counseling sessions, allowing unaccompanied children to be part of the decision-making process regarding recreational and other program activities, for example. In addition, ORR noted that additional mental health and substance use disorder treatment services are provided to unaccompanied children based on their medical needs, including specialized care, as appropriate, and in person and virtual options, depending on what best fits the child's needs.

ORR proposed in the NPRM at § 410.1302(c)(7) to require that unaccompanied children receive acculturation and adaptation services that include information regarding the development of social and interpersonal skills that contribute to those abilities necessary to live independently and responsibly (88 FR 68938). ORR believes these services are important to supporting the social development and meeting the cultural needs of unaccompanied children in standard programs.

Establishing an admissions process that includes assessments that unaccompanied children should receive upon admission to a standard program helps ensure the immediate needs of unaccompanied children are met in a consistent way, that other needs are identified and can be supported while in ORR care, and that all unaccompanied children are provided a standardized orientation and information about their care in ORR custody. ORR therefore proposed to require at § 410.1302(c)(8)(i) of the NPRM that upon admission, standard programs must address unaccompanied children's immediate needs for food, hydration, and personal hygiene, including the provision of clean clothing and bedding (88 FR 68938). At § 410.1302(c)(8)(ii), ORR proposed in the NPRM that standard programs must conduct an initial intakes assessment covering the biographic, family, migration, health history, substance use, and mental health history of the unaccompanied child. If the unaccompanied child's responses to questions during any examination or assessment indicate the possibility that the unaccompanied child may have been a victim of human trafficking or labor exploitation, the care provider facility must notify the ACF Office of Trafficking in Persons within twenty-four (24) hours. Care providers must also provide unaccompanied children with a comprehensive orientation in formats accessible to all children regarding program intent, services, rules (provided in writing and orally), expectations, the availability of legal assistance, information about U.S. immigration and employment/labor laws, and services from the Office of the

Ombuds that were proposed in § 410.2002 in simple, non-technical terms and in a language and manner that the child understands, if possible, under § 410.1302(c)(8)(iii) of the NPRM. In conjunction with services supporting visitation and contact with family members required under § 410.1302(c)(10), ORR proposed that newly admitted unaccompanied children receive assistance with contacting family members, following ORR guidance and the standard program's internal safety procedures under proposed § 410.1302(c)(8)(iv) of the NPRM. ORR noted that medical needs upon admission are required to be assessed comprehensively under § 410.1307. Finally, in the NPRM, ORR noted that standard programs are required under 45 CFR 411.33 to provide orientation information related to sexual abuse and sexual harassment, and must follow 45 CFR part 411, subpart E, regarding assessment of an unaccompanied child's risk of sexual victimization and abusiveness.

ORR believes the cultural, religious, and spiritual needs of unaccompanied children should be provided for while in ORR care. Therefore, at § 410.1302(c)(9) of the NPRM ORR proposed to require that standard programs, whenever possible, provide access to religious services of an unaccompanied child's choice, celebrate culture-specific events and holidays, are culturally aware in daily activities as well as food menus, choice of clothing, and hygiene routines, and cover various cultures in educational services (88 FR 68938). ORR noted that it operates the UC Program in compliance with the requirements of the Religious Freedom Restoration Act and other applicable Federal conscience protections, as well as all other applicable Federal civil rights laws and applicable HHS regulations.[229]

Under § 410.1302(c)(10) of the NPRM, ORR proposed to require standard programs provide unaccompanied children with visitation and contact with family members (regardless of their immigration status), structured to encourage such visitation, such as offering visitation and contact at regular, scheduled intervals throughout the week (88 FR 68938). As proposed in the NPRM, standard programs should provide unaccompanied children with at least 15 minutes of phone or video contact three times a week with parents and legal guardians, other family members, and caregivers located in the United States and abroad, in a private space that ensures confidentiality and at no cost to the unaccompanied child, parent, legal guardian, family member, or caregiver. ORR emphasized that this is the minimum amount of phone or video time that standard programs must provide to unaccompanied children and that standard programs may provide additional time over and above this requirement, like daily phone or video calls. Standard programs would also be required to respect an unaccompanied child's privacy during visitation while reasonably preventing unauthorized release of the child. ORR noted that standard programs should also encourage in-person visitation between unaccompanied children and their parents, legal guardians, family members, or caregivers (unless there is a documented reason to believe there is a safety concern) and have policies in place to ensure the safety and privacy of unaccompanied children and staff, such as an alternative public place for visits.

To facilitate the safe and timely release of unaccompanied children to sponsors or their family, under § 410.1302(c)(11) of the NPRM, ORR proposed to require standard programs to assist with family unification services designed to identify and verify relatives in the United States as well as in foreign countries and assistance in obtaining legal guardianship when necessary for release of the unaccompanied children.

Under § 410.1302(c)(12) of the NPRM, ORR proposed to require standard programs to provide unaccompanied children with information on legal services, including the availability of free legal assistance and notification that they may be represented by counsel at no expense to the government; the right to a removal hearing before an immigration judge; the ability to apply for asylum with USCIS in the first instance; and the ability to request voluntary departure in lieu of removal (88 FR 68939). These services are foundational to ensuring that unaccompanied children are aware of their legal rights and have access to legal resources.

Finally, under § 410.1302(c)(13) of the NPRM, ORR proposed to require standard programs provide information about U.S. child labor laws and permissible work opportunities in a manner that is sensitive to the age, culture, and native language of each unaccompanied child (88 FR 68939).

Cultural competency among ORR standard programs is considered an important component of a successful program by ORR and under the FSA. Under § 410.1302(d) of the NPRM, ORR proposed that standard programs would be required to deliver the services included in § 410.1302(c) in a manner that is sensitive to the age, culture, native language, and the complex needs of each unaccompanied child (88 FR 68939).

Finally, under § 410.1302(e) of the NPRM, ORR proposed that standard programs would be required to develop a comprehensive and realistic individual service plan for each unaccompanied child in accordance with the child's needs as determined by the individualized needs assessment (88 FR 68939). Individual plans would be implemented and closely coordinated through an operative case management system. To ensure that service plans are addressing meaningful and appropriate goals in partnership with unaccompanied children, ORR proposed in the NPRM that service plans should identify individualized, person-centered goals with measurable outcomes and note steps or tasks to achieve the goals, be developed with input from the children, and be reviewed and updated at regular intervals. Under current practice, this is every 30 days the child is in custody following the child's case review. Unaccompanied children aged 14 and older should be given a copy of the plan, and unaccompanied children under age 14 should be given a copy of the plan when appropriate for that particular child's development. As proposed in the NPRM, § 410.1302(e) would also require that individual plans be in the child's native language or other mode of auxiliary aid or services and/or by the use of clear, easily understood language, using concise and concrete sentences and/or visual aids and checking for understanding where appropriate.

As discussed in response to public comments received at § 410.1301 and ORR's revision to apply subpart D to secure facilities, ORR is revising § 410.1302 to specify that ''standard programs and secure facilities'' shall deliver the minimum standards and services within this section. ORR is accordingly revising the section title of § 410.1302 to ''Minimum standards applicable to standard programs and secure facilities.'' Further, for consistency, ORR is revising § 410.1302(c)(10) to remove the reference to standard programs.

Before proceeding to specific comments on § 410.1302, ORR would like to discuss a key issue raised by commenters relating to this section, where ORR has made important revisions in response to these comments. Section 410.1001 replaces the term ''licensed program'' used in the FSA with the term ''standard program.'' The NPRM had specified that standard program means ''any program, agency, or organization that is licensed by an

appropriate State agency, or that meets other requirements specified by ORR if licensure is unavailable in the State to a program providing services to unaccompanied children, to provide residential, group, or transitional or long-term home care services for dependent children, including a program operating family or group homes, or facilities for special needs unaccompanied children.'' (88 FR 68982). As stated in the preamble to the NPRM, the proposed definition of ''standard program'' was broader in scope than the FSA definition of ''licensed placement'' to account for circumstances where State licensure is unavailable to ORR care provider facilities in a State because the facility cares for unaccompanied children (88 FR 68915 through 68916). Several commenters expressed concern that the proposed language ''or that meets other requirements specified by ORR'' was not sufficiently specific or clear and could lead to allowing programs to avoid licensure requirements even in a State where licensing is available. In response, ORR is revising its requirement under § 410.1302(a) to make clear that if a standard program is in a State that does not license care provider facilities because they serve unaccompanied children, the standard program must still meet the State licensing requirements that would apply if the State allowed for licensure. Similarly, ORR is revising § 410.1302(b) to remove references to other additional requirements specified by ORR if licensure is unavailable in their State to care provider facilities providing care and services to unaccompanied children. ORR notes that it has revised § 410.1302 to require standard programs and secure facilities meet the requirements of that section but is not including secure facilities in the discussion here of State licensure because no State has ceased licensing secure facilities that care for or propose to care for unaccompanied children.

The FSA requires placement of unaccompanied children in State-licensed facilities, subject to certain exceptions, a goal that ORR has long shared.[230] The FSA also requires ORR to make ''reasonable efforts'' to place unaccompanied children in ''those geographical areas where the majority of minors are apprehended, such as southern California, southeast Texas, southern Florida and the northeast corridor.'' [231] For most of the years in which the UC Program has operated since the program came to ORR in 2003, there was no tension between these requirements. In fact, over the last two decades, ORR built a large share of its care provider facility network in Texas, Florida, and California, consistent with the FSA requirement that unaccompanied children be placed in areas where the majority of minors are apprehended. Today, Texas represents at least half of all UC Program bed capacity.

On May 31, 2021, the Governor of the State of Texas issued a proclamation directing the Texas Health and Human Service Commission (HHSC) to amend its regulations to ''discontinue state licensing of any child-care facility in this state that shelters or detains [unaccompanied children] under a contract with the Federal government.'' [232] Subsequently, HHSC exempted ORR care provider facilities from the State's licensing requirements.[233] Four months later, the Governor of the State of Florida issued an Executive Order that directed the Florida Department of Children and Families (DCF) to de-license ORR care provider facilities.[234] Accordingly, DCF then de-licensed ORR's care provider facilities. These actions were historic and unforeseen; never have States not licensed child-care facilities simply because they serve migrant youth. Since then, ORR has significantly enhanced monitoring of care provider facilities in Texas and Florida and has required that care provider facilities in those States continue to abide by the State licensing standards. ORR, however, has not stopped placements in those States. As a practical matter, ORR cannot currently operate the UC Program without using care provider facilities in Texas and Florida.

ORR also notes that on April 12, 2021, the Governor of South Carolina issued an Executive Order that ''prevent[s] placements of unaccompanied migrant children . . . into residential group care facilities or foster care facilities located in, and licensed by, the State of South Carolina.'' [235] At the time, ORR did not operate any shelter facilities in South Carolina. ORR currently operates three transitional foster care facilities in South Carolina that remain licensed by the State.

In 2021 when Texas and Florida de-licensed ORR care provider facilities, ORR was also facing a significant increase in referrals of unaccompanied children. Since 2021, annual referrals to ORR have been in the range of 120,000 or more.[236] As a result, it is now impossible for ORR to accommodate 120,000 or more referred unaccompanied children each year while also limiting placements to licensed programs in States that agree to license ORR's care provider facilities.

Shuttering facilities in Texas and Florida would result in the loss of the significant expertise that has been developed over decades in many care provider facilities in Texas and Florida. New facilities may not have staff that have worked with this population of children and new facilities may not have the same cultural competency that longstanding facilities in Texas and Florida offer. Moreover, the vast majority of unaccompanied children are apprehended at the Southwest border, usually along the Texas-Mexico border. Shuttering facilities in Texas, in particular, would lead to longer wait times for unaccompanied children in DHS custody because the children would need to be transported much longer distances. And in fiscal year 2023, nearly one-quarter of all releases of unaccompanied children was to sponsors in Texas and Florida; [237] ceasing to operate programs in those States would be enormously disruptive to efforts to promptly place children with their parents or other appropriate sponsors.

Although ORR has not stopped placements in Texas and Florida, it continues to look for ways to expand its capacity in States other than Texas and Florida. However, ORR cannot maintain needed capacity to receive referrals of unaccompanied children and find shelter for them without continued reliance on Texas and Florida.

In the meantime, ORR is committed to ensuring that the protections afforded through State licensing continue to be provided to unaccompanied children placed in ORR's care provider facilities in Texas and Florida. ORR is currently providing enhanced monitoring of its care provider facilities in Texas and Florida to ensure that they are in compliance with FSA Exhibit 1 and ORR's policies. Enhanced monitoring includes on-site visits and desk monitoring. In the final rule, ORR has committed to continuing this enhanced monitoring by requiring at new § 410.1303(e) (as redesignated) that ORR will provide enhanced monitoring of standard programs in States that do not allow State-licensing of programs providing care and services to unaccompanied children, and of emergency or influx facilities.

ORR also notes that under the terms and conditions of their Federal grants, unless waived by ORR, standard programs agree to obtain accreditation by a nationally recognized accreditation organization approved by ORR. Accreditation requires organizations to regularly demonstrate on an ongoing basis that their organization adheres to established best practice standards for

all levels of organizational operations. This includes governance and management, financial operations, risk management, performance and quality improvement, and policy. It also includes best practice standards for each type of service an organization provides and the staffing associated with that service (*i.e.,* foster care, homes studies, staff/child ratios, caseload size, training, supervisory ratios). The organization completes an extensive initial ''self-study'' assessing itself against these best practice standards, and then the accrediting body reviews it, and conducts a week-long site visit using peer reviewers to assess true implementation of the standards themselves. For each renewal cycle, the organization updates its self-assessment, assuring any updates to best practice standards are incorporated into their operations, and again undergoes a lengthy peer review site visit. Generally speaking, licensing standards are viewed as ''minimum basic standards'' and accreditation is a seal of excellence that indicates an organization is committed to implementing and sustaining the implementation of best practices in their field (*i.e.,* child welfare, mental health, residential treatment, etc.). Accreditation organizations recognized by ORR include the Council on Accreditation (COA), the Joint Commission (TJC), the Commission on Accreditation of Rehabilitation Facilities (CARF), and the American Correctional Association (ACA). As an explicit requirement under standard programs' grants, ORR monitors for compliance with this requirement, pursuant to § 410.1303; further, failure to maintain accreditation may subject standard programs to enforcement actions, including remedies for noncompliance as described at 45 CFR 75.371.

The language in this final rule pertaining to ''standard'' programs is intended to reflect the substantially changed circumstances since the parties entered into the FSA. When the parties entered into the FSA in 1997, the number of unaccompanied children entering federal custody was less than 3,000, and the agreement contemplated the availability of State licensure at facilities serving unaccompanied children. As noted above, in recent years the number of referrals to ORR has been around 120,000 a year, and it would be impossible to operate the program, at least for the foreseeable future, without programs in the States that now do not license facilities that serve unaccompanied children. Accordingly, ORR has adjusted by requiring programs in those States to continue to meet their State licensing standards and by substantially enhancing monitoring of facilities in those states. ORR continues to believe it would be preferable if all States continued to license facilities serving unaccompanied children, but ORR believes the actions it has taken are necessary adjustments to these changed circumstances.

To be clear, under this final rule, standard programs must be State-licensed if State licensure is available in their State; or if State licensure is not available, standard programs must meet the State's licensing requirements. This requirement replaces the NPRM's reference to ''other requirements specified by ORR'' at § 410.1302(a) and ''other additional requirements'' at § 410.1302(b).

Comment: ORR received several comments that objected to its proposal to use the term ''standard program,'' as defined at proposed § 410.1001, instead of ''licensed program,'' as defined in the FSA. In particular, some commenters asserted that State licensure is a material requirement of the FSA and that the proposed rule did not fully incorporate the FSA's State-licensing requirement by allowing care providers to ''meet[ ] other requirements specified by ORR if licensure is unavailable in the State.'' These same commenters asserted that the final rule must reintroduce a State licensing requirement in every provision where the FSA requires State-licensed placement. Commenters also stated that proposed § 410.1302(a) and § 410.1302(b) appeared to allow programs to avoid State licensing requirements, even in States that have a licensing framework available, which is inconsistent with the State licensing requirement of the FSA. Two commenters expressed concern that removing the State licensure requirement would relax the minimum standards for the care and placement of unaccompanied children.

Response: ORR refers readers to the previous discussion of licensed placements in the preamble. As explained, ORR must have a framework that allows for placements in States that do not license facilities because they serve unaccompanied children. ORR notes that by codifying the term ''standard program,'' instead of ''licensed program'' as used in the FSA, ORR does not intend for, and the final rule does not permit, care provider facilities to avoid State licensure requirements. ORR reiterates that in response to the comments received, ORR is revising its requirement under § 410.1302(a) to make clear that if a standard program is in a State that does not license care provider facilities because they serve unaccompanied children, the standard program must still meet the State licensing requirements that would apply if the State allowed for licensure.

Comment: A group of commenters recommended that ORR revise § 410.1302(b) to read ''(b) Comply with all applicable State child welfare laws, regulations, and standards, all State and local building, fire, health, and safety codes, and other requirements specified by ORR if licensure is unavailable in their State to care provider facilities providing services to unaccompanied children.'' Several other commenters expressed concern that proposed § 410.1302(b) did not require standard programs to follow State child welfare laws and State and local building, fire, health, and safety codes. The same commenters also expressed concern that the proposed rule included several Federal preemption provisions, including in proposed § 410.1302(b), and these provisions could be interpreted broadly to give ORR discretion to ignore State licensing requirements if the agency perceives a conflict with State law.

Response: ORR has revised § 410.1302(b) to clarify that all standard programs and secure facilities must comply with child welfare laws and regulations (such as mandatory reporting of abuse) and all State and local building, fire, health, and safety codes. However, ORR is not adding reference to ''standards'' in this final rule because it believes ''standards'' are included within its references to ''laws and regulations'' as well as ''codes.''

The intent of the language commenters referred to as a Federal preemption provision had been intended to convey that if a State took action to reduce or curtail protections of unaccompanied children under Federal law, ORR would take needed actions to ensure that Federal protections were preserved. However, in reviewing comments, it became clear to ORR that that intent had not been effectively conveyed, and in the interest of clarity, ORR has also removed the Federal preemption statement from the final rule at § 410.1302(b).

Comment: Several commenters stated that because the proposed rule did not include a preference for State-licensed placements over unlicensed placements, § 410.1103(e) may be read as prioritizing unlicensed placements in Texas over licensed placements in other geographic areas, which undermines the purpose of paragraph 6 of the FSA. Another commenter noted that facilities in States

without a licensing requirement could make more competitive bids due to potentially lower operating expenses, lower-cost environments, and the ability to provide more beds. The commenter expressed concern that ORR might also expand existing programs in States that no longer license ORR care provider facilities for those same reasons. One commenter also highlighted that facilities may opt-out of State licensure because of perceived burdens, additional requirements, or higher operating costs. This commenter was also concerned that ORR would treat State licensure and the ''other standards'' described in the NPRM as functionally equivalent, and that this construction would allow latitude for care provider facilities to meet the lowest of the available standards, including unlicensed care provider facilities in States that do offer licensure to facilities caring for unaccompanied children. Further, several commenters stated that requiring State licensure, in addition to FSA compliance, would ensure that State and local licensing agencies are able to monitor ORR facilities.

Response: ORR appreciates the commenters' concerns and reiterates its commitment to ensuring that all standard programs comply with State licensing requirements, as required in §§ 410.1302(a) and (b), whether or not specific States will license programs that serve unaccompanied children. Thus, all standard programs are similarly situated in that they are required under the final rule to comply with State licensing requirements. Also, consistent with paragraph 6 of the FSA, ORR has revised § 410.1103(e) to require ORR to ''make reasonable efforts to provide licensed placements in those geographical areas where DHS encounters the majority of unaccompanied children.''

Moreover, ORR is providing enhanced monitoring of its care provider facilities in Texas and Florida to ensure that they are in compliance with ORR's policies. In lieu of its regular monitoring of each facility every two years, ORR is currently providing enhanced monitoring of its care provider facilities in Texas and Florida to ensure that they are in compliance with FSA Exhibit 1 and ORR's policies. Enhanced monitoring may include on-site visits and desk monitoring. In the final rule, ORR has committed to continuing this additional monitoring by requiring at § 410.1303(e) (as redesignated) that ORR will provide enhanced monitoring of standard programs in States that do not allow State-licensing of programs providing care and services to unaccompanied children, and of emergency or influx facilities. ORR notes that this enhanced monitoring makes it more expensive and resource-intensive for ORR to operate programs in Texas and Florida, not less.

Comment: Multiple commenters recommended that ORR enhance its care provider staff training requirements to require training that ensures services are provided to unaccompanied children in a child-friendly, trauma-informed way. Several commenters also recommended that staff who conduct individualized assessments under § 410.1302(c)(2) be trained in trauma-informed practices. One commenter recommended that those staff also be trained professionals in medical and mental healthcare so that they can make referrals for appropriate services. Finally, one commenter suggested that ORR expressly require programs to provide services in a way that recognizes a child's culture and identity.

Response: Section 410.1302(d) requires that standard programs and secure facilities provide services in a way that is sensitive to the unaccompanied child's age, culture, native or preferred language, and their complex needs. Also, ORR is requiring at § 410.1305(a) that standard programs, restrictive placements, and post-release service providers provide training to staff, contractors, and volunteers that is tailored to the unique needs, attributes, and gender of unaccompanied children. The training also must be responsive to the challenges faced by staff and unaccompanied children. ORR agrees with commenters that staff, contractors, and volunteers should be trained in trauma-informed practices and intends for the training requirement to require training to provide services and individualized assessments in a trauma-informed manner. Additionally, ORR expects that training topics will include how to provide services in a child-friendly way and how to effectively communicate with unaccompanied children. ORR notes that it included a training requirement for standard programs and restrictive placements to ensure that staff are appropriately trained on behavior management strategies, including de-escalation techniques, as a proposed requirement in the preamble discussion of § 410.1304 (88 FR 68942) and § 410.1305(a) (88 FR 68943), but the training requirement was omitted in error in the regulation text of § 410.1305(a). Therefore, ORR is finalizing the requirement under § 410.1305(a) that ''Standard programs and restrictive placements shall ensure that staff are appropriately trained on its behavior management strategies, including de-escalation techniques, as established pursuant to § 410.1304.'' ORR is not, however, specifying other training topics in the final rule but may do so in subregulatory guidance, which will allow ORR to make more frequent, iterative updates to its training requirements in order to ensure that training remains up to date on best practices and is responsive to changing needs of unaccompanied children in ORR custody.

Comment: Several commenters recommended that ORR provide a minimum standard requirement that recognizes an unaccompanied child's reasonable right to privacy and autonomy. Several commenters asserted that proposed § 410.1302(c) lacks a guarantee of a reasonable right to privacy as required by the FSA. They pointed out that Exhibit 1 of the FSA includes ''the right to: (a) wear his or her own clothes, when available; (b) retain a private space in the residential facility, group or foster home for the storage of personal belongings; (c) talk privately on the phone, as permitted by the house rules and regulations; (d) visit privately with guests, as permitted by the house rules and regulations; and (e) receive and send uncensored mail unless there is a reasonable belief that the mail contains contraband.'' They noted that proposed rule § 410.1801(b)(12) included this requirement for children placed in EIFs, but proposed rule § 410.1302(c) did not include this requirement for standard programs.

Response: ORR agrees with the commenters that the FSA requires that unaccompanied children have a reasonable right to privacy, and ORR agrees that ensuring a reasonable right to privacy is appropriate as a matter of policy. ORR is therefore revising the final rule, consistent with Exhibit 1 of the FSA, to additionally require at § 410.1302(c)(14) that unaccompanied children must have a reasonable right to privacy, which includes the right to wear the child's own clothes when available, retain a private space in the residential facility, group or foster home for the storage of personal belongings, talk privately on the phone and visit privately with guests, as permitted by the house rules and regulations, and receive and send uncensored mail unless there is a reasonable belief that the mail contains contraband.

Comment: Several commenters recommended further ways to strengthen the minimum services required under proposed § 410.1302(c). Several commenters recommended that ORR incorporate minimum physical

space requirements as applicable to standard programs. Several commenters expressed support for requiring that unaccompanied children receive weekly individual counseling sessions. One commenter recommended that care provider facilities should be required to ensure all unaccompanied children have access to mental health services. One commenter supported the proposed requirement that upon admission, standard programs must address unaccompanied children's immediate needs for food, hydration, and personal hygiene, and recommended that ORR specify that this includes feminine hygiene products.

Response: As an initial matter, except as to the licensing requirements previously discussed, the final rule fully incorporates the minimum standards of care and services required in Exhibit 1 of the FSA. ORR has also exceeded those minimum standards. For example, ORR requires at § 410.1302(c) that unaccompanied children must be provided with personal grooming and hygiene items, access to toilets and sinks, adequate temperature control and ventilation, and adequate supervision. Additionally, the final rule requires that food be of adequate variety, quality, and in sufficient quantity to supply the nutrients needed for proper growth and development and that water be always available to each unaccompanied child. Related to physical space requirements, ORR agrees that it is important that children have access to outdoor and indoor spaces that allow them to exercise, socialize, and move freely. ORR notes that the requirement of weekly counseling is a minimum requirement, and that group counseling is also available to support the needs of unaccompanied children. Further, § 410.1307(a) requires that unaccompanied children have access to appropriate routine medical care, which includes access to mental healthcare. And under § 410.1307(b)(1), ORR requires standard programs and restrictive placements to establish a network of licensed healthcare providers, which must include mental health practitioners. While ORR notes that the requirement to provide for immediate personal hygiene needs includes the provision of feminine hygiene products, ORR is revising § 410.1302(c)(1) to explicitly state these items and other items as follows: ''. . . personal grooming and hygiene items such as soap, toothpaste and toothbrushes, floss, towels, feminine care items, and other similar items.''

Comment: Many commenters proposed ways that ORR could enhance its requirements related to how unaccompanied children communicate with their families. One commenter recommended that ORR require standard programs to provide unaccompanied children with an individualized case management plan that includes family finding and outreach services. Several commenters identified that the proposed phone call requirements in § 410.1302(c)(10) have been superseded by policy changes to require daily minimum 10-minute calls Monday through Friday (or 50 minutes of phone time throughout the weekdays), as well as 45-minute calls on weekends, holidays, and the child's birthday, and additional calls as needed in exceptional circumstances. One commenter supported the proposed requirement that unaccompanied children be provided at least 15 minutes of phone or video contact three times a week with family members, and that this should be a minimum requirement, as daily contact is ideal. One commenter expressed support for the proposed rule's specific mention of in-person visitation as well as the provision of a private space for communications. A few commenters recommended that ORR codify visitation and communication standards that apply to unaccompanied children who have parents, caregivers, or family members in Federal custody. Finally, many commenters noted that the ability to provide unaccompanied children with video contact may be limited for security reasons.

Response: As an initial matter, ORR encourages and supports contact between unaccompanied children and their families. ORR believes that unaccompanied children should be assisted as soon as possible upon their admission into ORR custody with contacting their family members and has included in § 410.1302(c)(8)(iv) a requirement that unaccompanied children be assisted with contacting family members as part of the admissions process. Also, ORR appreciates the commenters' concerns that its current policy as reflected in the ORR Policy Guide provides for more opportunities for phone calls than was specified in the proposed regulation. ORR emphasizes that the requirements under § 410.1302(c)(10) are the minimum requirements that care provider facilities must meet and that standard programs and secure facilities may provide additional phone call time over and above this requirement, such as daily phone or video calls or calls for a longer length of time. ORR intends to continue to apply its subregulatory guidance to require additional phone call time above the requirements of this part. Also, ORR intends for § 410.1302(c)(10) to apply to calls with family members who may be in Federal custody. Finally, ORR notes that care provider facilities may provide phone calls if video calls are not feasible due to security concerns.

Comment: One commenter expressed concern that foster care facilities, or ''long-term home care'' facilities as referenced in this final rule, may not be able to meet the standards for standard programs.

Response: ORR notes that the standards under this section are consistent with its existing policies and procedures that are required for long-term home care facilities, such that meeting the requirements under this section will not pose an additional burden for care provider facilities. ORR believes that all unaccompanied children in standard programs and secure facilities should receive the same minimum services and at least a specified level of quality of those services, and for that reason is establishing the same minimum standards for all standard programs and secure facilities.

Comment: Some commenters expressed concern that the NPRM contemplated placement of unaccompanied children in OON placements, which were not defined as meeting either State licensing or ''standard program'' requirements. One commenter recommended that the final rule must provide that any OON placement shall be State-licensed and meet the other requirements for licensed facilities outlined in the FSA, including the minimum standards in Exhibit 1. The same commenter recommended that the final rule state that a child may be placed in an OON placement only if it is in the least restrictive placement appropriate, consistent with paragraph 11 of the FSA, and that any secure OON placement must satisfy the secure placement criteria in paragraph 21 of the FSA. One commenter recommended requiring that OON facilities be State-licensed and comply with FSA minimum standards requirements.

Response: As noted by the commenters, ORR is finalizing, at § 410.1001, a definition of care provider facility that does not include OON placements. ORR refers readers to the discussion in response to comments at § 410.1001. ORR further notes that under existing policies, ORR thoroughly vets OON placements prior to placing unaccompanied children at such placements. Moreover, the final rule expressly provides that OON placements must be State licensed

under § 410.1001. As part of its vetting of OON placements, ORR conducts monitoring of OON placements to ensure they are in good standing with State licensing authorities and are complying with all applicable State child welfare laws and regulations and all State and local building, fire, health, and safety codes.

Comment: Some commenters expressed concern that under the NPRM ORR proposed to permit unlicensed placements of unaccompanied children without safeguards established in the FSA at paragraph 12A (requiring that ''minors shall be separated from delinquent offenders''). Specifically, these commenters recommended that the final rule specify that until an unaccompanied child is placed in a program licensed by the State to provide services for dependent children, the child ''shall be separated from delinquent offenders,'' consistent with paragraph 12A of the FSA, except as provided in paragraph 21 of the FSA.

Response: ORR refers commenters to ORR's previous response to similar comments at § 410.1103, as well as its discussion of revisions made to the final rule at § 410.1102.

Comment: Many commenters recommended that ORR explicitly protect LGBTQI+ unaccompanied children from discriminatory treatment and abuse as a minimum standard, noting that such an obligation would align with current ORR policies. One commenter recommended increasing safeguards by requiring standard programs and secure facilities to consider factors relating to gender and sexual orientation under § 410.1302(c)(2). A number of commenters recommended that ORR require that unaccompanied children be provided with clothing that reflects a child's gender identity and hygiene items that reflect their identity and needs.

Response: ORR believes that protecting unaccompanied children from discriminatory treatment is important. ORR's existing policies for the care of LGBTQI+ unaccompanied children require that all children in ORR care are entitled to human rights protections and freedom from discrimination and abuse.[238] For example, care providers must ensure that children who identify as LGBTQI+ are fairly treated and served during their time in ORR custody. ORR's existing policy also establishes zero tolerance for discrimination or harassment of all children, including LGBTQI+ children, a prohibition on segregating or isolating children on the basis of their sexual orientation or gender identity, and ensures confidentiality of personal information unless disclosure is necessary for medical or mental health treatment or the child requests it to be shared. ORR notes that, as set forth at § 410.1302(c)(2)(iii), each unaccompanied child must receive an assessment that includes identification of individualized needs, which may include needs based on the child's sexual orientation or gender identity. ORR notes that while some children affirmatively identify as LGBTQI+ and readily share this information unprompted or when asked, other children may not be comfortable providing this information as a part of the individualized needs assessment or otherwise. As such, ORR will continue to consider how to best identify LGBTQI+ children so that they may be cared for fairly and with sensitivity. Further, section 410.1302(c)(8)(i) of this final rule requires that ORR establish an admissions process that meets each unaccompanied child's immediate needs for food, hydration, and personal hygiene, including clean clothing and bedding, and ORR has existing policies that require care provider facilities to provide unaccompanied children with clothing of their choice.

Comment: One commenter recommended that ORR add a provision to § 410.1302(c), requiring ORR to conduct post-18 planning, to include sufficient lead time to prevent any child 17 or older from aging out of ORR custody without a concrete and actionable post-18 plan that takes into account the child's resources and needs.

Response: As noted previously, ORR's existing policies already include requirements regarding post-18 planning, and ORR believes these policies are sufficient to meet the needs of children who ''age out'' of ORR care. Through the post-18 planning process, care provider facilities explore other planning options for the future of unaccompanied children if release to a sponsor is not an option. ORR declines to further amend the final rule in response to these comments at this time and will take them into consideration as part of its continuous evaluation of its existing policies and potential future updates to this part. ORR notes that addressing these concerns through its policies in particular allows ORR to make more frequent, iterative updates in keeping with best practices, to communicate its requirements in greater detail, and to be responsive to the needs of unaccompanied children and care provider facilities.

Comment: One commenter recommended that group counseling under § 410.1302(c)(6) include language and supports appropriate for LGBTQI+ unaccompanied children, and that counseling groups specifically for LGBTQI+ children should be available and implemented by trained staff. Another commenter stated that unaccompanied children should have access to age-appropriate professional counseling services that respects Catholic Church teachings.

Response: ORR believes that care providers should affirmatively support LGBTQI+ unaccompanied children in their placement settings, and notes that existing policies require that LGBTQI+ unaccompanied children be treated with dignity and respect, receive recognition of their sexual orientation and gender identity, not be discriminated against or harassed based on actual or perceived sexual orientation or gender identity, and be cared for in an inclusive and respectful environment.[239]

With respect to the second comment, ORR believes that counseling services should respect the religious and cultural beliefs of unaccompanied children. For example, it is ORR's existing policy that if an unaccompanied child requests religious information or other religious items, such as religious texts, books, or clothing, the care provider must provide the applicable materials in the unaccompanied child's native language, as long as the request is reasonable. Unaccompanied children also have access to religious services whenever possible under § 410.1302(c)(9), and ORR notes that this can include religious counseling.

Comment: One commenter recommended that ORR expressly include the child's religious and cultural background in the lists of factors for conducting an individualized needs assessment under proposed § 410.1302(c)(2) in order to ensure that all appropriate measures are taken to preserve the child's culture and identity. One commenter recommended that ORR include language to ensure that unaccompanied children have access to ''culturally responsive and religiously appropriate'' meals and freely available snacks to ensure that unaccompanied children are receiving adequate nutrition. One commenter recommended that ORR add language guaranteeing that unaccompanied children have better access to laundry and clean clothing and are provided with clothing that is sensitive to the unaccompanied child's cultural and religious identity. One commenter recommended that ORR include access to cultural and religious hygiene needs as a requirement under § 410.1302(c)(1).

Response: ORR agrees it is important to respect unaccompanied children's

religious and cultural identities and practices. For that reason, ORR proposed under § 410.1302(c)(2) that each unaccompanied child receive an individualized needs assessment that includes identification and history of the unaccompanied child and their family, the identification of any individualized needs the unaccompanied child may have, and religious preferences and practices, among other requirements (88 FR 68937). ORR is finalizing clarifying edits to § 410.1302(c)(2)(v) to state ''Identification of whether the child is an Indigenous language speaker'' instead of ''whether an Indigenous language speaker.'' ORR agrees that it is important that unaccompanied children receive adequate nutrition, and therefore proposed to require that food be of adequate variety, quality, and in sufficient quantity to supply the nutrients needed for proper growth and development according to the USDA Dietary Guidelines for Americans, and appropriate for the child and activity level, and that drinking water is always available to each unaccompanied child. ORR notes that its existing policies further require that care provider facilities must establish procedures to accommodate dietary restrictions, food allergies, health issues, and religious or spiritual requirements, and that part 410 is not intended to govern or describe the entire UC Program. ORR notes that § 410.1302(c)(8)(i) of this final rule provides as a minimum standard an admissions process including meeting unaccompanied children's needs to, among other things, ensure that children have appropriate clean clothing and bedding. Further, at § 410.1302(c)(9), the final rule requires standard programs and secure facilities to practice cultural awareness in, among other areas, choice of clothing. ORR agrees that children should be provided with personal hygiene and grooming items that reflect their needs and identities, including their religious needs and identities. Under existing policies, ORR requires care provider facilities to provide religious or spiritual items in the child's native or preferred language, as long as the request for items in the particular language is reasonable, as further discussed in the response to public comment at § 410.1306(e).

Comment: One commenter expressed concern that proposed § 410.1302(c)(9) is not sufficiently responsive to meeting unaccompanied children's religious and cultural needs, recommending that ORR delete ''Whenever possible'' from proposed § 410.1302(c)(9) to ensure that unaccompanied children have access to individualized religious and cultural services.

Response: ORR notes that the requirement to provide religious and cultural services of a child's choice ''whenever possible'' is consistent with the requirements under the FSA at Exhibit 1 and ORR's existing practice in the Policy Guide. Under existing policies, ORR requires care provider facilities to provide opportunities for unaccompanied children to observe and practice their spiritual or religious beliefs, and to comply with any requested religious or spiritual items as long as the request is reasonable. ORR encourages care provider facilities to proactively create opportunities to support children's religious and cultural needs, to provide access to religious services, and to provide transportation to outside places of worship or specific items or information if the requests are reasonable.

Comment: One commenter expressed concern around the conditions of care provider facilities and their ability to provide children with basic services such as bathrooms, recommending that ORR inspect facilities to ensure sufficient access to clean bathrooms and clean running hot/cold water.

Response: ORR thanks the commenter for their recommendation and is making edits to clarify, consistent with ORR's original intent, that § 410.1302(c)(1) includes that access to showers must be provided, in addition to toilets and sinks as proposed in the NPRM, and requires that care provider facilities maintain safe and sanitary conditions that are consistent with ORR's concern for the particular vulnerability of children. ORR is also requiring at § 410.1302(c)(1), among other things, that care provider facilities must provide suitable living accommodations and provide drinking water that is always available. As also clarified in this section, all standard programs and secure facilities must meet State licensing requirements as well as all local building, fire, health, and safety codes.

Comment: Many commenters recommended that ORR list the specific initial intake forms, or otherwise include language that ORR will develop specific policies and procedures based on this rule. One commenter recommended that self-identification for Indigenous peoples should be considered in intake forms.

Response: ORR has opted to not provide specific descriptions of forms in these regulations because the forms and their contents, will necessarily change over time to be responsive and adaptive to the evolving needs of the UC Program. ORR thanks the commenter for the recommendation related to the self-identification of Indigenous peoples on intake forms and will take this feedback into consideration as it continues to update its forms.

Comment: Many commenters expressed the view that the proposed educational services do not adequately prioritize the skills that unaccompanied children will need following their release from ORR care or to integrate into schools in the United States. Many commenters recommended that educational instruction for children with extremely short lengths of stay be primarily focused on acculturation, psychosocial education, self-regulation techniques, and beginning language learning, with a secondary focus on the standard academic subjects. For example, they recommended that education focus not on basic academic competencies or subject matter education, but rather on intensive English language immersion to help prepare unaccompanied children for their transition to their community school after release and on other forms of learning and healthy routines that would prepare them for release given the average short stay in ORR custody. Commenters also suggested a number of subjects that should be covered in ORR-provided education, as well as resources including books in preferred languages and the ability to earn transferable academic credits.

Many commenters recommended that ORR strengthen its standard of care to, at a minimum, meet the current standards provided to unaccompanied children in ORR care, noting that the ORR Policy Guide requires a minimum of six hours of structured education, Monday through Friday. Many commenters recommended that ORR should not limit education to Monday through Friday because this limits educational programming for short stay unaccompanied children.

One commenter supported the provision of educational services to the extent that such educational services aligned with international standards under the Convention on the Rights of the Child. However, the commenter expressed concern that proposed educational services do not extend to secure facilities. Additionally, the commenter noted that the proposed rule provides a much narrower description of the education services that standard programs must provide to unaccompanied children than what international standards require.

Response: ORR expects care provider facilities to tailor their education offerings to meet the educational and

developmental needs of unaccompanied children to ensure they are receiving appropriate social, emotional and academic supports and services. Further, ORR believes that acculturation skills and other life skills are necessary for unaccompanied children to prepare them for release to a sponsor, and as such, is finalizing the rule to state that educational services are required to take place in a structured classroom setting, Monday through Friday, and should concentrate on the development of basic academic competencies and on English Language Training (ELT), as well as acculturation and life skills development. The educational services must include instruction and education and other reading materials in such languages as needed. Basic academic areas may include such subjects as science, social studies, math, reading, writing, and physical education.

Comment: A number of commenters expressed support for adaptation of educational services to a child's disability and requested that the final rule include explicit language to ensure that unaccompanied children with disabilities receive program modifications, auxiliary aids, and services and that care provider facilities must communicate as effectively with children with disabilities as with children without disabilities to ensure they have an equal opportunity to engage in the program. The commenters recommended that needs for educational modifications should be documented in the child's individual service plan (ISP). The commenter also recommended referencing the Department of Education's section 504 regulations for requirements for educational programs.

Response: Under § 410.1311(c), as revised in this final rule, ORR shall provide reasonable modifications to the UC Program, including the provision of services, equipment, and treatment, so that an unaccompanied child with one or more disabilities can have equal access to the UC Program in the most integrated setting appropriate to their needs, as is consistent with section 504 and HHS implementing regulations at 45 CFR part 85. ORR notes that it is not, however, required to take any action that it can demonstrate would fundamentally alter the nature of a program or activity. ORR is further requiring that any program modifications be documented in the child's case file under § 410.1311(d).

Comment: One commenter expressed support for the proposal to require facilities to provide recreation services to unaccompanied children because it provides them with learning, exercise, and socialization. Additionally, the commenter noted that these activities provide an important outlet and routine for children to occupy themselves, and help manage their anxiety.

Response: ORR agrees that recreation and outdoor activities are important to children's development, and thanks the commenter for their support.

Comment: One commenter expressed concern that group counseling sessions proposed under § 410.1302(c)(6) are not sufficient to meet the needs of unaccompanied children in ORR care, recommending that ORR consider factors such as the size of the group and the age ranges in the group to ensure that the forum is appropriate for group counseling sessions.

Response: ORR notes that this standard is consistent with FSA Exhibit 1 minimum standards. Further, as also consistent with FSA Exhibit 1, ORR is finalizing the provision of weekly individual counseling, under § 410.1302(c)(5). Further, under § 410.1307(b), as finalized, ORR must ensure unaccompanied children have access to appropriate routine medical and dental care, including addressing the mental health needs of unaccompanied children.

Comment: One commenter recommended that the requirement at § 410.1302(c)(8)(iii) of the NPRM requiring that the comprehensive orientation presentation given to unaccompanied children including information about the Ombuds be made mandatory for all programs, and not limited to those meeting the definition of ''standard program.''

Response: ORR notes that ORR is expanding the applicability of 410.1302(c)(8)(iii) to secure facilities and that this requirement is included at § 410.1800(b)(9) for EIFs.

Comment: A few commenters requested clarification regarding whether § 410.1302(c)(10) as proposed in the NPRM applies to EIFs.

Response: Section 410.1302(c)(10) as finalized is applicable to standard programs and secure facilities. Requirements for EIFs are in subpart I, and ORR refers comments to that section for further discussion on requirements ORR is finalizing.

Comment: Many commenters recommended that § 410.1302(c)(13) provide information to unaccompanied children regarding the purposes of the Legal Services Provider, and their scope of work and authority, and focus on providing information on practical areas such as the employment approval process, permissible and prohibited work, human trafficking awareness, and how to remain safe when engaging in employment. Many commenters expressed concern that ORR may miscommunicate information on child labor laws and work opportunities and therefore requested examples of how ORR will convey this information.

Response: ORR agrees that information related to the scope of LSPs, and practical information relating to employment and labor laws are important for unaccompanied children. ORR is engaging in a partnership with the Department of Labor to effectively provide communications, such as Know Your Rights videos and information, to unaccompanied children and their sponsors.[240]

Comment: Many commenters expressed support for the proposed requirement that individual service plans for each unaccompanied child be developed under § 410.1302(e).

Response: ORR thanks the commenter for their comment.

Comment: Several commenters recommended the final rule include specific provisions for individual service plans and section 504 service plans for unaccompanied children with disabilities. This includes identification of disability-related needs, and a description of services, supports, and modifications the child will receive including a plan for release. These commenters stated that ISPs should also include services for children with mental health disabilities. Commenters recommended that the child should be included in the development of their ISP along with others knowledgeable about the child, such as the unaccompanied child's parent/legal guardian, child advocate, LSP, and treating professionals. Commenters recommended that the final rule require, consistent with the *Lucas R.* settlement agreement regarding disabilities, that the service plan of an unaccompanied child with disabilities be reviewed every six months or within 30 days of any of the following: (a) a transfer to a more restrictive placement; (b) psychiatric hospitalization of the unaccompanied child (unless the plan has already been reviewed within a 3-month period); or (c) upon the recommendation of a licensed medical or mental health provider, including the unaccompanied child's clinician. Commenters also recommended that, if an unaccompanied child has one or more disabilities, the unaccompanied child's individual service plan should include any triggers of the unaccompanied child's disability-related behaviors and identify individualized responses staff should attempt to de-escalate a situation. Commenters further recommended that

if an unaccompanied child with disabilities exhibits persistent behaviors that affect their safety or that of others, this should trigger a re-evaluation of their individual service plan by the same group of knowledgeable persons that developed the plan. The commenters requested that a pending service plan not delay the release of a child. With regard to changes in placement to more segregated settings, the commenter requested that a new assessment and review of the ISP take place before placement changes when possible.

Response: Consistent with the discussion of the *Lucas R.* litigation above at section III.B.4, ORR is not incorporating in this rule all aspects of the disability settlement agreement. However, ORR will be assessing implementation of the relevant portions of the agreement, and will evaluate future policymaking in this area, which may be informed by the anticipated year-long comprehensive disability needs assessment that ORR will be undertaking in collaboration with subject matter experts, and ORR's development of a disability plan.

Comment: One commenter recommended that care provider facilities provide the ISP in the unaccompanied child's primary language. The commenter also recommended that given the complexity of ISPs, such documents should be applied to unaccompanied children in restrictive or longer-term placements, not standard or EIFs placements.

Response: ORR agrees that if the child's native language is not their preferred language, then the ISP should be provided in the preferred language as this is consistent with language access requirements under § 410.1306. ORR is therefore, in this final rule, requiring that the ISP be provided in the child's native or preferred language. Consistent with this, ORR is finalizing this change to ''native or preferred language'' throughout § 410.1302 (specifically at § 410.1302(d) and § 410.1302(c)(13)), rather than ''native language'' as ORR had proposed. ORR also emphasizes that the finalized requirements under § 410.1302(e) pertain to standard programs and secure facilities, and that ORR's existing requirement is that all care provider facilities provide ISPs for each child in their care. ORR did not propose to adopt each of its existing requirements into this rule because of the sheer number and detail of those requirements and because keeping those requirements at the subregulatory level will allow ORR to make more appropriate, timely, and iterative updates in keeping with best practices and to allow continued responsiveness to the needs of unaccompanied children and care provider facilities.

Final Rule Action: After consideration of public comments, ORR is revising the section title of § 410.1302 to ''Minimum standards applicable to standard programs and secure facilities''; § 410.1302 to add ''secure facilities'' to standard programs so that secure facilities are required to provide the minimum standards under this section; § 410.1302(a) to require standard programs and secure facilities be licensed by an appropriate State agency, or meet the requirements of State licensing if located in a State that does not allow State licensing of programs that care or propose to care for unaccompanied children; § 410.1302(b) to require standard programs and secure facilities to comply with all State child welfare laws and regulations (such as mandatory reporting of abuse) and all State and local building, fire, health, and safety codes and by removing ''and other additional requirements specified by ORR if licensure is unavailable in their State to care provider facilities providing services to unaccompanied children'' and removing ''If there is a potential conflict between ORR's regulations and State law, ORR will review the circumstances to determine how to ensure that it is able to meet its statutory responsibilities. If a State law or license, registration, certification, or other requirement conflicts with an ORR employee's duties within the scope of their ORR employment, the ORR employee is required to abide by their Federal duties;'' § 410.1302(c)(2)(iii) to use the term ''individualized needs'' instead of ''special needs'' as was finalized in this final rule at § 410.1001; § 410.1302(c)(1) to specify that personal grooming and hygiene items include items ''such as soap, toothpaste and toothbrushes, floss, towels, feminine care items, and other similar items,'' to include access ''showers'' in addition to toilets and sinks, and to include ''maintenance of safe and sanitary conditions that are consistent with ORR's concern for the particular vulnerability of children;'' § 410.1302(c)(2)(v) to state ''Identification of whether the child is an Indigenous language speaker'' instead of ''whether an Indigenous language speaker;'' § 410.1302(c)(3) to replace ''concentrate primarily on the development of basic academic competencies and secondarily on English Language Training (ELT), including: . . .'' with '' concentrate on the development of basic academic competencies and on English Language Training (ELT), as well as acculturation and life skills development, including . . .;'' § 410.1302(c)(13) to state ''native or preferred language instead of ''native language;'' § 410.1302(c)(14) to add a requirement that unaccompanied children must have a reasonable right to privacy, which includes the right to wear the child's own clothes when available, retain a private space in the residential facility, group or foster home for the storage of personal belongings, talk privately on the phone and visit privately with guests, as permitted by the house rules and regulations, and receive and send uncensored mail unless there is a reasonable belief that the mail contains contraband; § 410.1302(d) to state ''native or preferred language'' instead of ''native language;'' and § 410.1302(e) to state ''native or preferred language'' instead of ''native language;'' and is otherwise finalizing this section as proposed in the NPRM.

Section 410.1303 Reporting, Monitoring, Quality Control, and Recordkeeping Standards

ORR conducts ongoing monitoring of all components of care provider facilities' activities. These efforts ensure consistent oversight, accountability standards, and put in place checkpoints at regular intervals, consistent with ORR's authorities.[241] ORR proposed in the NPRM language at § 410.1303 to describe how ORR would ensure that care provider facilities are providing required services (88 FR 68939 through 68941). Under § 410.1303(a), ORR proposed in the NPRM to monitor all care provider facilities for compliance with the terms of the regulations in parts 410 and 411. ORR proposed in the NPRM the types of monitoring activities that it would perform: desk monitoring, routine site visits, site visits in response to ORR or other reports, and monitoring visits. Desk monitoring would include ongoing oversight from ORR headquarters. Examples of desk monitoring include monthly check-ins by ORR Federal staff with the care provider facility, regular record and report reviews, financial/budget statements analysis, ongoing reviews of staff background checks and vetting of employees, subcontractors, and grantees, and communications review. Routine site visits would be day-long visits to facilities to review compliance for policies, procedures, and practices and guidelines. Typically, routine site visits occur on a once or twice monthly basis, both unannounced and announced. Site visits in response to ORR or other requests would be visits for a specific purpose or investigation

(*e.g.,* regarding a corrective action plan). Routine monitoring visits would be conducted as part of comprehensive reviews of all care provider facilities. Typically, these may be week-long visits and are usually conducted by ORR not less than every two (2) years.

When care provider facilities are out of compliance with ORR policies and procedures, ORR issues a corrective action. A list of corrective actions may be communicated by ORR to care provider facilities, for example, as part of a report provided to the care provider facility after a monitoring visit. Under § 410.1303(b), ORR proposed in the NPRM to issue corrective actions to care provider facilities when it finds that a care provider facility is out of compliance with ORR regulations and subregulatory policies, including guidance and terms of its contracts and cooperative agreements (88 FR 68939). If ORR finds a care provider facility to be out of compliance, it would communicate the concerns in writing to the care provider facility's director or appropriate person through a written monitoring or site visit report, with a list of corrective actions and child welfare best practice recommendations, as appropriate. ORR would request a response to the corrective action findings from the care provider facility and specify a timeframe for resolution and the disciplinary consequences for not responding within the required timeframes. Examples of disciplinary consequences would include stopping placements at the care provider facility until all corrective actions have been addressed or possible non-renewal of the grant for the program, as appropriate.[242]

ORR proposed in the NPRM, language at § 410.1303(c) describing additional monitoring activities that ORR would conduct at secure facilities. In addition to other monitoring activities, consistent with existing policy and practice, ORR would review individual unaccompanied children's case files to ensure unaccompanied children placed in secure facilities are assessed at least every 30 days for the possibility of a transfer to a less restrictive setting (88 FR 68939).

ORR proposed in the NPRM, language at § 410.1303(d) describing monitoring of long-term home care and transitional home care facilities (88 FR 68939 through 68940). ORR proposed that long-term and transitional foster care homes be subject to the same types of monitoring as other ORR care but tailored to the foster care arrangement. For example, under § 410.1303(d), ORR proposed in the NPRM that during on site monitoring visits, ORR would be able to schedule a visit with the staff of a particular home care facility to conduct a first-hand assessment of the home environment and the care provider's oversight of the home. In addition to ORR monitoring, ORR proposed in the NPRM that ORR long-term home care and transitional home care facilities that provide services through a sub-contract or sub-grant be responsible for conducting annual monitoring or site visits of the sub-recipient, as well as weekly desk monitoring. Finally, ORR proposed to require that care providers provide the findings of such reviews to the designated ORR point of contact.

ORR proposed in the NPRM at § 410.1303(e),) that the care provider facilities develop quality assurance assessment procedures that accurately measure and evaluate service delivery in compliance with the requirements of this part, as well as those delineated in 45 CFR part 411 (88 FR 68940).

ORR proposed in the NPRM under § 410.1303(f), to establish care provider facility reporting requirements (88 FR 68940). The purpose of such reporting is to help ensure that incidents involving unaccompanied children are documented and responded to in a way that protects the best interests of children in ORR care, including their safety and well-being. Reporting requirements increase safety for children in ORR's care, and promote transparency and accuracy, and improve the care provided. ORR would require care provider facilities to report any emergency incident, significant incident, or program-level event to ORR, and in accordance with any applicable Federal, State, and local reporting laws. Accurately documenting incidents and program-level events is essential to ensuring the health and well-being of all unaccompanied children in care.

ORR proposed in the NPRM under § 410.1303(f)(1) to require that care provider facilities document incidents and events with sufficient detail to ensure that any relevant entity can facilitate any required follow-up; document incidents in a way that is trauma-informed and grounded in child welfare best practices; and update the report with any findings or documentation that are made after the fact (88 FR 68940). Additionally, proposed § 410.1303(f)(2) states that care provider facilities must never fabricate, exaggerate, or minimize incidents; use disparaging or judgmental language about unaccompanied children in incident reports; use incident reporting or the threat of incident reporting as a way to manage the behavior of unaccompanied children or for any other illegitimate reason. By ''illegitimate reason,'' ORR means a reason that is unrelated to the purposes of incident reporting, which as stated above are to help ensure that incidents involving unaccompanied children are documented and responded to in a way that protects the best interest of children in ORR care, including their safety and well-being. Further, illegitimate reasons include those that would be inconsistent with ORR's statutory responsibilities (*e.g.,* to ensure that the interest of the child are considered in decisions and actions relating to the care and custody of an unaccompanied child, to place unaccompanied children in the least restrictive setting that is in the best interest of the child); or inconsistent with these regulations and subregulatory policies, including ORR guidance and the terms of its contracts or cooperative agreements.

ORR proposed in the NPRM, limitations on how certain reports may be used by ORR or care provider facilities (88 FR 68940). ORR believes that these limitations will protect the best interests of unaccompanied children and put their safety first as well as help ensure that reports do not become a potential hindrance to placement in the least restrictive setting. Under § 410.1303(f)(3), ORR proposed in the NPRM to prohibit care provider facilities from using reports of significant incidents as a method of punishment or threat towards any child in ORR care for any reason. Under § 410.1303(f)(4), ORR proposed in the NPRM that the existence of a report of a significant incident may not be used by ORR as a basis for an unaccompanied child's step-up to a restrictive placement or as the sole basis for a refusal to step a child down to a less restrictive placement. Care provider facilities would likewise be prohibited from using the existence of a report of a significant incident as a basis for refusing an unaccompanied child's placement in their facilities. Reports of significant incidents could be used as examples or citations of concerning behavior. However, the existence of a report itself would not be sufficient for a step-up, a refusal to step-down, or a care provider facility to refuse a placement.

ORR noted that 45 CFR part 411, subpart G, requires reporting to ORR of any allegation, suspicion, or knowledge of sexual abuse, sexual harassment, inappropriate sexual behavior, and Staff Code of Conduct[243] violations occurring in ORR care, along with any retaliatory actions resulting from reporting such incidents; ORR also noted that part 411

requires compliance with required staff background checks at subpart B.

ORR also proposed at § 410.1307(c) of the NPRM to require that ORR monitor compliance with the requirements to issue required notices and documentation for medical services requiring heightened ORR involvement, as well as the other listed requirements. ORR proposed in the NPRM to initiate a Graduated Corrective Action Plan, with reporting requirements increasing along with oversight measures if programs remain non-compliant. ORR refers readers to § 410.1307(c) for additional discussion.

Safeguarding and maintaining the confidentiality of unaccompanied children's case file records is critical to carrying out ORR's responsibilities under the HSA and the TVPRA. The HSA places responsibility on ORR for implementing policies with respect to the care and placement of unaccompanied children, ensuring that the interests of the child are considered in decisions and actions relating to their care and custody, overseeing the infrastructure and personnel of facilities in which unaccompanied children reside, and maintaining data on unaccompanied children.[244] Additionally, the TVPRA places responsibility for the care and custody of unaccompanied children on HHS and requires HHS to ''establish policies and programs to ensure that unaccompanied alien children in the United States are protected from traffickers and other persons seeking to victimize or otherwise engage such children in criminal, harmful, or exploitative activity, including policies and programs reflecting best practices in witness security programs.'' [245] These program statutes recognize that ORR is responsible for maintaining and safeguarding unaccompanied children's records and data and that unaccompanied children are vulnerable persons, and therefore, the privacy and confidentiality of their records is paramount. Unaccompanied children may have histories of abuse, may be seeking safety from threats of violence, or may have been trafficked or smuggled into the U.S. Accordingly, HHS's longstanding policy is to protect from disclosure information about unaccompanied children that could compromise the children's and sponsors' location, identity, safety, and privacy.

Consistent with its statutory responsibilities, ORR proposed in the NPRM in § 410.1303(g) that all care provider facilities must develop, maintain, and safeguard the individual case file records of unaccompanied children (88 FR 68941). The provisions in § 410.1303(g) would apply to all care provider facilities responsible for the care and custody of unaccompanied children, whether the program is a standard program or not. ORR noted that under its current policies the records of unaccompanied children generated in the course of post-release services (PRS) are not always considered to be included in the individual case files of unaccompanied children. However, ORR has determined that all unaccompanied children's records, including those produced for PRS, should be included in the individual case file records of unaccompanied children, whether generated while the child is in ORR custody or after release to their sponsor.[246] PRS records are created by, or on behalf of, ORR and assist ORR in coordinating supportive services for the child and their sponsor in the community where the child resides, as authorized under 8 U.S.C. 1232(c)(3)(B), which provides HHS authority to ''conduct follow-up services in cases involving children with mental health or other needs who could benefit from ongoing assistance from a social welfare agency.'' ORR facilitates the provision of PRS services through its network of PRS providers under cooperative agreements with ORR.

Under § 410.1303(g)(1) of the NPRM, ORR proposed to require care provider facilities and PRS providers to maintain the confidentiality of case file records and protect them from unauthorized use or disclosure (88 FR 68941). ORR also proposed in § 410.1303(g)(2) that the records in unaccompanied children's case files are the property of ORR, whether in the possession of ORR, a care provider facility, or PRS provider, including those entities that receive funding from ORR through cooperative agreements, and care provider facilities and PRS providers may not release unaccompanied children's case file records or information contained in the case files for purposes other than program administration without prior approval from ORR. This provision allows ORR to ensure that disclosure of unaccompanied children's records is compatible with program goals, to ensure the safety and privacy of unaccompanied children, to not discourage unaccompanied children from disclosing information relevant to their care and placement, and to prevent potential sponsors from being deterred from sponsoring unaccompanied children. Further, under proposed § 410.1303(g)(3), ORR would require care provider facilities and PRS providers to provide the case files of unaccompanied children to ORR immediately upon ORR's request.

Under § 410.1303(g)(4) of the NPRM, ORR proposed that employees, former employees, or contractors of a care provider facility or PRS provider must not disclose unaccompanied children's case file records or provide information about unaccompanied children, their sponsors, family or household members to anyone except for purposes of program administration, without first providing advance notice to ORR of the request, allowing ORR to ensure that disclosure of unaccompanied children's information is compatible with program goals and ensures the safety and privacy of unaccompanied children (88 FR 68941). Safeguarding unaccompanied children's information is consistent with ORR's responsibilities under its program statutes, including 8 U.S.C. 1232(c)(1), which requires the Secretary to establish ''policies and programs reflecting best practices in witness security programs,'' and House Report 116–450 recommendations to restrict sharing certain information with other Federal agencies. A request for an unaccompanied child's case file information must be made directly to ORR, allowing ORR to consider whether disclosure meets these requirements, is in the best interest of the unaccompanied child, safeguards the unaccompanied child's and their sponsor's, family and household member's personally identifiable and protected health information, and is compatible with statutory program goals and all applicable Federal laws and regulations.

For purposes of facilitating efficient program administration, ORR policy is to allow certain limited disclosures by ORR grantees and contractors for program administration purposes without attaining prior ORR approval such as (1) registration for school and for other routine educational purposes; (2) routine medical, dental, or mental health treatment; (3) emergency medical care; (4) to obtain services for unaccompanied children in accordance with ORR policies; and (5) pursuant to any applicable whistleblower protection laws. These record safeguarding policies allow ORR to protect the privacy and safety of each unaccompanied child while also ensuring that certain routine and emergency services and treatment are provided expeditiously without waiting for approval from ORR.

ORR proposed in the NPRM at § 410.1303(h) to require standard programs to maintain adequate records and make regular reports as required by ORR that permit ORR to monitor and

enforce the regulations in parts 410 and 411 and other requirements and standards as ORR may determine are in the best interests of each unaccompanied child (88 FR 68941). ORR welcomed public comment on these proposals.

Finally, ORR notes that as mentioned previously in the preamble in relation to § 410.1302, this final rule includes a new § 410.1303(e), requiring enhanced monitoring of unlicensed standard programs and EIFs. Under this new paragraph, ORR will require enhanced monitoring, including on-site visits and desk monitoring, in addition to other requirements of this section, for all standard programs that are not State-licensed because the State does not allow State licensing of programs providing care and services to unaccompanied children, and emergency or influx facilities. Accordingly, paragraphs (e) through (h) as published in the NPRM have been redesignated in this final rule.

Comment: Several commenters expressed concern that the proposed rule does not indicate the frequency, duration, or scope of ORR's monitoring and emphasized the need for more regular and rigorous monitoring of all care provider facilities by ORR to ensure risks to children and corrective actions are addressed in a timely manner. A few commenters recommended incorporating more details from the ORR Policy Guide for consistent implementation across all care provider facility types, for example stating that routine site visits described in the NPRM at § 410.1303(a)(2) occur at ''every facility'' rather than at ''facilities,'' to avoid leaving open the possibility for ORR to not monitor facilities. They requested additional information on what ''desk monitoring'' or ''ongoing oversight'' entails, how often such oversight occurs, or who is part of such oversight. One commenter noted that the language in the NPRM only describes monitoring activities but does not directly require monitoring activities under § 410.1303(a).

Response: ORR thanks the commenters for their feedback. ORR will continue to use and update its existing guidance to provide more detailed requirements for care provider facilities related to monitoring. ORR notes that its existing policies provide more detailed descriptions of desk monitoring and the ongoing monitoring activities that are part of it. ORR opted for this approach so that it can remain agile and provide more frequent iterative updates to its monitoring requirements in keeping with best practices and to allow continued responsiveness to the needs of unaccompanied children and care provider facilities. Where the regulations contain less detail, other guidance and communications from ORR to care provider facilities will provide specific guidance on requirements. Related to the concern about requiring monitoring at § 410.1303(a), ORR is revising to ''ORR shall monitor'' rather than ''ORR monitors'' to more accurately reflect that monitoring of care provider facilities is indeed a requirement for ORR. Similarly, ORR is revising § 410.1303(c) to state ''ORR shall review'' instead of ''ORR reviews'' to reflect that this is a requirement of ORR; and new § 410.1303(f) (previously § 410.1303(e) in the NPRM) to state ''Care providers shall'' instead of ''ORR shall require care providers to'', new §§ 410.1303(g)(1) through (4) (previously §§ 410.1303(f)(1) through (4) in the NPRM) to state ''shall'' instead of ''must'' and ''shall not'' instead of ''must never'' or ''are prohibited from'', new §§ 410.1303(h)(1) through (4) (previously §§ 410.1303(g) (1) through (4) in the NPRM) to state ''shall'' instead of ''must'' or ''may'', and new § 410.1303(i) (previously § 410.1303(h) in the NPRM) to state ''shall'' instead of ''must'', to reflect that they are requirements of care provider facilities and PRS providers, where specified.

With respect to the commenter's suggested revision to § 410.1303(a)(2), ORR does not believe the revision is necessary because paragraph § 410.1303(a), as codified in this final rule, already states that ORR shall monitor ''all care provider facilities.''

Comment: One commenter expressed concern that the rule weakens monitoring standards by limiting the role of independent monitors and child advocates. Similarly, one commenter expressed concern about the credibility and impartiality of ORR if it is the same entity being monitored and strongly supported the creation of independent, contracted interdisciplinary teams for oversight of all ORR facilities in order to ensure compliance with ORR standards and provide recommendations for performance improvements.

Response: ORR acknowledges the commenters' concerns but does not agree that the proposed regulation text weakens monitoring standards. ORR first clarifies that while it has legal responsibility for the care and custody of unaccompanied children in its custody by reason of their immigration status, ORR carries out this responsibility by funding care provider facilities to physically house children and provide direct care and services. ORR monitoring is therefore an essential component of ensuring care provider facilities adhere to relevant requirements set out in statute, these final regulations, and other guidance established by ORR. ORR is not in this sense monitoring itself; rather it is monitoring grantees and contractors it funds. Care provider facilities are also subject to performance and financial monitoring and reporting as described at 45 CFR part 75, but as stated at § 410.1303(a), this final rule codifies programmatic monitoring specifically with respect to care provider facilities' adherence to this part and with 45 CFR part 411. ORR also notes that § 410.1303 codifies existing policies regarding monitoring. ORR notes that its existing policies set out more detailed guidance describing ORR's monitoring activities and the requirements related to monitoring that care provider facilities must comply with. With respect to commenters' suggestion of an independent form of oversight for the program, ORR notes that at subpart K of this final rule, ORR is finalizing the creation of the UC Office of the Ombuds. In creating the Ombuds Office, ORR aims to provide an independent and impartial body that can receive reports and grievances regarding the care, placement, services, and release of unaccompanied children, and make recommendations to ORR regarding its policies and procedures, specific to protecting unaccompanied children in the care of ORR. ORR refers commenters to subpart K for more detailed discussion of the Ombuds.

Comment: A few commenters were concerned that the proposed rule limits ORR's monitoring to ''care provider facilities,'' as defined under § 410.1001 which do not include out of network placements (OON or OONs). One commenter stated that children placed in OONs often have more significant needs and relatively longer lengths of placement than children who are not and stated that it is essential that ORR monitor OON placements. One commenter recommended adding language in this section stating that ORR monitors all care provider facilities and OON placements for compliance with the terms of the regulations in this part and 45 CFR part 411.

Response: ORR thanks the commenters for their comments and emphasizes that it is current practice to conduct regular monitoring at OON placements, and it will continue to do so. Part 410 will not govern or describe the entire UC Program, and ORR will continue to use and update its existing policies to provide more detailed

requirements. ORR's monitoring activities at OON placements largely mirror the monitoring requirements that ORR uses at in-network facilities and are collaboratively conducted by the monitoring team, Federal Field Specialists, contracted field specialists, and case managers to ensure maximum visibility and compliance with all applicable standards of care at OON placements. ORR is not adding a requirement at this time under this section because the unique nature of each OON placement requires a collaborative and unique monitoring approach from ORR, and ORR does not believe a ''one size fits all'' monitoring approach would be appropriate given the array of types of OON placements, such as hospitals or other types of restrictive settings. Even still, monitoring activities at OON placements in practice largely mirror the monitoring requirements that ORR uses at in-network facilities and are conducted to ensure maximum visibility and compliance with all applicable standards of care at the OON placement. ORR also notes that OON placements are not required to meet the requirements of subpart D as they are not included in ORR's definition of care provider facilities.

Comment: A few commenters were concerned that the corrective actions and described process in proposed § 410.1303(b) address violations only on a case-by-case basis and that the proposed rule appears not to contemplate contractors or other entities who violate regulations regularly or systematically unless the violations are criminal in nature because it takes each violation as a singular event without relationship to other events or, potentially, to higher-level decisions.

The commenters stated that both ORR and children's interests are served when regulations are followed by care provider facilities, when systematic problems are identified early and resolved, and when actors who have consistently acted contrary to the best interests of children no longer have access to Federal contracts to care for children. The commenters suggested that to identify problem entities, the first step is to collect data on incidents, particularly on the more serious incidents, and aggregate incidents at the facility level as well as the grantee and contractor level. The commenters suggested that ORR follow Senate Finance Committee recommendations from 2021 stating ORR should utilize drawdowns and the discontinuation or non-continuation of grants/contracts to providers that do not effectively safeguard children in their care. One commenter recommended adding text to § 410.1303(b) requiring ORR to collect and aggregate data on violations and resulting corrective actions for both facilities and grantees. The commenter further suggested that ORR require such data to be used in ongoing monitoring and in consideration of the future composition of the ORR network, including to inform decisions regarding initiation, renewal, or discontinuation of contracts or cooperative agreements.

Response: ORR believes that data collection can play a pivotal role in facilitating the identification of potential issues, including potentially systematic issues, related to the care of unaccompanied children, and for that reason is finalizing requirements under § 410.1501 to require ORR to collect data, and care provider facilities to report data, under § 410.1501(g) that is necessary to evaluate and improve the care and services for unaccompanied children. It is ORR's existing practice to consider this aggregate data in its care provider facility scorecard reviews and ORR's Acquisition Requirements Team, the General Services Administration, and the Office of Acquisition Management Services also oversee performance under contracts and take appropriate action when contractors do not meet ORR's requirements for serving unaccompanied children. Additionally, ORR consults its Office of Grants Management and Office of General Counsel regarding performance issues for the grantee network. ORR additionally notes that under § 410.2002(c)(5), ORR is required to provide the data it maintains to the finalized UC Office of the Ombuds, and that the Ombuds is also empowered to provide recommendations and publish reports, among other duties, based on its findings. With respect to the Senate Finance Committee recommendations from 2021,[247] ORR notes that ACF already has authority to take such actions, as described at 45 CFR part 75,[248] and regularly exercises this authority (*e.g.,* through audits and enforcement actions).

Comment: Due to their concerns about potential lawsuits and treatment of children in secure placements within ORR's network, a few commenters suggested that ORR increase its monitoring requirements for secure facilities to ensure that routine site visits occur at a minimum of once per month and that weeklong monitoring visits are conducted yearly. The commenters also recommended that ORR review children's case files at least every 14 days to determine if the child is ready for a less restrictive placement, instead of at 30-day intervals, which they believe is in closer compliance with ORR's statutory and child welfare mandate.

Response: ORR has not specified specific time intervals for the various types of monitoring it conducts for all care provider facilities, including secure facilities, under § 410.1303(a) because, as previously discussed, ORR's existing policies provide more detailed descriptions of desk monitoring and the ongoing monitoring activities that are part of it. ORR opted for this approach so that it can remain agile and provide more frequent iterative updates to its monitoring requirements in keeping with best practices and to allow continued responsiveness to the needs of unaccompanied children and care provider facilities.

Comment: One commenter recommended including monitoring requirements under § 410.1303(d) for care provider facilities that are unable to be licensed through their State to ensure best practices and the safety of children in care.

Response: ORR is finalizing a requirement under § 410.1302(a) that all standard programs and secure facilities be licensed by their State or meet the requirements of State licensing if located in a State that does not allow State licensing of programs providing or proposing to provide care services to unaccompanied children. ORR conducts monitoring of all care provider facilities, regardless of whether they are in a State that allows or does not allow State licensing for ORR care provider facilities. ORR notes that it already conducts enhanced monitoring which includes regular on-site visits and desk monitoring of any care provider facilities where a State will not license the facility because it cares for or proposes to care for unaccompanied children.

Comment: One commenter was concerned that there is ambiguity about whether monitoring by a prime contractor is intended to supplement or replace ORR's monitoring of subrecipient long-term home care and transitional home care facilities. The commenter recommended that ORR directly monitor long-term home care and transitional home care facilities with the activities described in § 410.1303(a), which may be tailored to the foster care arrangement, and recommended that ORR long-term home care and transitional home care facilities that provide services through a sub-contract or sub-grant are responsible for conducting annual monitoring or site visits of the sub-recipient, as well as weekly desk monitoring. The commenter further recommended

including a requirement that upon request, care provider facilities must provide findings of such reviews to the designated ORR point of contact.

Response: ORR directly monitors all care provider facilities that it funds. If a care provider facility, including a long-term home or transitional home care facility, subawards ORR funds to another entity to carry out care and custody of unaccompanied children, then consistent with 45 CFR 75.352(d) the prime recipient of ORR funds is responsible for monitoring its subrecipients ''as necessary to ensure that the subaward is used for authorized purposes, in compliance with Federal statutes, regulations, and the terms and conditions of the subaward; and that subaward performance goals are achieved.''

Comment: A few commenters did not support the provisions at proposed § 410.1303(f)(4), stating that they are too limiting for case managers and their ability to perform essential functions.

Response: ORR acknowledges the commenters concerns but notes that the various requirements described at proposed § 410.1303(f)(4) in the NPRM (redesignated at § 410.1303(g)(4) in the final rule) concern placement decisions, and that ORR has statutory authority to make placement determinations. Care provider facilities, including case managers, do not decide on the placement of unaccompanied children in ORR custody. Further, as stated in the NPRM preamble, ORR believes that these provisions will protect the best interests of unaccompanied children and put their safety first as well as help ensure that reports do not become a potential hindrance to placement in the least restrictive setting (88 FR 68940).

Comment: A few commenters shared concerns that ORR care provider facilities often engage in over-reporting of incidents and that many SIRs frequently document minor rule infractions or developmentally appropriate child or adolescent behavior such as when children fail to follow facility rules, test boundaries, appropriately express frustration, or engage in horseplay or recreational activities. The commenters stated that SIRs frequently fail to contextualize children's behavior within the stressful circumstances, conditions, and length of time in government custody, or the trauma experienced. One commenter therefore recommended that regulatory language at proposed § 410.1303(f)(4) additionally state that care provider facilities may deny a placement only on the basis of the reasons and in accordance with the procedures set forth in § 410.1103(f) through (g). The commenter further recommended that ORR add language to § 410.1303(f)(4) to directly state that these reports are not complete or comprehensive and information in the reports may not be fully verified, and that staff should also consider that ORR does not intend for an incident report to provide complete context of the incident described or a child's experience in home country, journey, or time in care.

Response: ORR proposed in the NPRM at §§ 410.1303(f)(1) and (2) (redesignated at §§ 410.1303(g)(1) and (2) in the final rule) to provide additional parameters around the information contained in such reports to help ensure that incidents involving unaccompanied children are documented and responded to in a way that protects the best interests of children in ORR care, including their safety and well-being. ORR intends to continue to use its subregulatory guidance to provide additional details and requirements for care provider facilities. ORR notes, as stated by the commenters, that SIRs are not intended to provide complete context because they are internal records that contain information that may not be fully verified about a given incident or of the child's experience in home country, journey, or time in care.

Comment: Several commenters recommended revisions to § 410.1303(g), as proposed in the NPRM (redesignated as § 410.1303(h) in the final rule), to limit unauthorized access, use and disclosure of information and to preserve confidentiality of children's data and information. One commenter stated that the final rule should safeguard the personal information of unaccompanied children and their sponsors from unauthorized access, use, or disclosure, and include examples of parameters for what privacy and confidentiality should include, such as only collecting information that is necessary for the purposes of the UC Program and reporting privacy breaches to affected individuals. Commenters further recommended that ORR require compliance with applicable Federal and State laws and regulations regarding privacy and confidentiality because unaccompanied children may be vulnerable to discrimination, harassment, or retaliation based on their immigration status or background and face risks due to their personal information being accessed, used, or disclosed without their knowledge or consent. A few commenters stated that the proposed rule should not only prohibit the mishandling of unaccompanied children's information but also require organizations to implement policies and procedures to reduce the risk of mishandling such as proactively ensuring the privacy, security, and confidentiality of program data in accordance with national standards for protecting sensitive and restricted data. Another commenter recommended that proposed § 410.1303(g)(4) (redesignated to § 410.1303(h)(4) in the final rule) be expanded to address both unauthorized use and unauthorized disclosure of the sensitive information it describes. One commenter recommended that where the proposed rule uses the phrase ''unauthorized use or disclosure'' or a similar phrase, to include the terms unauthorized access, unauthorized use, misuse, and improper disclosure, stating that authorized users fulfilling job-related functions can still misuse private and sensitive data about children, and improper disclosure of the protected information in a case file (or elsewhere) does not require access to the file itself.

Response: ORR notes that the requirements under proposed § 410.1303(g) in the NPRM (redesignated to § 410.1303(h) in the final rule) are supplemented by existing policies that speak to many of these concerns, particularly related to care provider facilities policies for maintaining case files and for record management, retention and safekeeping. ORR notes that care provider facilities must ensure compliance with all requirements imposed by Federal statutes concerning the collection and maintenance of records that includes personal identifying information. With regard to compliance with national standards and State laws, ORR further notes, consistent with § 410.1302(a) as codified in this final rule, that standard care provider facilities must follow State licensing requirements, even if they are in a State that does not license facilities that care for unaccompanied children; further, all care provider facilities must follow the requirements of part 410, and ORR policies and procedures.

Comment: A few commenters stated concerns that ORR's proposal to share information about the children and their sponsors with other Federal agencies, such as DHS, for immigration enforcement purposes would violate the children's privacy rights and deter potential sponsors from coming forward, resulting in prolonged detention and increased costs for ORR.

Response: ORR clarifies that proposed § 410.1303(g) in the NPRM (redesignated to § 410.1303(h) in the final rule) also prohibits the sharing of information with other Federal agencies without prior approval from ORR. This

provision, like ORR's current policies, is consistent with provisions in House Report 116–450,[249] and restricts sharing certain case-specific information with EOIR and DHS that may deter a child from seeking relief through their legal service provider.

Comment: A few commenters noted that the ownership of records including case files of unaccompanied children is a complicated issue in part because many organizations are direct providers of different types of services for unaccompanied children, and that different providers are subject to different laws and best practices concerning the ownership of children's records. One commenter recommended that this section should address the different types of records kept by language access services providers, stating that some may be protected by attorney-client privilege. One commenter stated that while they agree that there is good reason for ORR to have ultimate responsibility for safeguarding some unaccompanied children's records, such as case files maintained by care provider facilities and PRS providers, the same approach may not be appropriate for ownership of other types of records such as a birth certificate, which belongs to the child and the child's parent or legal guardian, and the document and its contents can be shared with the child's or parent's consent. The commenter also included examples where ORR ownership would not apply, such as records maintained by legal services providers, which are protected by attorney-client privilege and cannot be shared with ORR, or medical or sensitive personal information protected by Federal and State policies. The commenter recommended that proposed § 410.1303(g)(2) in the NPRM, which identifies ORR as the owner of unaccompanied children's case files, should instead be addressed by a separate section not intended to establish a single rule for all records kept by all types of providers. The commenter also stated that the ownership of children's records is unnecessarily tied to restrictions on how providers may access or share information about a child and that the provision of services by particular providers may require explicit carve-outs from certain aspects of the uniform standards. The commenter therefore recommended that ORR include a new section in the rule which addresses the ownership of records maintained by different types of service providers, arguing that this would affirm ORR's ultimate responsibility for case files and other records kept by care provider facilities and PRS providers and its right to oversee and to regulate its grantees' and contractors' policies and procedures. The commenter recommended that ORR explicitly state that records maintained by legal service providers are not the property of ORR and address relevant issues raised by providers of other types of services in a manner that preserves their ability to efficiently serve unaccompanied children according to the relevant legal regimes and best practices of their field.

Response: ORR acknowledges the commenters' concerns related to legal service providers or other types of service providers that have records pertaining to unaccompanied children in ORR care. ORR clarifies that the requirements related to privacy and confidentiality of unaccompanied children's case file records under part 410 apply to care provider facilities and PRS providers, and do not apply to legal service providers. ORR notes that it includes privacy and confidentiality requirements in its grants, cooperative agreements, and contracts with other types of service providers, including legal service providers. This allows ORR to ensure all record keeping, privacy, and confidentiality terms are tailored as appropriate to the nature of the grant or contract. ORR further emphasizes that disclosures can be made, consistent with § 410.1303(g)(2), in accordance with law or for program administration purposes.

Comment: A few commenters noted that proposed § 410.1210(i) contains similar language to that found in proposed § 410.1303(g) in the NPRM and therefore recommended consolidating the general guidelines of proposed §§ 410.1303(g) through (h) in the NPRM (redesignated to §§ 410.1303(h) through (i) in the final rule) with the provisions of § 410.1210(i)(1) through (3) so that provisions currently focused solely on records managed by PRS providers will also apply to other types of service providers. One commenter stated that the proposed guidelines for the management, retention, and privacy of records maintained by PRS providers are both stronger and more detailed than the more general requirements proposed at § 410.1303(g) through (h) (redesignated to §§ 410.1303(h) through (i) in the final rule) that apply to care providers and suggested that the PRS provider facilities as well. Another commenter encouraged ORR to consolidate § 410.1210(i) with proposed § 410.1303(g) in the NPRM by using the version with stronger privacy and confidentiality protections, notably § 410.1210(i)(2)(iii). A few commenters, noting that proposed § 410.1210(i)(3)(iii) states that PRS providers' controls on information-sharing within the PRS provider network shall extend to subcontractors, similarly suggested extending safeguards from unauthorized access, inappropriate access, misuse, and inappropriate disclosure to subcontractors of all agencies and stated that the explicit inclusion of subcontractors is an important clarification that should be incorporated into other sections that safeguard children's information.

Response: ORR has many detailed subregulatory requirements for care provider facilities related to the privacy and confidentiality of the case file records of unaccompanied children, but did not propose to adopt each of its existing requirements into this rule because of the length and detail of those requirements and because maintaining those requirements in subregulatory guidance will allow ORR to make more appropriate, timely, and iterative updates to record management and privacy policy in keeping with best practices and to allow continued responsiveness to the evolving needs of unaccompanied children and care provider facilities. In contrast, ORR does not have as many subregulatory requirements for PRS providers related to the privacy and confidentiality of the case file records of unaccompanied children, and notes that the circumstances are different because the children served by PRS providers are no longer in ORR custody. For this reason, ORR chose to include more detail in the requirements under § 410.1210(i)(2) for PRS providers. ORR thanks the commenters for highlighting the nuances between § 410.1210(i) and proposed § 410.1303(g) in the NPRM (redesignated to § 410.1303(h) in the final rule) but does not believe these nuances cause a conflict between the requirements under this part or in ORR's existing policies pertaining to care provider facilities.

Comment: A few commenters expressed concern that the proposed rule does not have uniformly high standards for all entities who may keep records regarding unaccompanied children's personally identifiable information (PII), and that the sections contemplating data collection and safeguarding should be aligned to a high standard of protection and made consistent across different types of service providers and information. One commenter stated that, in contrast to the requirements listed in proposed § 410.1303(g) in the NPRM (redesignated to § 410.1303(h) in the

final rule), the proposed rule's guidelines for the handling of PII by child advocates under § 410.1308(f) and the providers of language access services under § 410.1306(i) are sparse. One commenter suggested that ORR should revise any text describing what organizations are subject to the guidelines of proposed § 410.1303(g) in the NPRM (redesignated to § 410.1303(h) in the final rule), to ensure consistent inclusion of PRS providers and to ensure that other types of service providers that encounter or handle records involving unaccompanied children's PII are following best practices for developing, maintaining, and safeguarding them. A few commenters noted that, while the rule contemplates information and data that ORR receives via its network of grantees and contractors, the proposed rule fails to contemplate information and data that arrives via other means and that implicates the continued well-being of children or safety and security of children's placements.

Response: ORR includes privacy and confidentiality requirements in its cooperative agreements and contracts with other types of service providers and prefers to keep these requirements subregulatory so they can be tailored, as appropriate, to the nature of a particular contract or cooperative agreement. Related to data and information that ORR receives via its network of grantees and contractors, ORR notes that its requirements apply to all information contained in an unaccompanied child's case file record, regardless of how it was received.

Comment: A few commenters stated concerns that ORR's policies in this section would limit children's and their family's access to their records of their treatment, thereby posing a potential infringement on parental and family rights. One commenter expressed concern that the provisions for prior approval and advance notice from ORR for disclosure of case file records improperly limit the access of the unaccompanied child, child's attorney, and child advocate to the case file, stating that the child, their attorney, and their child advocate should have unrestricted access to all non-classified records. The commenter stated that unrestricted access to all documents will help ensure that children are generally informed about their case. The commenter suggested that the child, child's attorney, and child advocate be afforded unrestricted access to the case file and that advance notice or approval only be required before disclosing the case file information to anyone else for any purpose.

Response: ORR does not agree that its proposed policies under § 410.1303(g) in the NPRM (redesignated to § 410.1303(h) in the final rule) limit access to case files for unaccompanied children, children's families, or children's LSPs, attorneys of record, or child advocates. As stated above, regarding the definition of ''case file,'' ORR notes that, consistent with the Privacy Act, codified at 5 U.S.C. 552a, the UC Program's System of Records Notice (SORN), and ORR policies, unaccompanied children have access to, and are entitled to copies of, their own case file records.[250] As such, both unaccompanied children and their parents or legal guardians may request their own files. ORR further notes that pursuant to the TVPRA, child advocates are ''provided access to materials necessary to effectively advocate for the best interest of the child,'' [251] and that under current ORR policies, child advocates have immediate access to children's case files without needing to submit a formal request to ORR. Further, under current ORR policies, unaccompanied children's attorneys may request their clients' case files, including on an expedited timeframe, as needed. ORR notes that its existing subregulatory guidance contains more detailed requirements related to the disclosure of records for these individuals, and the process for requesting access to case files or records. ORR believes that its established process for requesting access to case files safeguard and maintain the confidentiality of unaccompanied children's case file records consistent with ORR's responsibilities under the HSA and the TVPRA, as stated in the preamble discussion. Further, ORR believes that its proposed policies under § 410.1303(g) in the NPRM (redesignated to §§ 410.1303(h) in the final rule) recognize that unaccompanied children are vulnerable persons, and therefore, the privacy and confidentiality of their records is paramount, and carry out ORR's responsibility for maintaining and safeguarding unaccompanied children's records and information under the HSA and the TVPRA.

Comment: One commenter recommended that ORR require care provider facilities to keep detailed records of any circumstance in which they believe an unaccompanied child to have been separated from, a parent, legal guardian, or other family member at the time of apprehension into Federal custody. The commenter suggested that even if the separation cannot be substantiated, care provider facilities must collect all available information relating to the biographical information of the separated parent, legal guardian, or family member, the specific facts of the separation, documentation of notification to the child of the child's rights, and documentation of a referral for a child advocate.

Response: ORR thanks the commenter for the recommendation, and notes that under § 410.1302(c)(2)(ii) it is finalizing a requirement that essential data relating to the identification and history of the unaccompanied child and family be collected upon the referral of an unaccompanied child by another Federal department or agency into the custody of ORR. ORR also notes that it is already required to collect and share significant amounts of information relating to separated children as part of a Settlement Agreement reached in the class action *Ms. L.* litigation.[252] The settlement requires that ORR receive the information described by the commenter at or near the time of such child's transfer to ORR custody. ORR further notes that this information will be part of the separated child's case file.

Comment: Several commenters stated concerns that the requirement to provide advance notice to ORR prior to disclosure of information under proposed § 410.1303(g)(4) in the NPRM (redesignated to § 410.1303(h)(4) in the final rule) would violate the Whistleblower Protection Act, its subsequent amendments, and 5 U.S.C. 7211 and the right of employees to furnish information to Congress without interference. One commenter stated that proposed § 410.1303(g)(4) in the NPRM (redesignated to § 410.1303(h)(4) in the final rule) appears to formalize a blanket prohibition on certain personnel from releasing information without ORR's prior approval and without consideration for whistleblower protection and disclosure laws. One commenter stated that, because ORR is requiring care provider facilities and PRS providers to furnish records immediately, ORR should be able to provide this same information to state and local agencies for oversight of ORR.

Response: ORR emphasizes that no portion of this regulation impacts the rights, protections, and vital work of whistleblowers in providing information for the protection of children in ORR custody and for the general public interest. Section 410.1303(g) as proposed in the NPRM (redesignated to § 410.1303(h)(4) in the final rule) has no bearing on whistleblower policy and protections in any way and does not intend to infringe upon them. ORR will continue to comply with all required whistleblower

protection laws and encourages all whistleblowers to come forward as necessary and appropriate. Whistleblowers can initiate the process to report concerns to appropriate authorities, such as OIG or Congress. If case records are needed, OIG or Congress can request them from ORR. ORR discusses in the preamble of the NPRM its pre-approval of certain limited disclosures for the purposes of facilitating efficient program administration, and notes that it includes disclosures pursuant to all available whistleblower protection laws. ORR is committed to fully respecting and enforcing whistleblower protections, and nothing in part 410 should be read as removing or weakening those protections and rights. ORR's policy of allowing certain limited disclosures by ORR grantees and contractors without attaining prior ORR approval allows ORR to protect the privacy and safety of each unaccompanied child while also ensuring that certain routine and emergency services and treatment are provided expeditiously without waiting for approval from ORR, and it ensures that whistleblowing is not hindered or discouraged. ORR's intention with these requirements is first and foremost to protect the privacy and confidentiality of unaccompanied children and their families. It is in their interest, broad child welfare interest, and the public interest to ensure that their information is not freely or erroneously shared with others. These information sharing requirements have no bearing on existing whistleblower protections, which remain in place and continue to be a key mechanism for ensuring the safety and well-being of all children in ORR care. In order to make this clear, in this final rule, ORR is amending proposed § 410.1303(g)(4) in the NPRM (redesignated to § 410.1303(h)(4) in the final rule) to explicitly state that the provision is subject to applicable whistleblower protection laws.

Comment: Several commenters stated that providing a file to ORR ''immediately'' on request will likely be problematic for many programs and requested that ORR include a reasonable standard of within 4 business days for routine requests and 4 business hours for urgent requests. One commenter stated that the rationale for requiring immediate access to a case file for a child in ORR's custody would not necessarily apply to PRS providers, noting that the current policy of ORR does not always consider PRS to be included in the case file and that the proposed rule would be an expansion intended to apply to PRS providers and files. While the commenter expressed support for the expansion of PRS services, they did not believe that such an expansion necessitated that ORR be given immediate access to all PRS case files and noted that a requirement for immediate access could cause difficulties with the stated goals of providing the expanded services.

Response: ORR acknowledges the commenters' concerns related to the immediate provision of case files to ORR but believes the immediate provision of case files is necessary to ensure ORR has timely and accurate information. ORR will continue to monitor the impact of these requirements as they are implemented and may provide additional guidance related to the timelines for the immediate provision of case file information.

As to the concern about this requirement applying to PRS providers, ORR notes that it provides PRS to unaccompanied children by funding organizations through cooperative agreements. As a matter of prudent program management, ORR requires access to PRS provider records. ORR notes this requirement is also consistent with HHS regulations requiring agencies to have access to grantee records.[253] ORR also reiterates its discussion in the preamble that PRS records are created by, or on behalf of, ORR and assist ORR in coordinating supportive services for the child and their sponsor in the community where the child resides, as authorized under 8 U.S.C. 1232(c)(3)(B), which provides HHS authority to ''conduct follow-up services in cases involving children with mental health or other needs who could benefit from ongoing assistance from a social welfare agency.'' Lastly, it was unclear from the comments why an ORR requirement for immediate access to PRS records would cause difficulties with expanding services. However, ORR notes that it may provide additional subregulatory guidance as necessary to support the implementation of expanded PRS while ensuring ORR access to information as requested.

Comment: One commenter agreed that the language at proposed § 410.1303(g)(4) in the NPRM (redesignated to § 410.1303(h)(4) in the final rule) prohibiting certain individuals from disclosing sensitive information is appropriately strong and wide-ranging, but believed the term ''program administration'' is ambiguous. The commenter recommended that this should refer only to the administration of ORR's own programs, and not to the administration of programs of other agencies, such as those operated by U.S. Immigration and Customs Enforcement. The commenter suggested that individuals affiliated with ORR-funded service providers should not be allowed to communicate sensitive information about a child or their family for purposes other than the care and well-being of a child and that ORR should specify here that the named exception applies only to its own programs.

Response: ORR clarifies that ''program administration'' refers to administration of the UC Program and routine disclosures that are necessary to provide relevant services to unaccompanied children. ORR refers the commenter to its discussion above describing ORR's policy of allowing certain limited disclosures by ORR grantees and contractors without attaining prior ORR approval (noting examples such as registration for school and for other routine educational purposes; routine medical, dental, or mental health treatment; emergency medical care; and otherwise obtaining services for unaccompanied children in accordance with ORR policies). ORR reiterates that the provisions in § 410.1303(h) as codified in this final rule apply to all care provider facilities responsible for the care and custody of unaccompanied children, whether the program is a standard program or not. ORR also notes that its authority to regulate does not extend to the programs of other agencies, and thus records requirements, along with any of the requirements described in this final rule, apply only to the ORR UC Program.

Comment: One commenter stated that it is unclear how accountability systems for preserving the confidentiality of children's information and protecting their records from unauthorized use or disclosure at § 410.1801(b)(17) in the NPRM (redesignated as § 410.1801(c)(13) in the final rule) should be integrated with similar requirements proposed at § 410.1303(g) through (h) (redesignated to §§ 410.1303(h) through (i) in the final rule) that apply to all care providers, including emergency facilities.

Response: The requirements at proposed § 410.1801(b)(17) in the NPRM (redesignated as § 410.1801(c)(13) in the final rule) state that emergency or influx facilities maintains records of case files and make regular reports to ORR and must have accountability systems in place which preserve the confidentiality of client information and protect the records from unauthorized use or disclosure. ORR notes that proposed § 410.1303(g) through (h) in the NPRM, finalized at redesignated§ 410.1303(h)

through (i), provides more detailed requirements for all care provider facilities, and in the case of emergency or influx facilities, provides additional parameters for the accountability systems that the EIFs must have in place. However, ORR agrees that accountability to ensure that EIFs faithfully follow these recordkeeping requirements is important. Therefore, ORR will move the provision that was proposed at § 410.1801(b)(17) in the NPRM (''The EIF shall maintain records of case files and make regular reports to ORR. EIFs must have accountability systems in place, which preserve the confidentiality of client information and protect the records from unauthorized use or disclosure.'') into the newly designated § 410.1801(c)(13) so that the provision is non-waivable for EIFs.

Comment: One commenter stated that the rule should also provide for mechanisms to inform, obtain consent, and redress any breaches of privacy and confidentiality, and recommended including language in this section to explicitly address that.

Response: ORR notes that it has requirements related to informing and obtaining consent for record disclosure in its existing subregulatory guidance. In addition, as described above, ORR considers unaccompanied children's records to be subject to the Privacy Act. Therefore, it understands that unlawful disclosures may be subject to remedies described in that Act. ORR further notes that the Office of the Ombuds, as finalized and described under subpart K, may make efforts to resolve complaints or concerns raised by interested parties as it relates to ORR's implementation or adherence to Federal law or ORR policy, including any concerns reported to the Ombuds related to privacy and confidentiality. However, ORR will continue to monitor the impact of these requirements as they are implemented.

Final Rule Action: After consideration of public comments, ORR is revising § 410.1303(a) to state ''ORR shall monitor'' rather than ''ORR monitors;'' § 410.1303(c) to state ''ORR shall review'' instead of ''ORR reviews;'' and new § 410.1303(f) (previously § 410.1303(e) in the NPRM) to state ''Care providers shall'' instead of ''ORR shall require care providers to;'' new §§ 410.1303(g)(1) through (4) (previously §§ 410.1303(f)(1) through (4) in the NPRM) to state ''shall'' instead of ''must'' and ''shall not'' instead of ''must never'' or ''are prohibited from;'' new §§ 410.1303(h)(1) through (4) (previously §§ 410.1303(g) (1) through (4) in the NPRM) to state ''shall'' instead of ''must'' or ''may;'' and new § 410.1303(i) (previously § 410.1303(h) in the NPRM) to state ''shall'' instead of ''must.'' ORR is also adding a new paragraph, (e), requiring enhanced monitoring of unlicensed standard programs and emergency or influx facilities, which states, ''In addition to the other requirements of this section, for all standard programs that are not State-licensed for the care of unaccompanied children and for emergency or influx facilities, ORR shall conduct enhanced monitoring, including on-site visits and desk monitoring.'' The remaining paragraphs of § 410.1303 have been redesignated accordingly. Additionally, ORR makes a clarifying revision at new § 410.1303(h) (previously § 410.1303(g) in the NPRM) to delete ''whether the program is a standard program or not'' as both standard and non-standard programs are already included in the definition of care provider facilities. ORR makes grammatical revisions to the previous § 410.1303(g)(2) in the NPRM, now § 410.1303(h)(2), and divides this provision into two sentences. It now states ''The records included in an unaccompanied child's case files are ORR's property, regardless of whether they are in ORR's possession or in the possession of a care provider facility or PRS provider. Care provider facilities and PRS providers may not release those records or information within the records without prior approval from ORR except for program administration purposes.'' ORR is revising the previous § 410.1303(g)(4) in the NPRM, now § 410.1303(h)(4), to add that ORR's requirements to not disclose case file records or information are ''subject to applicable whistleblower protection laws.'' ORR is also revising the previous § 410.1303(h) in the NPRM, now § 410.1303(i), to specify that care provider facilities and PRS providers shall maintain adequate records in the unaccompanied child case file. ORR is otherwise finalizing § 410.1303 as proposed.

Section 410.1304 Behavior Management and Prohibition on Seclusion and Restraint

ORR proposed in the NPRM language at § 410.1304 describing the requirements for behavior management and the prohibition on seclusion and restraint (88 FR 68941 through 68942). ORR proposed in the NPRM these requirements consistent with its statutory responsibilities to implement policies with respect to the care and placement of unaccompanied children, to place unaccompanied children in the least restrictive setting available that is in their best interest, and to ensure the interest of unaccompanied children are considered in decisions and actions related to their care and custody. ORR understands that its responsibilities apply to each unaccompanied child in its care, including unaccompanied children who are subject to behavioral interventions, as well as to other unaccompanied children placed at the same care provider facility as an unaccompanied child who is subject to behavioral interventions.

Effective behavior management is critical to supporting the health, safety, and well-being of unaccompanied children in ORR care and can help prevent emergencies and safety situations. Consistent with ORR's statutory responsibilities, ORR proposed in the NPRM at § 410.1304(a) to incorporate FSA paragraph 11 requirements and child welfare best practices by requiring care provider facilities to have behavior management strategies that include techniques for care provider facilities to follow. Under § 410.1304(a), ORR proposed in the NPRM that care provider facilities must develop behavior management strategies that include evidence-based, trauma-informed, and linguistically responsive program rules and behavior management policies that take into consideration the range of ages and maturity of unaccompanied children in the program and that are culturally sensitive to the needs of each unaccompanied child. Examples of evidence-based standards and approaches may include setting clear and healthy expectations and limits for their behaviors and the behaviors of others; creating a healthy structured environment with routines and schedules; utilizing positive reinforcement strategies and avoiding negative reinforcement strategies; and fostering a supportive environment that encourages cooperation, problem-solving, healthy de-escalation strategies, and positive behavioral management skills. Further, ORR proposed in the NPRM that the behavior management strategies must not use any practices that involve negative reinforcement or involve consequences or measures that are not constructive or not logically related to the behavior being regulated. This would include, as proposed under § 410.1304(a)(1), prohibiting the use or threatened use of corporal punishment, significant incident reports as punishment, and unfavorable consequences related to family/sponsor unification or legal matters (*e.g.,* immigration relief). It would also include prohibiting the use of forced chores or other activities that serve no

purpose except to demean or humiliate an unaccompanied child, search an unaccompanied child's personal belongings solely for the purpose of behavior management, and medical interventions that are not prescribed by a medical provider acting within the usual course of professional practice for a medical diagnosis or that increase risk of harm to the unaccompanied child or others. Under § 410.1304(a)(2), ORR proposed in the NPRM to require that any sanctions employed not adversely affect either an unaccompanied child's health or physical, emotional, or psychological well-being; or deny an unaccompanied child meals, hydration, sufficient sleep, routine personal grooming activities, exercise (including daily outdoor activity), medical care, correspondence or communication privileges, or legal assistance. ORR noted that under § 410.1305 of the NPRM it proposed requiring training for care provider facility staff on behavior management strategies, including the use of de-escalation strategies. Under § 410.1304(a)(3), ORR proposed in the NPRM to prohibit the use of prone physical restraints, chemical restraints, or peer restraints for any reason in any care provider facility setting.

ORR proposed in the NPRM, language at § 410.1304(b), requiring that involvement of law enforcement would be a last resort and a call by a care provider facility to law enforcement may trigger an evaluation of staff involved regarding their qualifications and training in trauma-informed, de-escalation techniques. ORR noted that calls to law enforcement are not considered a behavior management strategy, and care provider facilities are expected to apply other means to de-escalate concerning behavior. But in some cases, such as emergencies or where the safety of unaccompanied children or staff are at issue, care provider facilities may need to call 9–1–1. ORR also noted that § 410.1302(f) describes requirements for care provider facilities regarding the sharing of information about unaccompanied children. Additionally, because ORR would like to ensure law enforcement is called in response to an unaccompanied child's behavior only as a last resort in emergencies or where the safety of unaccompanied children or staff are at issue, ORR requested comments on the process ORR should require care provider facilities to follow before engaging law enforcement, such as the de-escalation strategies that must first be attempted and the specific sets of behaviors exhibited by unaccompanied children that warrant intervention from law enforcement.

ORR proposed in the NPRM at § 410.1304(c) to prohibit standard programs and RTCs from the use of seclusion as a behavioral intervention. ORR noted that this prohibition on the use of seclusion specifically relates to its potential use as a behavioral intervention, and not to a medical need for isolation or quarantine, as discussed in § 410.1307(a)(10). Standard programs and RTCs would also be prohibited from using restraints, except as described at proposed § 410.1304(d) and (f). In emergency safety situations only, ORR proposed in the NPRM that standard programs and RTCs should be permitted to use personal restraints under § 410.1304(d). ORR believes that emergency safety situations should be prevented wherever possible and that personal restraints should only be used after de-escalation strategies and less restrictive approaches have been attempted and failed. As such, ORR emphasized in its proposed requirements under § 410.1304(a) that behavior management strategies used by care provider facilities be evidence-based, trauma-informed, and linguistically responsive. ORR further emphasized in its requirements under proposed § 410.1305 that staff must be trained in these behavior management strategies, including de-escalation techniques.

In secure facilities, not including RTCs, there may be situations where an unaccompanied child becomes a danger to themselves, other unaccompanied children, care provider facility staff, or property. As a result, secure facilities may need to employ more restrictive forms of behavior management than shelters or other types of care provider facilities in emergency safety situations or during transport to or from immigration court or asylum interviews when there are certain imminent safety concerns. ORR noted that under proposed § 410.1303(f) in the NPRM and ORR's current policy, all care provider facilities, regardless of setting, are required to report any emergency incident, significant incident, or program-level event to ORR, and in accordance with any applicable Federal, State, and local reporting laws.

Therefore, ORR proposed in the NPRM under § 410.1304(e)(1) to allow secure facilities except for RTCs to use personal restraints, mechanical restraints, and/or seclusion in emergency safety situations. ORR noted under proposed § 410.1304(a)(3) that the use of prone physical restraints, chemical restraints, or peer restraints is prohibited for any reason for all care provider facilities, including secure facilities. ORR proposed in the NPRM at § 410.1304(e)(2) to allow secure facilities to restrain an unaccompanied child for their own immediate safety or that of others during transport to an immigration court or an asylum interview. ORR proposed in the NPRM at § 410.1304(e)(3) that secure facilities may restrain an unaccompanied child while at an immigration court or asylum interview if the child exhibits imminent runaway behavior, makes violent threats, demonstrates violent behavior, or if the secure facility has made an individualized determination that the child poses a serious risk of violence or running away if the child is unrestrained in court or the interview. ORR noted that while secure facilities may have safety or runaway risk concerns for which they deem restraints necessary for certain unaccompanied children, immigration judges retain discretion to provide input as to whether the unaccompanied child should remain in restraints while in their courtroom. ORR proposed in the NPRM to require under § 410.1304(e)(4) that secure facilities must provide all mandated services under this subpart to an unaccompanied child, to the greatest extent practicable under the circumstances, while ensuring the safety of the unaccompanied child, other unaccompanied children at the secure facility, and others. Finally, under § 410.1304(f) ORR proposed in the NPRM to allow care provider facilities to use soft restraints (*e.g.,* zip ties and leg or ankle weights) only during transport to and from secure facilities, and only when the care provider believes a child poses a serious risk of physical harm to self or others or a serious risk of running away from ORR custody.

Comment: One commenter wrote that proposed § 410.1304(a) aligns with many State laws and recommended that ORR require care provider facilities to employ trauma-informed, evidence-based de-escalation and intervention techniques when responding to the behavior. The commenter recommended an additional provision under § 410.1304(b) requiring that trauma-informed, evidence-based de-escalation and intervention techniques be exhausted before resorting to law enforcement, and that facilities should develop collaborative relationships with community-based service organizations that provide culturally relevant and trauma-informed services to the children served by the facility.

Response: Section 410.1304(a) of this final rule provides that care provider facilities must develop behavior

management strategies that include evidence-based, trauma-informed, and linguistically responsive program rules and behavior management policies, and notes that the requirements for these strategies include behavior intervention techniques utilized by care provider facilities. As discussed in the preamble of the NPRM, examples of evidence-based standards and approaches may include setting clear and healthy expectations and limits for their behaviors and the behaviors of others, creating a healthy structured environment with routines and schedules, utilizing positive reinforcement strategies and avoiding negative reinforcement strategies, and fostering a supportive environment that encourages cooperation, problem-solving, healthy de-escalation strategies, and positive behavioral management skills (88 FR 68941). ORR notes that under § 410.1305 it is finalizing a requirement for training for staff at standard programs and restrictive placements on the behavior management strategies, including the use of de-escalation strategies. ORR is revising § 410.1304(a) to state ''shall'' instead of ''must'' and ''care provider facilities shall'' instead of ''the behavior management strategies must'' to reflect that these are requirements of care provider facilities. ORR is also revising § 410.1304(a)(1) to replace ''family/sponsor'' with ''sponsor,'' as family in this context is redundant of sponsor.

Related to the recommendations for § 410.1304(b), ORR reiterates its discussion in the NPRM that ORR expects care provider facilities to apply other means to de-escalate concerning behavior before a call to law enforcement is made. ORR notes that it requested comments in the NPRM on the process ORR should require care provider facilities to follow before engaging law enforcement, such as the de-escalation strategies that must first be attempted and the specific sets of behaviors exhibited by unaccompanied children that warrant intervention from law enforcement.

Comment: One commenter recommended that access to privacy should not be routinely used as an incentive or punishment for behavior management because they believe it is ineffective.

Response: ORR believes that having a reasonable right to privacy is important for unaccompanied children and is in line with the requirements under Exhibit 1 of the FSA, and for that reason has further revised its proposal to add § 410.1302(c)(14) to require a reasonable right to privacy as a minimum standard. ORR believes its revisions at § 410.1302(c)(14) establishing a reasonable right to privacy as a minimum standard adequately protects unaccompanied children's access to privacy related to behavior management as well.

Comment: A few commenters supported the prohibition of certain practices under § 410.1304(a)(2)(ii) and recommended that that the provision should also state that limiting access to religious services should not be a punishment for behavior, as children who miss religious services often report anxiety and frustration.

Response: ORR believes that access to religious services is an important source of support for unaccompanied children and is therefore revising § 410.1304(a)(2)(ii) to include religious observation and services as part of the activities and items care provider facilities shall not deny as part of behavior management strategies.

Comment: In response to ORR's request in the NPRM for comments on the process ORR should require care provider facilities to follow before engaging law enforcement, one commenter recommended factors to consider before a call to law enforcement, including the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures or the provision of auxiliary aids or services will mitigate the risk without the involvement of law enforcement. Another commenter recommended ORR implement a trauma-informed care system that begins at the moment a child first enters ORR custody, rather than in the midst of a crisis that warrants intervention. Another commenter recommended that ORR implement behavioral support systems that are fair, consistent, and equitably enforced, with consideration for individualized needs and unconscious bias.

Response: ORR thanks the commenters for their feedback related to ORR's request for comments on the procedures that care provider facilities should be required to follow before engaging law enforcement. ORR may consider these suggestions for future policymaking in this area.

Comment: Several commenters did not support § 410.1304(b) as proposed in the NPRM and were concerned that it would disincentivize staff from contacting law enforcement with safety concerns or reporting escalating behavior. Some commenters were concerned that a call to law enforcement could trigger an evaluation of the staff involved, but not an evaluation of the child's behavior or the care provider facility's policies or procedures. One commenter stated that law enforcement could be effective in preventing children from being involved in emergencies and are better equipped to respond to such situations. One commenter noted that in some cases, like emergencies, care provider facilities may need to call 9–1–1. Other commenters did not support the proposal under § 410.1304(b) and were concerned that it would impede the ability of law enforcement to investigate child trafficking.

Response: ORR disagrees that engaging law enforcement is an effective first-line strategy to prevent emergency safety situations arising from behaviors, because as stated in the preamble to the NPRM, ORR does not believe that calls to law enforcement are an effective behavior management strategy, and care provider facilities are expected to apply other means to de-escalate concerning behavior (88 FR 68942). ORR reiterates that it does believe that calls to law enforcement may sometimes be necessary when other less restrictive approaches have been tried and failed, when there is an emergency, or when the safety of children or staff are at issue, and that care provider facilities may need to call 9–1–1 as a last resort. ORR's proposal is intended to ensure that calls to law enforcement occur only in these limited scenarios, and that an evaluation of staff may be required to determine compliance with this proposal.

ORR notes that it is finalizing under § 410.1303(g) that all care provider facilities, regardless of setting, are required to report any emergency incident, significant incident, or program-level event to ORR, and in accordance with any applicable Federal, State, and local reporting laws. ORR routinely reviews all such reports and determines whether further follow-up or corrective actions are necessary when care providers are out of compliance with ORR's requirements. Further, ORR is finalizing behavior management requirements under § 410.1304(a) pursuant to which care providers shall use evidence-based, trauma-informed, and linguistically responsive program rules and behavior management policies.

Comment: A few commenters supported the proposal under § 410.1304(b) and had recommendations related to calls to law enforcement for unaccompanied children with disabilities. Recommendations included that a call to law enforcement should trigger a mandatory evaluation of the involved staff and of compliance with

the requirements of the child's current ISP, as well as a re-assessment of the child's ISP and whether the child needs additional services or reasonable modifications.

Response: ORR will study these important issues further and will consider the commenters' recommendations in future policymaking, which may be informed by the anticipated comprehensive disability needs assessment that ORR will be undertaking in collaboration with subject matter experts, and ORR's development of a disability plan.

Comment: One commenter was concerned that the proposal would impede whistleblowers and limit outside accountability.

Response: ORR does not believe that requiring a call to law enforcement be a last resort to address behavior issues impedes the ability of whistleblowers, and notes that this requirement under § 410.1304(b) is specific to behavior management. ORR wishes to emphasize that no portion of this regulation impacts the rights, protections, and vital work of whistleblowers in protecting children in ORR custody and for the general public interest. ORR notes that it is finalizing its proposal to require, under § 410.1303(g), reporting of all program-level events, significant incidents, and emergency incidents consistent with any applicable Federal, State, and local reporting laws because ORR believes such reporting can increase safety for children in ORR's care, and promote transparency and improve the care provided. Specifically related to child trafficking, ORR's current policies, as outlined in the ORR Policy Guide, require that care provider facilities report suspicions about the possibility of human trafficking or smuggling to OTIP within 24 hours, and that a child be referred to a child advocate for support if a historical disclosure is made related to labor or sex trafficking. Lastly, ORR is finalizing its proposal under § 410.2000 to establish a UC Office of the Ombuds; its goals in doing so are to provide an independent and impartial body that can receive reports and grievances regarding the care, placement, services, and release of unaccompanied children.

Comment: One commenter stressed that special consideration should be given to Indigenous children when calling law enforcement due to historical and ongoing trauma of Indigenous peoples in their countries of origin.

Response: ORR thanks the commenter for their feedback. ORR agrees that culturally sensitive and trauma-informed approaches should be exhausted first before resorting to a call to law enforcement for all unaccompanied children, including Indigenous children, and that individual needs assessments, outlined at § 410.1302(c)(2), are an important part of taking the historical and cultural backgrounds of children into account when developing goals and plans for the children while in ORR care.

Comment: A few commenters supporting the proposal had additional recommendations, including requiring that a child's contact with law enforcement trigger a referral for mental health services; requiring an evaluation of staff in all instances of calls to law enforcement due to the impact of unconscious bias and potential harm to children from unnecessary interactions with the police; requiring staff to apply other trauma-informed, evidence-based, age appropriate and strengths-based means to deescalate concerning behavior, and principles for effective de-escalation, such as requiring a mental health response for a mental health crisis. One commenter recommended that ORR clarify that law enforcement should only be called in emergency safety situations.

Response: ORR believes that the mental health needs of unaccompanied children should be supported, and for that reason is finalizing at § 410.1307(a)(1) that care provider facilities must have mental health professionals as part of their network of licensed healthcare providers to ensure access to such healthcare services, and at §§ 410.1302(c)(5) and (6) that individual and group counseling must be provided to unaccompanied children. ORR believes that calls to law enforcement should only be made as a last resort, such as emergencies or where the safety of unaccompanied children or staff are at issue. ORR is not requiring staff evaluations in all instances of calls to law enforcement out of concern that this could prevent staff from calling law enforcement when it is indeed appropriate (*i.e.,* in emergency safety situations when it is a last resort and other, less restrictive methods have been tried and failed).

Comment: One commenter recommended that ORR require documentation of the use of restraints and seclusion, including the type of restraint used, if applicable, and the justification to align with external standards. The commenter also recommended that ORR clarify that any use of restraints should be treated as an emergency incident, significant incident, or program-level event subject to documentation under proposed § 410.1303(f) in the NPRM. A few commenters recommended that ORR require documentation of any use of a restraint on a child, including the evidence the staff relied upon in determining that the use of a restraint or seclusion of a child was warranted. They recommended every instance in which a restraint is used on a child be reviewed and evaluated for compliance and staff qualification and training, noting that this can be used to determine whether any corrective action is warranted at the staff or facility-level.

Response: ORR is finalizing under § 410.1303(g) that all care provider facilities, regardless of setting, are required to report any emergency incident, significant incident, or program-level event to ORR, and in accordance with any applicable Federal, State, and local reporting laws. ORR notes that the definition of significant incident expressly includes the use of safety measures, such as restraints, and the definition of emergency incident means an urgent situation in which there is an immediate and severe threat to a child's safety and well-being that requires immediate action. Accordingly, all uses of restraints or seclusion must be appropriately documented and reported to ORR, consistent with § 410.1303(g). ORR believes these reporting requirements are sufficient to document the use of restraints and seclusion with enough detail to enable further incident review.

ORR emphasizes that, as finalized under § 410.1304(e)(1), mechanical restraints are permitted only in secure facilities (that are not RTCs), in emergency safety situations, and consistent with State licensure requirements. ORR notes that under § 410.1001 it is finalizing the definition of emergency safety situation to mean a situation in which a child presents a risk of imminent physical harm to themselves, or others, as demonstrated by overt acts or expressed threats. ORR is further clarifying in the definition of mechanical restraints at § 410.1001 by adding that, ''For purposes of the Unaccompanied Children Program, mechanical restraints are prohibited across all care provider types except in secure facilities, where they are permitted only as consistent with State licensure requirements.''

ORR reiterates that, as discussed in the preamble of this final rule addressing subpart D and as it proposed in the NPRM, it believes that mechanical restraints should only be used after de-escalation strategies and less restrictive approaches have been attempted and failed (88 FR 68942). ORR further emphasizes that it is finalizing, under § 410.1305(a), that

standard programs and restrictive placements (which include secure facilities) shall ensure that staff are appropriately trained on behavior management strategies, including de-escalation techniques. In addition, under § 410.1303(g), all uses of mechanical restraint as well as personal restraint and seclusion must be appropriately documented and reported to ORR. ORR will use these reports to closely examine each use by a secure facility of restraints or seclusion to ensure that it comports with these regulations as well as governing Federal constitutional and statutory requirements.

Comment: One commenter recommended that ORR adopt a requirement to frequently monitor a child during the use of restraints or seclusion, and that staff should use only the minimum amount of force for the minimum amount of time necessary to gain control of the child and that restraints should never be used in a manner that causes physical, emotional, or psychological pain, extreme discomfort, or injury. The commenter noted that this is in alignment with external standards.

Response: For standard programs and RTCs, ORR reiterates that it is finalizing under § 410.1304(c) that seclusion and restraint are prohibited, except for the circumstances under § 410.1304(d) which permit the use of personal restraint only in emergency safety situations. ORR is revising § 410.1304(c) to remove the phrase ''as a behavioral intervention'' because ORR believes seclusion is already distinct, by definition, from medical isolation. ORR reiterates believes that personal restraints should only be used after de-escalation strategies and less restrictive approaches have been attempted and have failed.

Related to secure facilities, ORR first notes that it is replacing ''except for RTCs'' with ''(that are not RTCs)'' for consistency with phrasing throughout the regulation text of part 410. Furthermore, ORR is finalizing at § 410.1304(e)(1) that personal restraint, mechanical restraint, and/or seclusion are permitted in emergency safety situations, and as consistent with State licensure requirements. ORR believes that adding ''and as consistent with State licensure requirements'' emphasizes how ORR requirements are intended to complement State requirements related to the use of restraints and seclusion in secure facilities that are not RTCs. Additionally, ORR is adding at § 410.1304(e)(1) that ''All instances of seclusion must be supervised and for the short time-limited purpose of ameliorating the underlying emergency risk that poses a serious and immediate danger to the safety of others.'' ORR also notes that it is revising the definition of seclusion at § 410.1001 to ''the involuntary confinement of a child alone in a room or area from which the child is instructed not to leave or is physically prevented from leaving'' by adding ''is instructed not to leave or.'' ORR believes that the use of restraints or seclusion should only be utilized in emergency safety situations, that staff should use only the minimum amount of force for the minimum amount of time necessary to gain control of the child, and that restraints and seclusion should never be used in a manner that causes physical, emotional, or psychological pain, extreme discomfort, or injury, but believes its policy otherwise as proposed is sufficient to protect children from improper use of restraints or seclusion. This policy is based on ORR's existing practices, and ORR prefers to keep the details of its policy in subregulatory guidance so ORR can make timely updates as best practices continue to evolve.

Comment: One commenter wrote that unaccompanied children with disabilities are at a higher risk of being subjected to restraints or seclusion due to their disability-related behavior. While the commenter opposed the use of seclusion in any care provider setting, they recommended, at minimum, that any use of personal restraints or seclusion of a child with a disability trigger an evaluation of the staff involved, including an evaluation for compliance with the child's ISP and an assessment whether reasonable modifications could have eliminated the need for the use of restraint or seclusion. Finally, the commenter recommended that ORR delineate specific factors that staff should consider when deciding whether it is appropriate to utilize restraint or seclusion, such as the nature, duration, and severity of the risk presented by the child's behavior and develop guidance to ensure the child's physical health and safety and guard against the use of restraint or seclusion where contraindicated based on the child's individualized needs.

Response: ORR agrees that a child's disability is an important factor to consider when determining whether restraint or seclusion is appropriate. As noted in the background discussion at III.B.4 and responses to previous comments, ORR is intending to work with experts to undertake a year-long comprehensive needs assessment to evaluate the adequacy of services, supports, and resources currently in place for unaccompanied children with disabilities in ORR's custody across its network, and to identify gaps in the current system, which will inform the development of a disability plan and future policymaking that best address how to effectively meet the needs of children in ORR's care and custody. These efforts will provide ORR with an opportunity to consider commenters' recommendations in greater depth.

Comment: One commenter supported ORR's provision limiting the use of personal restraints to emergency safety situations. A few commenters wrote that ORR should ensure personal restraints are used only when absolutely necessary in emergency safety situations when the child presents an imminent risk of physical harm to self or others. One commenter recommended that ORR clarify that emergency safety situations should be prevented wherever possible; that alternative interventions to de-escalate emergency safety situations be exhausted, including following a child's ISP; that decisions on whether a situation necessitates personal restraints be made by staff with appropriate training and child welfare expertise; that care providers only be permitted to use a restraint for as long as necessary to ensure the safety of the child or others and use of the restraint must immediately end upon the cessation of the safety threat, with a maximum duration of 15 minutes.

Response: ORR agrees that emergency safety situations should be prevented wherever possible, and that personal restraint should only be used after de-escalation strategies and less restrictive approaches, such as any detailed in a child's ISP, have been attempted and failed. ORR also agrees that personal restraint should only be used when absolutely necessary in emergency safety situations and for that reason, is finalizing at § 410.1304(d) that standard programs and RTCs may use personal restraint only in emergency safety situations. ORR further notes that under § 410.1001 it is finalizing the definition of emergency safety situation to mean a situation in which a child presents a risk of imminent physical harm to themselves, or others, as demonstrated by overt acts or expressed threats.

ORR notes that it included a training requirement for standard programs and restrictive placements to ensure that staff are appropriately trained on behavior management strategies, including de-escalation techniques, as a proposed requirement in the preamble discussion of § 410.1304 (88 FR 68942) and § 410.1305(a) (88 FR 68943), but the training requirement was omitted in

error in the regulation text of § 410.1305(a). As such, ORR is finalizing the requirement under § 410.1305(a) that ''Standard programs and restrictive placements shall ensure that staff are appropriately trained on its behavior management strategies, including de-escalation techniques, as established pursuant to § 410.1304.'' As previously discussed, ORR is not specifying further training topics in this rule so it can provide more timely, frequent, and iterative updates through its existing policies. However, ORR agrees that training on the use of restraints, including how to determine when a situation necessitates restraints, is a type of training that may be appropriately required of staff pursuant to § 410.1305. ORR appreciates the commenters' feedback relating to potential time limitations on personal restraint and decisions by staff on whether restraint is necessitated.

Comment: One commenter was concerned, related to § 410.1304(e)(2), that an unaccompanied child that is a danger to self or others during secure transport has that same level of risk regardless of the destination, and requested clarification.

Response: While placed at secure facilities (that are not RTCs), children will rarely have the occasion to be transported for circumstances other than for appearances in immigration court or asylum interviews. However, because there could be other circumstances in which transportation is needed, we have revised 410.1304(e)(2) to apply to transportation generally. ORR notes that § 410.1304(f) provides for the use of soft restraints during transport to and from secure facilities when the care provider facility believes a child poses a serious risk of physical harm to self or others or a serious risk of running away from ORR custody.

Comment: One commenter was concerned about the use of restraints while unaccompanied children appear in immigration court or at an asylum interview and recommended that ORR include a requirement for staff to demonstrate that no reasonable alternative is available before using restraints in court proceedings.

Response: ORR thanks the commenter for their feedback. ORR reiterates that secure facilities may have safety or runaway risk concerns for which they deem restraints necessary for certain unaccompanied children. Further, the conduct of an immigration court proceedings or asylum interviews are outside the scope of this rule. Therefore, ORR does not adopt the commenter's recommendation.

Comment: One commenter was concerned about the qualifications of staff determining whether to use restraints during transport and while at immigration court or asylum hearings, noting that there is a risk of harm from unnecessary use of restraints and trauma-informed approaches are available instead. They recommended that the decision whether to use restraints be made by a licensed psychologist or psychiatrist and include a confirmation that there are no other alternatives available. Finally, the commenter recommended that ORR require care provider facilities to notify ORR, the child, and the legal services provider when restraints are being considered to coordinate with children and their legal representatives if assistance is requested to reschedule hearings or interviews or for other accommodations; and documenting any use of restraints.

Response: ORR agrees that trauma-informed and less restrictive approaches should be attempted and failed before an unaccompanied child is restrained. ORR thanks the commenters for their feedback related to the qualifications of staff making determinations for the use of restraints and notifications related to the potential use or use of restraints. ORR is not requiring advanced notification related to the use of restraints because such decisions may be time-sensitive and in response to emergency safety situations or behaviors by the child that demonstrate a risk of harm. ORR notes that it is finalizing requirements requiring the reporting and documentation of any emergency incident, significant incident, or program level event, which include the documentation of the use of any restraints, and ORR has existing policies on the reporting of certain significant incidents to attorneys of record and legal service providers, among other individuals.

Comment: One commenter was concerned about the use of restraints and seclusion in secure facilities under § 410.1304(e), noting that the limitation to emergency safety situations is too vague and does not limit their use to exceptionally rare circumstances when there is no reasonable alternative to prevent escape or physical injury, as required by external standards. A few commenters opposed the provision because mechanical restraints and seclusion are not permitted in other placement types, due to concern over past alleged improper use of mechanical restraints and seclusion in secure facilities, because mechanical restraints and seclusion can cause harm even in emergency safety situations, and finally, because the commenter asserted that children in secure facilities have the greatest need for supports and services, mechanical restraints and seclusion are particularly inappropriate.

Response: ORR reiterates that it proposed in the NPRM to only allow the use of mechanical restraints and seclusion in emergency safety situations, and that it believes that they should only be used after de-escalation strategies and less restrictive approaches have been attempted and failed (88 FR 68942). ORR notes that under § 410.1001 it is finalizing the definition of emergency safety situation to mean a situation in which a child presents a risk of imminent physical harm to themselves, or others, as demonstrated by overt acts or expressed threats, and is finalizing the definition of mechanical restraint to add ''For purposes of the Unaccompanied Children Program, mechanical restraints are prohibited across all care provider types except in secure facilities, where they are permitted only as consistent with State licensure requirements.''

Final Rule Action: After consideration of public comments, ORR is revising § 410.1304(a) by replacing ''must,'' as used in the NPRM, to ''shall'' and ''care provider facilities shall'' instead of ''the behavior management strategies must.'' ORR is revising § 410.1304(a)(1) to replace ''family/sponsor'' with ''sponsor.'' In addition, ORR is revising § 410.1304(a)(2)(ii) to include ''religious observation and services'' as one of the activities that care providers are prohibited from denying to unaccompanied children and is otherwise finalizing this section as proposed. Finally, ORR is revising § 410.1304(e)(1) by adding ''and as consistent with State licensure requirements,'' and ''All instances of seclusion must be supervised and for the short time-limited purpose of ameliorating the underlying emergency risk that poses a serious and immediate danger to the safety of others;'' and by replacing ''except for RTCs'' with ''(that are not RTCs).'' Finally, ORR is revising § 410.1304(e)(2) to apply to transportation generally.

Section 410.1305 Staff, Training, and Case Manager Requirements

Having requirements for staff, training, and case managers is in the best interest of unaccompanied children and is supportive to their health and development while in ORR care. ORR proposed in the NPRM at § 410.1305 to establish certain requirements consistent with ORR's authority to oversee the infrastructure and personnel of facilities in which unaccompanied

children reside (88 FR 68942 through 68943).[254] Under § 410.1305(a), ORR proposed in the NPRM to require that standard programs, restrictive placements, and post-release service providers, must provide training to all staff, contractors, and volunteers; and that training ensures that staff, contractors, and volunteers understand their obligations under ORR regulations and policies and are responsive to the challenges faced by staff and unaccompanied children at the facility. ORR anticipated that examples of training topics under this paragraph would include the rights of unaccompanied children, including to educational services, creating bias-free environments, supporting children with disabilities, supporting the mental health needs of unaccompanied children, trauma, child development, prevention of sexual abuse, the identification of victims of human trafficking, and racial and cultural sensitivity. Standard programs and restrictive placements would also be required to ensure that staff are appropriately trained on its behavior management strategies, including de-escalation techniques, as established pursuant to proposed § 410.1304. All trainings would be required to be tailored to the unique needs, attributes, and gender of the unaccompanied children in care at the individual care provider facility. For example, staff who work with early childhood unaccompanied children should be provided with training in early childhood care best practices. Additionally, case managers should be trained on child welfare best practices before providing services to children.[255] Care provider facilities must document the completion of all trainings in personnel files. In addition to training, ORR would require all staff to complete background check requirements and vetting for their respective roles prior to service provision and care provider facilities would need to provide documentation to ORR of compliance.

Under § 410.1305(b), ORR proposed in the NPRM that standard programs and restrictive placements would be required to meet the staff-to-child ratios established by their respective States or other licensing entities, or ratios established by ORR if State licensure is unavailable. Under current practice, ORR generally requires staffing ratios of a minimum of 1 staff to 8 unaccompanied children during the day and 1 staff to 16 unaccompanied children at night while children are sleeping. If, however, State requirements require a stricter staff-to-child ratio, then under § 410.1305(b), ORR proposed in the NPRM to require the care provider to abide by that smaller ratio.

Standard programs and restrictive placements must provide case management services in their facilities. Effective case management systems and policy are important to ensuring care provider facilities are effective in attaining positive outcomes for unaccompanied children. Areas for attention include specifying case manager-to-unaccompanied-child ratios that take the occupancy level of the facility into account, ensuring that case management staff are site-based and provide their services in person, and ensuring that case management staffing levels are appropriate to meet ORR's standards for the length of care of unaccompanied children. ORR proposed in the NPRM to require under § 410.1305(c) that standard programs and restrictive placements have case managers based at the facility's site. To meet the unique needs of a given facility, ORR could then determine the appropriate ratio of case managers-per-unaccompanied-child through its cooperative agreements and contracts with care provider facilities, as appropriate. This will allow ORR to include changes in the staffing ratio relative to the occupancy of unaccompanied children at the facility and consider the policies related to unaccompanied children's length of stay.

Before proceeding to discuss comments on § 410.1305, ORR would like to discuss a key issue raised by commenters relating to § 410.1302 that pertain to § 410.1305 as well. Several commenters expressed concern that the proposed language ''or that meets other requirements specified by ORR'' at § 410.1302(a) was not sufficiently specific or clear and could lead to allowing programs to avoid licensure requirements even in a State where licensing is available. In response, ORR revised its requirement under § 410.1302(a) to make clear that if a standard program is in a State that does not license care provider facilities because they serve unaccompanied children, the standard program must still meet the State licensing requirements that would apply if the State allowed for licensure. Similarly, ORR is revising § 410.1305(b), to remove ''or ratios established by ORR if State licensure is unavailable'' and to apply to ''care provider facilities'' to replace ''standard programs and restrictive placements.'' Therefore, ORR is requiring at § 410.1305(b) that care provider facilities shall meet the staff-to-child ratios established by their respective States or other licensing entities.

Comment: One commenter recommended that ORR require standard programs that are congregate care facilities to have registered or licensed nurse and other licensed clinical and child welfare staff onsite.

Response: ORR thanks the commenter for their recommendation. ORR includes requirements for care provider facilities to have clinician and lead clinician positions within its cooperative agreements and believes this is sufficient to ensure clinical oversight at standard programs.

Comment: Several commenters recommended all staff and contractors interacting with children in ORR custody receive training in trauma-informed care approaches. A few commenters noted that such training improves awareness of trauma-related symptoms, promotes an emotionally safe environment, and provides interventions to mitigate the effects of trauma. Several commenters recommended that ORR mandate training on comprehensive, trauma-informed, culturally, and linguistically best practices for all staff and providers who have access to unaccompanied children.

Response: ORR notes that it included a proposed training requirement in the preamble discussion of § 410.1304 (88 FR 68942) and § 410.1305(a) (88 FR 68943) for standard programs and restrictive placements to ensure that staff are appropriately trained on its behavior management strategies, including de-escalation techniques; however, the training requirement was omitted in error in the regulation text of § 410.1305(a). As such, ORR is adding the requirement under § 410.1305(a) that ''Standard programs and restrictive placements shall ensure that staff are appropriately trained on its behavior management strategies, including de-escalation techniques, as established pursuant to § 410.1304.'' ORR further notes that the preamble to the NPRM describes examples of trainings that standard programs and restrictive placements may provide, including: the rights of unaccompanied children, including to educational services, creating bias-free environments, supporting children with disabilities, supporting the mental health needs of unaccompanied children, trauma, child development, prevention of sexual abuse, the identification of victims of human trafficking, and racial and cultural sensitivity (88 FR 68943). ORR notes that it is also revising § 410.1305(a) to remove the phrase ''at

the facility'' for clarity because it is a requirement for PRS providers, but PRS providers are not facility-based.

Comment: One commenter recommended that ORR require congregate care facilities to conduct criminal records checks and checks on any State child abuse and neglect registries for adults working in the facility. A few commenters expressed concern that proposed § 410.1305 does not include standards for minimum training or prohibitive background criteria.

Response: ORR believes that thorough background checks for all care provider facility staff and contractors are a critical element of the UC Program. For that reason, ORR is finalizing at § 410.1305(a) that standard programs and restrictive placements complete and document completion of background check requirements. Further, ORR's existing policies for care provider facilities require complete background investigations on staff, contractors, and volunteers, and a national criminal history fingerprint check if not already required by State law. ORR notes that 45 CFR part 411 sets forth the relevant background check requirements that staff at care provider facilities must undergo prior to being hired, which include criminal background checks, child protective services check, and in addition, staff must undergo periodic criminal background check updates every five years. These standards continue to apply. ORR will continue to use and update its existing guidance to provide more detailed requirements regarding background checks for care provider facilities. This includes having procedures in place to help care provider facilities navigate circumstances in which care provider facilities are awaiting the background check results of prospective personnel. ORR has encountered issues with some state public safety agencies that refuse to either conduct child safety background checks or conduct them in a timely manner. Because of this, ORR has memorialized into policy that care provider facility staff whose FBI background checks, sex offender registry checks, and reference checks are complete but whose Federal suitability investigation and Federally required State-based child abuse and neglect checks are not yet fully adjudicated must either be supervised by direct care staff whose checks are complete or satisfy the provisional hiring requirements that ORR has established in policy pursuant to 45 CFR part 411. Details on how ORR utilizes child welfare best practices and robust background check measures to onboard staff are further provided in ORR policy.

Therefore, ORR is removing the proposed text ''prior to service provision'' and finalizing, ''All staff, contractors, and volunteers must have completed required background checks and vetting for their respective roles required by ORR'' in order to provide for the efficient onboarding of staff even if there is a delay in the completion of background checks due to circumstances outside the control of the care provider facility or staff member.

Comment: A few commenters recommended that ORR require staff receive cultural competency training. One commenter specifically requested that such cultural competency training include indigenous cultural competency.

A few commenters recommended that ORR mandate training on unaccompanied children's rights and responsibilities. One commenter recommended that ORR require care providers to provide their staff with quarterly Know Your Rights trainings to ensure that unaccompanied children, and Indigenous unaccompanied children in particular, are protected from human trafficking and other crimes while in ORR care. A few commenters recommended ORR mandate training on language access services and linguistically best practices for all staff and providers who have access to unaccompanied children.

Many commenters recommended that ORR include staff training on gender identity and sexual orientation in order to support the needs of unaccompanied children in ORR care who identify as LGBTQI+.

Many commenters recommended that ORR incorporate staff training on the impact of racial discrimination on sponsor communities and the criminal justice system, in order to inform the use of such information in unification decisions.

Response: ORR thanks the commenters for their feedback and declines to accept commenter's recommendations to specify training topics. ORR believes these recommendations are consistent with the examples provided of training topics in the NPRM at 88 FR 68943, which included the rights of unaccompanied children, including to educational services, creating discrimination-free environments, supporting children with disabilities, supporting the mental health needs of unaccompanied children, trauma, child development, prevention of sexual abuse, the identification of victims of human trafficking, and racial and cultural sensitivity. ORR requires at § 410.1305(a) that trainings provided are responsive to the challenges faced by staff and unaccompanied children. ORR believes that keeping the topics of trainings in subregulatory guidance will allow ORR to make more appropriate, timely, and iterative updates in keeping with best practices and to allow continued responsiveness to the needs of unaccompanied children and care provider facilities.

Comment: One commenter expressed support for codifying an expectation of onsite case management but recommended that ORR strengthen the language in proposed § 410.1305(c) to explicitly require that all case management occur in-person and onsite. This commenter expressed concern that the current language may be interpreted to permit virtual case management services, which commenter believes is insufficient to meet the needs of each individual unaccompanied child.

Response: ORR believes its requirement at § 410.1305(c) that standard programs and restrictive placement must have case managers based on site at the facility is sufficient for ensuring that case management services occur onsite, and for that reason is updating this requirement at § 410.1305(c) to apply to all care provider facilities. ORR believes this requirement provides care provider facilities some flexibility to meet the needs for case management of unaccompanied children while balancing the potential operational infeasibility of providing onsite services for all case management. ORR encourages care provider facilities to provide onsite services to the fullest extent possible.

Final Rule Action: After consideration of public comments, ORR is revising § 410.1305(a) to remove the phrases ''at the facility'' and ''prior to service provision'' and to replace ''and must provide documentation to ORR of compliance'' with ''required by ORR.'' So that it states ''All staff, contractors, and volunteers must have completed required background checks and vetting for their respective roles required by ORR, '' instead of ''All staff, contractors, and volunteers must have completed all required background checks and vetting for their respective roles prior to service provision and care provider facilities must provide documentation to ORR of compliance,'' and to replace ''standard programs and restrictive placements'' with ''care provider facilities.'' ORR is adding the requirement under § 410.1305(a) that ''Standard programs and restrictive placements shall ensure that staff are appropriately trained on its

behavior management strategies, including de-escalation techniques, as established pursuant to § 410.1304.'' ORR is revising § 410.1305(b) to remove the phrase ''or ratios established by ORR if State licensure is not available'' and to apply to ''care provider facilities'' to replace ''standard programs and restrictive placements.'' ORR is revising § 410.1305(c) to apply to ''care provider facilities'' to replace ''standard programs and restrictive placements.'' ORR is otherwise finalizing § 410.1305 as proposed.

Section 410.1306 Language Access Services

ORR described under § 410.1306 proposed requirements to provide language accessibility for unaccompanied children (88 FR 68943 through 68945). ORR believes that it is important to establish specific, minimum language access requirements, which are critical to ensuring that unaccompanied children understand their rights, the release process, and the services they may receive while in ORR care. In the NPRM, ORR's proposed requirements under § 410.1306 applied to standard programs and restrictive placements. As discussed later in this section, ORR's finalized language access service requirements apply to all care provider facilities.

Under § 410.1306(a), ORR proposed in the NPRM that standard programs and restrictive placements would be required, to the greatest extent practicable, to consistently offer all unaccompanied children the option of interpretation and translation services in their native or preferred language, depending on their preference, and in a way they understand to the greatest extent practicable (88 FR 68943). ORR noted in the NPRM that under 45 CFR 85.51, standard programs and restrictive placements shall also ensure effective communication with unaccompanied children with disabilities (88 FR 68945). This includes furnishing appropriate auxiliary aids and services such as qualified sign language interpreters, Braille materials, audio recordings, note-takers, and written materials, as appropriate for the unaccompanied child. In the NPRM, ORR stated that under its existing policies, standard programs and restrictive placements are required to make every effort possible to provide interpretation and translation services (88 FR 68943). However, ORR noted in the NPRM its belief that it was important to propose the additional requirement that standard programs and restrictive placements consistently offer each unaccompanied child the option of effective interpretation and translation services to ensure meaningful and timely access to these services. ORR stated in the NPRM that if standard programs and restrictive placements are unable to obtain a qualified interpreter or translator in the unaccompanied children's native or preferred language, depending on their preference, after taking reasonable efforts, standard programs and restrictive placements would then be required to consult with qualified ORR staff (under current policy, the Federal Field Specialist and Project Officer) for guidance on how to provide meaningful access to their programs and activities to children with limited English proficiency (88 FR 68943). Under the proposals in the NPRM, standard programs and restrictive placements would be permitted to use professional telephonic interpreter services after they take reasonable efforts to obtain in-person, qualified interpreters (as defined). In the NPRM, ORR stated its belief that the proposals struck a good balance between the importance of interpretation and translation services and the reality of the vast array of language access needs of unaccompanied children. In the NPRM, ORR stated that standard programs and restrictive placements would also be required to translate all documents and materials shared with unaccompanied children in their native or preferred language, depending on their preference, and in a timely manner.

To ensure efficient and reliable access to necessary interpretation and translation services during placement, ORR stated in the NPRM that under § 410.1306(b) it would be required to make placement decisions informed by language access considerations (88 FR 68943). In the NPRM, ORR proposed that to the extent it is appropriate and practicable, giving due consideration to unaccompanied child's individualized needs, ORR would place unaccompanied children with similar language needs within the same standard program or restrictive placement. ORR stated its belief that this would further ensure the efficient use of resources while also considering the need for timely and appropriate placement.

ORR proposed in the NPRM at § 410.1306(c) to codify language access requirements during intake, orientation, and while informing unaccompanied children of their rights to confidentiality and limits of confidentiality of information while in ORR care (88 FR 68944). ORR stated in the NPRM that under current ORR practice, among other things, standard programs and heightened supervision facilities complete an initial intakes assessment of an unaccompanied child; provide a standardized orientation that is appropriate for the age, culture, language, and accessibility needs of the unaccompanied child; and complete a UC Assessment that covers biographic, family, legal/migration, medical, substance use, and mental health history and is subject to ongoing updates. ORR stated in the NPRM that under current practice, standard programs and restrictive placements provide unaccompanied children with a Disclosure Notice, which is an ORR document explaining the limits to the confidentiality of information unaccompanied children share while in ORR care and custody, as well as the types of information that standard programs and restrictive placements and ORR must share if disclosed by the unaccompanied children for the safety of the unaccompanied children or for the safety of others.

ORR proposed in the NPRM under § 410.1306(c)(1) to require that standard programs and restrictive placements both provide a written notice of the limits of confidentiality they share while in ORR care and custody, and to orally explain the contents of the written notice to the unaccompanied children, in their native preferred language, depending on their preference, and in a way they can effectively understand (88 FR 68944). Under the proposals in the NPRM, standard programs and restrictive placements would be required to do both prior to the completion of the UC Assessment, and prior to unaccompanied children starting counseling services as proposed at § 410.1302(c)(5) and (6).

ORR proposed in the NPRM under § 410.1306(c)(2), to require that standard programs and restrictive placements would be required to ensure assessments and initial medical exams are conducted in the unaccompanied children's native or preferred language, depending on their preference, and in a way they effectively understand (88 FR 68944). ORR proposed in the NPRM under § 410.1306(c)(3) to require that standard programs and heightened supervision facilities provide a standardized and comprehensive orientation to all unaccompanied children within 48 hours of admission in the unaccompanied children's native or preferred language and in a way they effectively understand regardless of spoken language, reading comprehension level, or disability. Further, under § 410.1306(c)(4), ORR proposed in the NPRM for all step-ups to and step-downs from restrictive

placements, standard programs and restrictive placements would be required to specifically explain to the unaccompanied children why they were placed in a restrictive placement or, if stepped down, why their placement was changed, while doing so in the unaccompanied children's native or preferred language, and in a way they effectively understand.

Under § 410.1306(c)(5), ORR proposed in the NPRM that if the unaccompanied children are not literate, or if documents provided during intakes and/or orientation are not in a language that they can read and effectively understand, standard programs and restrictive placements would be required to have a qualified interpreter orally translate or sign language translate and explain all the documents in the unaccompanied children's native or preferred language, depending on their preference, and confirm with the unaccompanied children that they fully comprehend all materials (88 FR 68944). Additionally, at § 410.1306(c)(6) and (7), ORR proposed in the NPRM that standard programs and restrictive placements would be required to provide unaccompanied children information regarding grievance reporting and ORR's sexual abuse and harassment policies and procedures in the unaccompanied children's native or preferred language, based on their preference, and in a way they effectively understand. Under § 410.1306(c)(8), ORR proposed in the NPRM that standard programs and restrictive placements would be required to notify the unaccompanied children that standard programs and restrictive placements will accommodate the unaccompanied children's language needs while they remain in ORR care.

Under § 410.1306(c)(9), with respect to all requirements described in § 410.1306(c), ORR proposed in the NPRM to require standard programs and restrictive placements to document in each unaccompanied children's case file that they acknowledged that they effectively understand what was provided to them (88 FR 68944).

Under § 410.1306(d), ORR described proposed requirements regarding language access and education. In order to provide meaningful education services to unaccompanied children, ORR believes that it is important to ensure that educational services are presented to unaccompanied children in a language that is accessible to them. In the NPRM, ORR proposed at section 410.1306(d)(1) to require standard programs and heightened supervision facilities to provide educational instruction and relevant materials in a format and language accessible to all unaccompanied children, regardless of their native or preferred language, including by providing in-person interpretation, professional telephonic interpretation, and written translations, all by qualified interpreters or translators. ORR proposed in the NPRM under § 410.1306(d)(2) to require standard programs and heightened supervision facilities to provide recreational reading materials in formats and languages accessible to all unaccompanied children, which would facilitate their out-of-class enrichment and engagement. ORR proposed in the NPRM under § 410.1306(d)(3) to require standard programs and heightened supervision facilities to translate all ORR-required documents provided to unaccompanied children for use in educational lessons, in formats and languages accessible to all unaccompanied children.

ORR believes that it is important to ensure that the unaccompanied children's religious and cultural expressions, practices, and identities are accommodated to the extent practicable. Accordingly, under § 410.1306(e), when an unaccompanied child makes a reasonable request for religious and/or cultural information or other religious/cultural items, such as books or clothing, ORR proposed in the NPRM the standard program or restrictive placement would be required to provide the applicable items, in the unaccompanied child's native or preferred language, depending on the unaccompanied child's preference. At the same time, with respect to the obligations of care provider facilities, ORR noted that it operates the UC Program in compliance with the requirements of the Religious Freedom Restoration Act and other applicable Federal conscience protections, as well as all other applicable Federal civil rights laws and applicable HHS regulations (88 FR 68944).[256]

ORR proposed in the NPRM in § 410.1306(f) that standard programs and restrictive placements would be required to utilize any necessary professional interpretation or translation services needed to ensure meaningful access by an unaccompanied child's parent(s), guardian(s), and/or potential sponsor(s). Under the proposals in the NPRM, standard programs and restrictive placements would also be required to translate all documents and materials shared with the parent(s), guardian(s), and/or potential sponsors in their native or preferred language, depending on their preference. ORR noted in the NPRM that under 45 CFR 85.51, standard programs and restrictive placements shall also ensure effective communication with parent(s), guardian(s), and/or potential sponsor(s) with disabilities (88 FR 68944).

In the NPRM, ORR acknowledged the importance of making appropriate interpretation and translation services available to all unaccompanied children while receiving healthcare services so that they understand the services that are being offered and/or provided (88 FR 68945). Under § 410.1306(g), while unaccompanied children are receiving healthcare services, ORR proposed in the NPRM to require that standard programs and restrictive placements ensure that unaccompanied children are able to communicate with physicians, clinicians, and other healthcare staff in their native or preferred language, depending on their preference, and in a way they effectively understand, prioritizing services from an in-person, qualified interpreter before using professional telephonic interpretation services.

In the NPRM, § 410.1306(h) proposed language access requirements for standard programs and restrictive placements while unaccompanied children receive legal services. To facilitate unaccompanied children receiving effective legal services, ORR stated its belief that it is essential that unaccompanied children understand the legal services offered to them and the process for participation in removal proceedings post-release, and accordingly, unaccompanied children should be provided with meaningful access to language services as relates to legal services (88 FR 68945). ORR proposed in the NPRM to require that standard programs and restrictive placements make qualified interpretation and translation services available upon request to unaccompanied children, child advocates, and legal service providers while unaccompanied children are being provided with legal services. Additionally, ORR proposed in the NPRM in § 410.1306(i) that interpreters and translators would be required to keep information about the unaccompanied children's cases and/or services confidential from non-ORR grantees, contractors, and Federal staff.

Comment: A number of commenters supported ORR's proposals for language access services, stating the proposals ensure unaccompanied children can effectively communicate with their caregivers, legal representatives, and other service providers. One commenter specifically supported the requirement that care provider facilities offer all unaccompanied children the option of interpretation and translation services

in their native or preferred language, depending on their preference, and in a way they understand to the greatest extent practicable. Another commenter supported consistently offering all unaccompanied children the option of interpretation and translation services; language access considerations informing placement decisions; and providing educational instruction, relevant materials, appropriate recreational reading materials, and documents that are part of the educational lessons in a format and language accessible to all children. This commenter stated that language access is critical to ensure unaccompanied children can fully participate in available services and effectively communicate with their caregivers about their needs and reduce the isolation that comes with being unable to communicate. Another commenter supported providing language access services when an unaccompanied child received legal services, stating legal service providers and child advocates cannot render effective services without quality interpretation and translation, and the commenter also supported providing interpretation and translation services for children who speak indigenous dialects, which the commenter stated has been a problem.

Response: ORR thanks the commenters for their support. As described in the NPRM, ORR's proposed requirements under § 410.1306 applied to standard programs and restrictive placements. Upon further review of this section and other finalized requirements, ORR is revising § 410.1306 such that the language access service requirements apply to all care provider facilities.

Comment: A few commenters recommended ORR clarify how care provider facilities will identify an unaccompanied child's native or preferred language. One commenter recommended that ORR specify the methods and tools care provider facilities should use to comprehensively assess an unaccompanied child's language proficiency, which the commenter stated ensures an accurate understanding of the child's language needs. Another commenter expressed concern that unaccompanied children may feel intimidated or be unaware of their language access rights and recommended care provider facility staff proactively approach the children at the earliest point of contact at the facility to correctly identify the children's ''primary'' or preferred language and evaluate the children's language throughout the duration of their care. A separate commenter recommended that ORR take specific steps to assess an unaccompanied child's language needs in a culturally competent and child sensitive manner.

Response: ORR does not intend § 410.1306 to describe all requirements related to language access services, including procedures care provider facilities should implement. Where § 410.1306 contains less detail, ORR will consider issuing policy guidance, if needed, to provide specific guidance to address the commenters' recommendations.

Comment: One commenter expressed concern about § 410.1306(a)(1) and treating interpretation and translation services as an option offered to unaccompanied children without more guidance may not be enough to ensure that these services are utilized by children. The commenter recommended that care provider facilities specifically offer each child interpreter and translation services to alleviate the burden on the child to request those services.

Response: As revised, section 410.1306(a)(1) states that, to the greatest extent practicable, care provider facilities shall consistently offer interpretation and translation services to unaccompanied children. ORR believes that this requirement addresses the commenter's concern that care provider facilities specifically offer each child these services. ORR clarifies that this requirement places the burden on the care provider facilities to ensure children are aware of their ability to access and receive these services so that the burden is not on children to request these services. Further, ORR believes the language ''to the greatest extent possible'' and ''consistently offer'' are appropriate safeguards to guarantee that care provider facilities ensure unaccompanied children are aware of their ability to access and receive interpretation and translation services.

Comment: A commenter recommended ORR focus on ''language justice'' by prioritizing the provision of services in the child's preferred language as much as possible, rather than using translators and interpreters, to ensure children can effectively and confidently access services in their preferred language. This commenter also stated that language justice is critical with highly sensitive and personal services, such as health care, where a child may feel uncomfortable disclosing information to a third party or important details may get lost in translation. Lastly, the commenter recommended that when providing services in the child's preferred language is not possible, in-person interpreter services should be used with an aim of minimizing their necessity.

Response: ORR understands ''language justice,'' as used by the commenter, to mean ''the right everyone has to communicate, to understand, and to be understood in [their] language(s)'' and ''entails a commitment to facilitating equitable communication across languages in spaces where no language will dominate over any other.'' [257] ORR acknowledges the importance of ensuring unaccompanied children can communicate in the language they feel comfortable speaking and/or reading and feel respected in their language choice. However, in this final rule, ORR declines to codify the commenter's recommendation to prioritize the provision of services in the child's preferred language as much as possible, rather than using qualified translators and interpreters, because this standard is not required by any applicable laws, regulations, or guidance. Instead, ORR provides, and will continue to provide, meaningful access to its programs and services to LEP individuals through language access services as required by applicable laws, regulations, and guidance from the Department, and as set forth in Executive Order 13166, *Improving Access to Services for Persons with Limited English Proficiency.* Accordingly, ORR is finalizing, under § 410.1306(a)(1), that care provider facilities must, to the greatest extent practicable, consistently offer unaccompanied children the option of interpretation and translation services in their native or preferred language, depending on the unaccompanied children's preference, and in a way they effectively understand.

Lastly, ORR notes that it is finalizing language access requirements related to education services at § 410.1306(e), healthcare services at § 410.1306(g), and legal services at § 410.1306(h), so that unaccompanied children understand the services that are being offered and/or provided. ORR's policies prohibit staff, contractors, and volunteers from engaging in or permitting discriminatory treatment or harassment of anyone on the basis of their language, which ensures unaccompanied children feel respected in their choice of language.[258] Finally, ORR will monitor implementation of the regulations and will consider additional revisions if needed in future policymaking to ensure all unaccompanied children have meaningful access to the program regardless of the child's language, are provided the option of interpretation and translation services in their native or preferred language to the greatest

extent practicable, and are respected in their language choice.

Comment: One commenter recommended clarifying the phrase ''in a way they effectively understand'' used throughout § 410.1306 by adding to the phrase ''given the child's level of literacy, cultural background, age, and developmental stage'' to ensure better understanding.

Response: ORR clarifies that ''in a way they effectively understand'' includes consideration of the child's level of literacy, cultural background, age, and developmental stage, as recommended by the commenter but believes it is unnecessary to revise § 410.1306 to state so explicitly. ORR will monitor implementation of the regulation to assess whether any additional clarification is needed in future policymaking.

Comment: One commenter recommended ORR authorize the engagement of qualified and vetted interpreters, regardless of whether they are located within or outside the United States, and potentially require interpreters be affiliated with a licensed business within the United States.

Response: ORR declines to codify this level of detail at § 410.1306 as it did not intend for this regulation to govern or describe all requirements for language access services. ORR will consider whether any additional clarification is needed in future policymaking.

Comment: A few commenters had recommendations for ORR to improve unaccompanied children's access to language access services when the children's native or preferred language is less commonly spoken. One commenter recommended ORR work with the Guatemalan government to ensure that certified individuals conduct interpretation and translation of Mayan, Xinca, and Garilima languages. Another commenter recommended that for less commonly spoken languages, interpretation services should allow staff to communicate with the interpreter in Spanish and not just English because there may be a limited number of available interpreters due to the rarity of some dialects. This commenter also recommended that interpretation services for indigenous individuals should encompass their native language and not just English and Spanish.

Response: ORR appreciates the recommendations for how to best implement the rule when unaccompanied children's native or preferred language is less commonly spoken. At § 410.1306(a), ORR is finalizing the requirement that interpretation and translation services be offered in the child's native or preferred language, depending on the child's preference, which could include the Mayan, Xinca, and Garilima languages as mentioned by the commenter.

Additionally, ORR notes that currently staff could communicate with qualified interpreters in Spanish and not just English. However, ORR declines to codify this recommendation in § 410.1306 because it did not intend for the final regulation to contain this level of detail, and where the regulation contains less detail, ORR will consider the recommendation during future policymaking.

Comment: One commenter recommended several revisions and additions to § 410.1306 to ensure each unaccompanied child and sponsor can communicate effectively and respectfully with ORR staff and providers, regardless of their language or dialect, and receive language access services while in ORR custody. Specifically, this commenter recommended definitions for the following terms: language access services, interpretation services, translation services, multilingual materials, and cultural competency training. The commenter also recommended ORR provide language access services in a timely, confidential, and culturally appropriate manner. Additionally, the commenter recommended that ORR provide language access services in accordance with applicable laws and regulations, such as Title VI of the Civil Rights Act of 1964 and Executive Order 13166, and follow the standards and guidelines issued by HHS and DOJ. Lastly, this commenter recommended each unaccompanied child and sponsor receive services and care that are respectful and responsive to their cultural and linguistic diversity, staff and providers receive cultural competency training in accordance standards and guidelines issued by HHS and DOJ, and ORR hire staff and providers who are competent and sensitive to the cultural and linguistic diversity of unaccompanied children and sponsors.

Response: As finalized, ORR is requiring care provider facilities to adhere to many of these recommendations, as reflected in this final rule. ORR did not propose to codify all terms used in the NPRM, including those that have generally accepted definitions like interpretation and translation services. ORR believes the meaning of the identified terms is generally accepted and can be further clarified, if needed, through future policymaking. Additionally, ORR notes that it is finalizing confidentiality requirements for interpreters and translators under § 410.1306(i), and standards for ''qualified interpreter'' and ''qualified translator'' at § 410.1001.

ORR provides, and will continue to provide, meaningful access to its programs and services to LEP individuals through language access services in accordance with applicable laws, regulations, and guidance from the Department, and as set forth in Executive Order 13166, *Improving Access to Services for Persons with Limited English Proficiency.* ORR did not propose to add language in this rule stating it adheres to existing sources of authority. Further, ORR notes that under its current policies it requires care provider facilities to respect and support the cultural identity of unaccompanied children when providing services. ORR also requires that care provider facility staff, contractors, and volunteers receive cultural competency and sensitivity training.[259] ORR will continue to monitor its requirements for language access services as they are implemented and will consider whether additional clarification is needed through future policymaking.

Comment: One commenter recommended virtual interpretation, noting that other care provider organizations prefer virtual over in-person.

Response: ORR notes, first, that although the NPRM § 410.1306 used the term ''professional telephonic'' interpretation, the definition of ''qualified interpreter'' at § 410.1001 refers to ''remote'' interpretation. For the sake of consistency and accuracy, ORR is revising the use of ''professional telephonic'' to ''qualified remote interpretation'' throughout § 410.1306. Regarding the use of in-person versus remote interpretation, ORR is finalizing as proposed in the NPRM at § 410.1306(a)(2), (d)(1) and (3), and (g) that care provider facilities utilize in-person interpretation before using qualified remote interpretation to ensure unaccompanied children effectively understand what is being communicated to them. By using in-person interpretation, qualified interpreters can read non-verbal cues (*e.g.,* body language and facial expressions), they can build trusting relationships with the unaccompanied children and sponsors, and they can securely discuss sensitive information (*e.g.,* health information and legal services). In-person qualified interpreters are better able to accomplish these important aspects of

interpretation services than interpreters using visual forms of remote communication. Further, ORR clarifies that care provider facilities may utilize qualified remote, or virtual, interpreters if they undertake reasonable efforts to secure qualified in-person interpreters and are unable to do so, provided that the qualified remote interpreters meet the requirements set forth in ORR's policies.[260]

Comment: One commenter opposed the proposal at § 410.1306(a)(3) that all posted materials must be in every unaccompanied child's preferred language, stating this poses challenges to care provider facilities that serve children whose native or preferred languages span four to six different languages. Instead, the commenter recommended that all posted materials be in the majority of languages with a provision for additional language support as needed.

Response: ORR will monitor implementation of the regulation and will take into consideration the concerns raised during future policymaking if needed.

Comment: One commenter recommended ORR make grammatical revisions to the regulation text at § 410.1306(c)(1) to clarify that the limits of confidentiality are related to the information they share while in ORR care and custody.

Response: ORR appreciates the commenter's concern, but believes the current regulatory text clearly states care provider facilities must provide a written notice of the limits of confidentiality they share while in ORR care and custody to the unaccompanied children and no further revision is necessary.

Comment: One commenter recommended § 410.1306(c)(6) state that other grievance reporting policies and procedures must be provided in a manner accessible to unaccompanied children with disabilities. Additionally, this commenter recommended § 410.1306(c)(6) require care provider facilities to adopt grievance reporting procedures consistent with 45 CFR 84.7.

Response: ORR agrees that grievance reporting policies and procedures must be provided in a manner accessible to unaccompanied children with disabilities, and therefore is adding that to § 410.1306(c)(6) as finalized. Additionally, while ORR acknowledges that care provider facilities must adopt grievance reporting procedures consistent with 45 CFR 84.7, ORR is not explicitly adding such a requirement that otherwise exists to this final rule.

Comment: One commenter recommended ORR require at § 410.1306(c)(7) that care provider facilities educate unaccompanied children on ORR's sexual abuse and sexual harassment policies in an age-appropriate manner.

Response: ORR is not incorporating this recommendation at § 410.1306(c)(7) because the existing regulations governing ORR at § 411.33 already provide that unaccompanied children be notified and informed of ORR's sexual abuse and sexual harassment policies in an age and culturally appropriate fashion and in accordance with § 411.15. Additionally, ORR is finalizing at § 410.1306(c)(7) that unaccompanied children be educated in a way they effectively understand, which includes in an age-appropriate manner.

Comment: One commenter recommended ORR define or provide examples of what would constitute an unreasonable request for religious accommodations at § 410.1306(e), stating the standard, as proposed, subjects programs to multiple interpretations of what actions are acceptable.

Response: ORR notes that § 410.1306(e) pertains specifically to the language in which requested religious and/or cultural information or items are provided to an unaccompanied child. ORR clarifies that a request for religious and/or cultural information or items in the unaccompanied child's native or preferred language, depending on the child's preference, may be unreasonable, for example, if the request would require the care provider facility to obtain a voluminous text not published in the preferred language, or items that could not be imported into the United States without great expense. ORR facilitates the free exercise of religion by unaccompanied children in its Federal custody and, in accordance with § 410.1302(c)(9), ORR provides access to religious services whenever possible. As such, ORR is revising § 410.1306(e) to remove ''accommodation'' to avoid confusion with the distinct standard that applies under Religious Freedom Restoration Act (RFRA). ORR is making clarifying edits to reflect that § 410.1306(e) concerns ''Religious and cultural observation and services.''

Finally, ORR notes that it operates and will continue to operate the UC Program in compliance with the requirements of the RFRA, Title VII of the Civil Rights Act of 1964, and all applicable Federal conscience protections, as well as all applicable Federal civil rights laws and HHS regulations.

Comment: One commenter stated that some unaccompanied children have waited three weeks or more to have an initial conversation with their parents or other family members because the care provider facilities were unable to obtain interpretation services in the relevant language to approve contact. This commenter also expressed concern that there are delays in unification due to delays in translating birth certificates or other identity documents. Additionally, the commenter stated that these delays unnecessarily detain unaccompanied children for longer lengths of stay and impact the children's mental health and well-being. To address delays in interpretation and translation services, the commenter recommended revising § 410.1306(f) to require care provider facilities make all efforts to expeditiously obtain interpretation and translation services needed to approve contact between children, their family, and potential sponsors, and not delay contact approval due to the children's language. The commenter also recommended that care provider facilities must secure timely translation services needed for documents required to complete the unification process. Lastly, the commenter recommended care provider facilities immediately notify ORR if they need translation and interpretation services to facilitate family contact or unification, and ORR would expeditiously provide such assistance.

Response: At § 410.1306(a)(1), ORR is finalizing the requirement that care provider facilities must make all efforts to consistently offer interpretation and translation services to unaccompanied children. ORR is also finalizing at § 410.1306(a)(1) that if after taking reasonable efforts, care provider facilities are unable to obtain a qualified interpreter or translator for the unaccompanied children's native or preferred language, depending on the children's preference, care provider facilities shall consult with qualified ORR staff for guidance on how to ensure meaningful access to their programs and activities for the children, including those with limited English proficiency. ORR notes that if the care provider facility is unable to secure qualified in-person interpretation, the facilities may use qualified remote interpreter services. ORR believes these requirements will improve unaccompanied children's access to language access services and alleviate the commenter's concerns. Lastly, ORR will consider the commenter's recommendations during future policymaking if needed to improve

unaccompanied children's access to language access services.

Comment: ORR received a few comments supporting privacy and confidentiality requirements for interpreters at § 410.1306(i) but seeking further clarification and recommending additional requirements to protect unaccompanied children receiving translation and interpretation services. A few commenters recommended that ORR clarify whether ORR requires interpreters to keep information confidential from ORR personnel and stated the current language is not clear. Another commenter recommended that ORR clarify the list of entities to whom language access services providers are prohibited from disclosing information about children's cases and/or services.

A few commenters recommended that interpreters involved in communications between unaccompanied children and legal representatives, or child advocates, must maintain confidentiality of such communications. One of these commenters recommended additional confidentiality protections for unaccompanied children receiving legal services, stating that when an unaccompanied child receives legal services, including consultations, meetings, or other communications between the child and the child's attorney, accredited representative, or legal service provider, interpreters must keep all information confidential. Additionally, this commenter recommended that the unaccompanied child's case file should not include interpretation provided during legal services and that the interpreter or translator should not disclose any information interpreted or translated during confidential communications between the child and the child's legal representative to any third party (including ORR staff or subcontracted staff).

Finally, one commenter recommended additional safeguards for data that should apply to all language access service providers.

Response: ORR agrees that it is important to protect the privacy and confidentiality of interpretation and translation services unaccompanied children receive.

ORR clarifies that § 410.1306(i) of this final rule requires interpreters and translators to keep all information about the unaccompanied children's cases and/or services, confidential from non-ORR grantees, contractors, and Federal staff. ORR clarifies that interpreters and translators would be permitted to share information about the unaccompanied child's case and/or services to care provider facilities, care provider facility staff, ORR staff, ORR contractors, and others providing services under the direction of ORR.

ORR also appreciates the recommendations to require additional safeguards for data and additional confidentiality requirements for communications made between unaccompanied children and their child advocate and/or legal service providers. ORR notes that in other sections of this final rule, it is finalizing confidentiality requirements that would apply to communications made to child advocates and legal services providers as well as data safeguard protections for the unaccompanied children's case files. ORR clarifies that these confidentiality requirements, discussed further below, will apply to information that interpreters and translators have concerning unaccompanied children's cases and/or services, and § 410.1306(i) of this final rule should be read in congruence with these other confidentiality requirements.

Under the definitions of qualified interpreters and qualified translators at § 410.1001, ORR is finalizing the requirement that qualified interpreters and translators adhere to generally accepted ethics principles for interpreters and translators. At § 410.1303(h), ORR is finalizing data safeguard and confidentiality protections for the unaccompanied child's case file, which includes the requirement that care provider facilities preserve the confidentiality of the child's case and the facilities must protect the case file from unauthorized use or disclosure. Further, under § 410.1309(a)(2)(v) and (vi), ORR is finalizing requirements that unaccompanied children receive a confidential legal consultation with a qualified attorney (or paralegal working under the direction of an attorney, or DOJ Accredited Representative), that is provided in an enclosed area that allows for confidentiality. ORR also notes that its current policies contain confidentiality requirements for care provider facilities that would be applicable to unaccompanied children receiving interpretation and translation services.[261] ORR believes that the data safeguard and confidentiality requirements being finalized in this rule, and the additional requirements set forth in ORR's current policies, are sufficient to protect the confidentiality of the unaccompanied child's information. However, based on the concerns raised by the commenters, ORR is revising § 410.1306(i) to clarify the requirements for interpreters and translators with respect to confidentiality of information. ORR is amending § 410.1306(i) as follows: ''*Interpreter's and translator's responsibility with respect to confidentiality of information.* Qualified interpreters and translators shall keep confidential all information they receive about the unaccompanied children's cases and/or services while assisting ORR, its grantees, and its contractors, with the provision of case management or other services. Qualified interpreters and translators shall not disclose case file information to other interested parties or to individuals or entities that are not employed by ORR or its grantees and contractors or that are not providing services under the direction of ORR. Qualified interpreters and translators shall not disclose any communication that is privileged by law or protected as confidential under this part unless authorized to do so by the parties to the communication or pursuant to court order.''

Final Rule Action: After consideration of public comments, ORR is finalizing this section with the following modifications. ORR is revising § 410.1306 to apply to all care provider facilities. ORR is revising § 410.1306 to align with the definition of qualified interpreter at § 410.1001 by replacing ''professional telephonic'' with ''qualified remote'' at § 410.1306(a)(2), (d)(1), (d)(3), and (g). ORR is also making clarifying edits to § 410.1306(e) to state ''*Religious and cultural observation and services*'' instead of ''*Religious and cultural accommodations.*'' Additionally, ORR is revising § 410.1306(c)(6) to add the following sentence at the end: ''Care provider facilities shall also provide grievance reporting policies and procedures in a manner accessible to unaccompanied children with disabilities.'' Finally, ORR is revising § 410.1306(i) by making clarifying edits, such that the provision now states: ''*Interpreter's and translator's responsibility with respect to confidentiality of information.* Qualified interpreters and translators shall keep confidential all information they receive about the unaccompanied children's cases and/or services while assisting ORR, its grantees, and its contractors, with the provision of case management or other services. Qualified interpreters and translators shall not disclose case file information to other interested parties or to individuals or entities that are not employed by ORR or its grantees and contractors or that are not providing services under the direction of ORR. Qualified interpreters and translators shall not disclose any communication

that is privileged by law or protected as confidential under this part unless authorized to do so by the parties to the communication or pursuant to court order.''

Section 410.1307 Healthcare Services

The provision of healthcare to unaccompanied children is foundational to their health and well-being and to supporting their childhood development. Therefore, ORR proposed in the NPRM at § 410.1307(a) to codify that ORR shall ensure the provision of appropriate routine medical and dental care; access to medical services requiring heightened ORR involvement, consistent with § 410.1307(c); family planning services; and emergency health services (88 FR 68945 through 68946). ORR notes that it stated in error in the NPRM preamble that ORR shall ensure this access only ''in standard programs and restrictive placements'' (88 FR 68945), and clarifies that § 410.1307(a), as reflected in the regulation text, applies to all unaccompanied children in all care provider facilities. This paragraph would codify corresponding requirements from Exhibit 1 of the FSA. ORR notes that § 410.1307(b), as reflected in the regulation text, applies to standard programs and restrictive placements; corresponding requirements relating to emergency and influx facilities are discussed, infra, at subpart I. Further, under § 410.1307(b), ORR proposed in the NPRM that standard programs and restrictive placements must establish a network of licensed healthcare providers, including specialists, emergency care services, mental health practitioners, and dental providers that will accept ORR's fee-for-service billing system under proposed § 410.1307(b)(1). To assess the unique healthcare needs of each unaccompanied child, consistent with existing policy and practice, ORR included a requirement that unaccompanied children in standard programs and restrictive placements receive a complete medical examination (including screening for infectious disease) within two business days of admission unless an unaccompanied child was recently examined at another facility and if an unaccompanied child is still in ORR custody 60 to 90 days after admission, an initial dental exam, or sooner if directed by State licensing requirements under § 410.1307(b)(2).

In order to prevent the spread of diseases and avoid preventable illness among unaccompanied children, ORR also proposed to require in standard programs and restrictive placements that children receive appropriate immunizations as recommended by the Advisory Committee on Immunization Practices' Child and Adolescent Immunization Schedule and approved by HHS's Centers for Disease Control and Prevention under proposed § 410.1307(b)(3). To aid in the early detection of potential health conditions and ensure unaccompanied children's health conditions are appropriately managed, under proposed § 410.1307(b)(4) ORR would require an annual physical examination, including hearing and vision screening, and follow-up care for acute and chronic conditions. ORR noted in the NPRM that it facilitates an array of health services, such as medications, surgeries, or other follow-up care, that have been ordered or prescribed by a healthcare provider (88 FR 68945). ORR would require the administration of prescribed medication and special diets under § 410.1307(b)(5) and appropriate mental health interventions when necessary, under § 410.1307(b)(6). ORR noted that it proposed in the NPRM to require routine individual and group counseling session at § 410.1302(c)(5) and (6).

There are a number of policies and procedures related to medical care and medications that ORR proposed in the NPRM to require in order to promote health and safety at their facilities. ORR proposed in the NPRM under § 410.1307(b)(7), that standard programs and restrictive placements must have policies and procedures for identifying, reporting, and controlling communicable diseases that are consistent with applicable State, local, and Federal laws and regulations. ORR proposed in the NPRM under § 410.1307(b)(8), that standard programs and restrictive placements must have policies and procedures that enable unaccompanied children, including those with language and literacy barriers, to convey written and oral requests for emergency and non-emergency healthcare services. Finally, under § 410.1307(b)(9), ORR proposed in the NPRM to require standard programs and restrictive placements have policies and procedures based on State or local laws and regulations to ensure the safe, discreet, and confidential provision of prescription and nonprescription medications to unaccompanied children, secure storage of medications, and controlled administration and disposal of all drugs. A licensed healthcare provider must write or orally order all nonprescription medications and oral orders must be documented in the unaccompanied child's file.

At times, the use of medical isolation or quarantine for unaccompanied children may be required to prevent the spread of an infectious disease due to a potential exposure. ORR proposed in the NPRM under § 410.1307(b)(10) to allow unaccompanied children to be placed in medical isolation and excluded from contact with general population when medically necessary to prevent the spread of an infectious disease due to a potential exposure, protect other unaccompanied children and care provider facility staff for a medical purpose or as required under State, local, or other licensing rules, as long as the medically required isolation is limited to only the extent necessary to ensure the health and welfare of the unaccompanied child, other unaccompanied children at a care provider facility and care provider facility staff, or the public at large. To ensure that unaccompanied children have access to necessary services during medical isolation, ORR proposed in the NPRM that standard programs and restrictive placements must provide all mandated services under this subpart to the greatest extent practicable under the circumstances of the medical isolation. A medically isolated unaccompanied child still must be supervised under State, local, or other licensing ratios, and, if multiple unaccompanied children are in medical isolation, they should be placed in units or housing together (as practicable, given the nature or type of medical issue giving rise to the requirement for isolation in the first instance).

In § 410.1307(c), ORR proposed in the NPRM requirements ensuring access to medical care for unaccompanied children. At § 410.1307(c)(1), consistent with the requirements of § 410.1103, ORR proposed in the NPRM that to the greatest extent possible, an unaccompanied child whom ORR determines requires medical care or who reasonably requests such medical care will be placed in a care provider facility that has available and appropriate bed space, is able to care for such an unaccompanied child, and is in a location where the relevant medical services are accessible. ORR noted that the proposal aligns with subpart B, Determining the Placement of an Unaccompanied Child at a Care Provider Facility, which would require that ORR shall place unaccompanied children in the least restrictive setting that is in the best interest of the child and appropriate to the child's age and individualized needs, and that ORR considers ''any specialized services or treatment required'' when determining placement of all unaccompanied children.

Additionally, ORR proposed in the NPRM that if an initial placement in a care provider facility that meets the requirements in § 410.1307(c)(1) is not immediately available or if a medical need or reasonable request, as described in § 410.1307(c)(1), arises after the Initial Medical Exam, ORR shall transfer the unaccompanied child to a care provider facility that is able to accommodate the medical needs of the unaccompanied child. If the medical need is identified, or a reasonable request is received, after the Initial Medical Exam, the care provider facility shall immediately notify ORR. This proposal aligned with subpart G, Transfers, which would require transfer of an unaccompanied child within the ORR care provider facility network when it is determined that an alternate placement for the unaccompanied child that would best meet the child's individual needs. Care provider facilities would be required to follow the process proposed in subpart G such as submitting a transfer recommendation to ORR for approval within three (3) business days of identifying the need for a transfer.

As described in the NPRM at § 410.1307(c)(2), ORR proposed to codify requirements ensuring that unaccompanied children are provided transportation to access medical services, including across State lines if necessary, and associated ancillary services. This would ensure unaccompanied children can access appointments with medical specialists (*e.g.,* neonatologists, oncologists, pediatric cardiologists, pediatric surgeons, or others), family planning services, prenatal services and pregnancy care, or care that may be geographically limited including but not limited to an unaccompanied child's need or request for medical services requiring heightened ORR involvement. ORR noted that the proposal was consistent with current policy, as noted in subpart E, Transportation of an Unaccompanied Child, that ORR, or its care provider facilities, provide transportation for purposes of service provision including medical services. ORR stated that if there is a potential conflict between ORR's regulations and State law, ORR would review the circumstances to determine how to ensure that it is able to meet its statutory responsibilities. The NPRM noted, however, that if a State law or license, registration, certification, or other requirement conflicts with an ORR employee's duties within the scope of their ORR employment, the ORR employee is required to abide by their Federal duties.

These proposals maintained existing policy that ORR must not prevent unaccompanied children in ORR care from accessing healthcare services, which may include medical services requiring heightened ORR involvement or family planning services, and must make reasonable efforts to facilitate access to those services if requested by the unaccompanied child.[262] This includes providing transport across State lines and associated ancillary services if necessary to access appropriate medical services, including access to medical specialists and medical services requiring heightened ORR involvement. Under these proposals, ORR will continue to facilitate access to medical services requiring heightened ORR involvement, including access to abortions, in light of ORR's statutory responsibility to ensure that the interests of the unaccompanied child are considered in decisions and actions relating to their care and custody, and to implement policies with respect to their care and placement.[263] In the NPRM, ORR stated that it would continue to permit such access in a manner consistent with limitations on the use of Federal funds for abortions which are regularly included in HHS's annual appropriations, commonly referred to as the ''Hyde Amendment.'' [264] For purposes of this final rule, consistent with current policy, ORR will continue to facilitate such access. ORR's policies are consistent with the Hyde Amendment. ORR further noted that it operates the UC Program in compliance with the requirements of the Religious Freedom Restoration Act and other applicable Federal conscience protections, as well as all other applicable Federal civil rights laws and applicable HHS regulations.[265]

Lastly, ORR proposed in the NPRM a requirement in § 410.1307(d) that care provider facilities shall notify ORR within 24 hours of an unaccompanied child's need or request for a medical service requiring heightened ORR involvement or the discovery of a pregnancy. This proposal was consistent with ORR's current policy requirements for notifying ORR of significant incidents and medical services requiring heightened ORR involvement.

Comment: Many commenters expressed support for the proposed provisions that seek to protect and ensure access to medical services that require heightened ORR involvement in § 410.1307(a), including access to abortion, citing the need to support unaccompanied children's health and safety.

Response: ORR believes that providing access to medical care, including access to abortion, is essential in light of ORR's statutory responsibility to ensure that the interests of unaccompanied children are considered in decisions and actions relating to their care and custody.[266] ORR also believes that the availability of medical services is foundational to the health and well-being of unaccompanied children.

Comment: One commenter expressed concern that the proposed requirements do not adequately address the potential trauma and mental health needs of unaccompanied children, who may have experienced violence, abuse, or exploitation in their home countries or during their migration journey. The commenter recommended that ORR ensure that unaccompanied children receive appropriate health services related to trauma and mental health issues. One commenter expressed the need to have mental health care services available that are tailored to the specific needs of Indigenous children.

Response: ORR believes that trauma-informed approaches should be used to support unaccompanied children in ORR custody. Under § 410.1304, ORR finalized that behavior management practices must include evidence-based and trauma-informed strategies. Under § 410.1302(c)(5) and § 410.1302(c)(6), ORR finalized that at least one weekly individual counseling session and at least two weekly group counseling sessions must be provided to unaccompanied children in standard programs and secure facilities. Further, under § 410.1307(b), care providers must establish a network of licensed healthcare providers that includes mental health practitioners and that will accept ORR's fee-for-service billing system under § 410.1307(b)(1). ORR believes that, wherever possible, services should be tailored to the individualized needs of unaccompanied children, including Indigenous children.

Comment: ORR received comments seeking clarity on the rule's impact on the provision of gender-affirming healthcare for unaccompanied children. A few commenters asked ORR to clarify whether ''medical services requiring heightened ORR involvement'' included gender-affirming healthcare.

A few commenters recommended that ORR explicitly state that gender-affirming medical and mental care should be provided when medically necessary.

A few commenters expressed concerns about providing

unaccompanied children with access to gender-affirming healthcare because they believe this care is not in the best interests of the unaccompanied children.

Response: ORR is not changing the final rule to include provisions specific to gender-affirming healthcare because the NPRM did not address this topic.

Comment: One commenter recommended that ORR add language requiring that ORR coordinate with other Federal, State, and local agencies as well as non-governmental organizations to ensure that unaccompanied children receive appropriate healthcare services while in ORR care. The commenter also recommended that ORR coordinate with other agencies and providers to facilitate the continuity of healthcare services for unaccompanied children after they are released from ORR custody.

Response: ORR understands the commenter's recommendation for coordination to refer to efforts to communicate and partner with agencies and organizations to ensure that children receive healthcare. ORR believes such coordination is in alignment with the proposed requirements of § 410.1307(b) for standard programs and restrictive placements to establish a network of licensed healthcare providers and encourages care provider facilities to engage in coordination with other Federal, State, and local agencies as well as non-governmental organizations to support the health care needs of unaccompanied children. Related to care after children are released from ORR custody, ORR notes that it has existing subregulatory requirements that allow for PRS case managers to provide referrals to community health centers and healthcare providers and inform released children and sponsor families of medical insurance options, including supplemental coverage, and assist them in obtaining insurance, if possible, so that the family is able to effectively manage the child's health-related needs. ORR prefers to keep these requirements subregulatory at this time so that they may evolve as needed to reflect best practices and the needs of unaccompanied children.

Comment: One commenter recommended that ORR ensure that Indigenous unaccompanied children have access to their communities' traditional medicines as part of meeting their medical needs.

Response: ORR encourages care provider facilities and PRS case managers to help connect children with communities, groups, and activities that foster the growth of their personal beliefs and practices and that celebrate their cultural heritage. ORR thanks the commenter for their feedback and may take it into further consideration for future policymaking.

Comment: Many commenters recommended that ORR should help coordinate medical recordkeeping to ensure the continued accuracy of health records after release from ORR care, and one commenter recommended adding a requirement that vaccines be recorded in State immunization registries and that records of vaccinations be provided to sponsors upon the unaccompanied child's release. One commenter supported the proposed immunization requirements, and further recommended that any available vaccination records from other countries be reviewed and included in the U.S. vaccination record if they have been given at the appropriate age, dose, interval, and U.S. accepted format.

Response: ORR agrees that accurate health care records, particularly related to vaccinations, are important for the continuity of care of unaccompanied children after their release from ORR custody. ORR notes that unaccompanied children are eligible for the Vaccine for Children (VFC) Program and must receive follow-up vaccinations in accordance with the Advisory Committee on Immunization Practices (ACIP) Catch-up schedule. ORR also notes that all health documents, including vaccine records, must be recorded in the UC Portal. ORR thanks the commenters for their support and feedback and may consider whether further policymaking is needed in this area.

Comment: One commenter recommended clarifying that an exception to completing a medical examination within two business days of admission to a standard program or restrictive placement only be granted if the unaccompanied child was recently examined at another ORR facility. The commenter also suggested adding a requirement that the initial medical examination document all medications ordered by a health care provider in the unaccompanied child's file. The commenter further recommended that ORR require that providers ask about and document any medications and medical records the unaccompanied child arrived in the United States with during the initial medical examination.

Response: Proposed § 410.1307(b)(2) states that the medical examination shall be conducted within two business days of admission, excluding weekends and holidays, unless the child was recently examined at another facility. ORR's existing subregulatory guidance further clarifies that children who transfer between ORR care provider programs do not need to receive a new initial medical examination, however State licensing may require a new ''baseline'' medical examination. Additionally, existing ORR procedures require care provider facilities to request information from the referring agency about whether the child had any medication or prescription information, including how many days' supply of the medication will be provided with the child when transferred into ORR custody and suggests that clinicians and caseworkers ask unaccompanied children about medication they were taking.

Comment: Many commenters expressed concern with the proposal to provide all unaccompanied children with routine dental care under § 410.1307(a), recommending that ORR update the provision to align with current practice that provides routine dental care to any children in ORR care beyond two months. One commenter recommended clarifying that an initial dental exam should occur if a dental concern arises, in addition to circumstances proposed under § 410.1307(b)(2). One commenter expressed concern that the proposed timeframe for an initial dental examination was ambiguous and recommended that ORR clarify that an initial dental examination be provided to unaccompanied children who are still in ORR care 60 days after referral to ORR care, rather than admission to ORR care, as transfers may interrupt the timeline necessary to be eligible for dental care.

Response: ORR clarifies that routine dental care, as specified in § 410.1307(a), provided to unaccompanied children is provided consistent with proposed § 410.1307(b)(2), which states that an initial dental exam is provided 60 to 90 days after admission, or sooner if directed by State licensing requirements. ORR thanks the commenter for the feedback related to the timeline, and notes that its existing subregulatory guidance states between 60 and 90 days after admission into ORR care, and this proposal is consistent with that requirement. Related to dental concerns that may arise, ORR notes that its existing subregulatory guidance further specifies that urgent dental care should be given as soon as possible. After considering public comments, ORR is codifying a new provision at § 410.1307(b)(11) that is consistent with its current policies to ensure that unaccompanied children experiencing urgent dental issues, such

as acute tooth pain, receive care as soon as possible and should not wait for the initial dental examination.

Comment: One commenter recommended adding pharmacies to the network of licensed healthcare providers that must be established by standard programs and restrictive placements. The commenter also recommended adding a requirement that care providers meet State and local licensing as well as public health requirements, which the commenter noted would be consistent with existing ORR policies.

Response: ORR agrees that health care providers must meet State and local licensing requirements and notes, as highlighted by the commenter, that this is a requirement under its existing subregulatory guidance. ORR thanks the commenter for the recommendations, and notes that it may continue to use and update its existing guidance to provide more detailed requirements for care provider facilities.

Comment: One commenter recommended that medical isolation be appropriately tailored to a child's age and that young children should not be left alone when in medical isolation. The commenter also recommended adding a requirement that medical isolation be limited to the least amount of time possible, supported by expedited testing to determine diagnoses if necessary.

Response: ORR agrees that medical care should be appropriate for a child's age and maturation, and that medical isolation should be limited to the least amount of time consistent with health care provider recommendations and best practices. ORR notes that, pursuant to its existing policies, during medical isolation, children should continue to receive tailored services (educational, recreational, social, and legal services) when feasible, and facilities must provide regular updates to ORR regarding the mental and physical health of children in isolation.

Comment: Many commenters recommended that ORR ensure that unaccompanied children's reproductive healthcare is confidential and that children's consent must be obtained before sharing healthcare information with others. Commenters recommended that ORR update the list of services proposed under § 410.1307(b) to include access to prenatal and postnatal care, which commenters believe is a critical aspect of ORR's commitment to the health of youth and also ensures that providers understand their duties.

Response: ORR notes that it has existing subregulatory requirements related to the sharing of health care information, and that care provider facilities must follow applicable Federal and State laws regarding consent for release of medical or mental health records. As part 410 will not govern or describe the entire UC Program, ORR will continue to use and update its existing guidance to provide more detailed requirements for care provider facilities. ORR notes that medical care required under § 410.1307(b) is inclusive of prenatal and postnatal care.

Comment: Many commenters recommended that ORR strengthen and clarify its healthcare service provisions by specifying that it will use pediatric specialists and will also address health needs that arise outside of the envisioned care timeframes. These commenters also recommended that ORR align mental health interventions with Medicaid Early and Periodic Screening, Diagnostic, and Treatment benefit coverage when medically necessary.

Response: ORR notes that the proposed requirement under § 410.1307(b) to establish a network of licensed healthcare providers includes specialists such as pediatric specialists, and mental health practitioners. ORR notes that Medicaid covered services vary by State, making it difficult for ORR to align interventions across the States it operates within. Nonetheless, ORR emphasizes that under § 410.1302(c)(5) and § 410.1302(c)(6), at least one weekly individual counseling session and at least two weekly group counseling sessions must be provided to unaccompanied children in standard programs.

Comment: One commenter recommended that Indigenous unaccompanied children must provide their consent to all medical procedures and medications due to historical sterilization practices and should also have a child advocate to help with medical decision making.

Response: ORR agrees that consent is a critical component of the provision of all health care services for all unaccompanied children, including Indigenous unaccompanied children, and believes the current rule sufficiently protects the health interests of all children.

Comment: Many commenters supported ORR's proposal at § 410.1307(c)(1)(ii) to transfer unaccompanied children to a care provider facility within three business days if medical services, specifically abortions, are unavailable at the initial placement to help ensure access to healthcare services regardless of geographic location.

Response: ORR agrees and believes this proposal will help provide unaccompanied children with access to medical care, including medical services requiring heightened ORR involvement.

Comment: Many commenters supported the proposal at § 410.1307(c) to provide access to medical care, including reproductive healthcare, noting that this proposal is consistent with ORR's Field Guidance #21—Compliance with *Garza* Requirements and Procedures for Unaccompanied Children Needing Reproductive Healthcare [267] and *J.D.* v. *Azar.* One commenter supported the proposal but recommended the proposal specify that ORR provides access to ''pediatric'' medical specialists and providers.

Response: ORR believes that providing access to medical care, whether prenatal services, pregnancy care, or abortion, is essential in light of ORR's statutory responsibility to ensure that the interests of unaccompanied children are considered in decisions and actions relating to their care and custody [268] and that having access to these medical services is foundational to the health and well-being of unaccompanied children. Finally, ORR notes that medical providers and specialists can include, but are not limited to, pediatric-trained medical providers, such as pediatric cardiologists and pediatric surgeons, as discussed in the NPRM (88 CFR 68946).

Comment: A few commenters requested that ORR provide more information on how ORR may facilitate access to medical care, specifically as it relates to abortion. For instance, commenters requested that ORR provide an estimate on the number of abortions ORR would facilitate under this proposal, the associated costs of such abortions, information on where abortions would take place, the types of abortion procedures that may be provided to unaccompanied children, and how ORR will determine whether abortions are in the best interests of unaccompanied children.

Response: ORR notes that in § 410.1307(c), ORR must make reasonable efforts to facilitate access to medical services requiring heightened ORR involvement, including access to abortion, if requested by the unaccompanied child. These efforts include considering relevant needs in initial placement and transfer decisions and providing transportation for medical services as needed. Any specific needs related to abortion will be determined on an individual basis, and ORR is unable to reliably estimate how many unaccompanied children in ORR

care may need an abortion and any associated transportation costs under this rule. Additionally, given the rapidly changing landscape of State abortion laws and access to abortion, ORR is unable to reliably estimate where abortions may take place.

Comment: Many commenters expressed concerns about the availability and manner of abortion counseling. Some commenters believed that pregnant unaccompanied children should receive unbiased options counseling about alternatives to abortion. Finally, one commenter requested more information on the counseling available to pregnant unaccompanied children and victims of sexual assault, and the types of staff that will provide this counseling.

Response: ORR acknowledges commenters' concerns and reiterates that unaccompanied children are provided with family planning services, which include non-directive options counseling among other services. ORR also notes that under its current policies,[269] ORR specifies that pregnant minors will receive non-directive options counseling and referrals to specialty care, such as obstetricians, for further evaluation and services.

For additional counseling services available to unaccompanied children, as discussed at § 410.1302(c)(5), ORR is requiring standard programs and secure facilities to provide counseling and mental health supports to unaccompanied children that include at least one individual counseling session per week conducted by certified counseling staff. These counseling sessions would address both the developmental and crisis-related needs of each unaccompanied child. ORR notes that this requirement would apply to unaccompanied children who have experienced sexual abuse or assault. For further information on services for victims of sexual abuse, ORR refers readers to the interim final rule, Standards To Prevent, Detect, and Respond to Sexual Abuse and Sexual Harassment Involving Unaccompanied Children (79 FR 77768, codified under 45 CFR part 411).

Comment: Many commenters did not support ORR's proposal to provide unaccompanied children with transportation and access to medical services requiring heightened ORR involvement, specifically abortion. Some commenters expressed their belief that providing access to abortion would violate the Hyde Amendment, an annual appropriations rider that prohibits the use of Federal funds for abortions subject to limited exceptions. Commenters also expressed the view that the Hyde Amendment extends to services that facilitate access to abortion, such as transportation. Further, commenters stated that ORR policies related to the *Garza* lawsuit, or any other policies that provide unaccompanied children with access to abortions, no longer apply in light of the Supreme Court's decision in *Dobbs* v. *Jackson Women's Health Organization,* which overturned *Roe* v. *Wade* and *Planned Parenthood* v. *Casey.*

Response: ORR acknowledges commenters' concerns but reiterates that ORR policy, as set out in § 410.1307(c), is consistent with limitations on the use of Federal funds for abortions. ORR must make reasonable efforts to facilitate access to medical services requiring heightened ORR involvement—which may include abortion—if requested by the unaccompanied child; these efforts include considering relevant needs in initial placement and transfer decisions and providing transportation for medical services as needed. Additionally, in order to fulfill its statutory responsibilities regarding the care of unaccompanied children, ORR staff and care provider facilities must not prevent unaccompanied children from accessing legal abortion and related services, and ORR staff and care provider facilities must make all reasonable efforts to facilitate lawful access to these services if requested by unaccompanied children. The U.S. Supreme Court's decision in *Dobbs* is not inconsistent with the terms of the *Garza* settlement, nor ORR's determination to maintain these previously-binding requirements. For further information, ORR refers readers to Field Guidance #21 [270] and the Policy Memorandum on Medical Services Requiring Heightened ORR Involvement [271] where ORR explains its responsibilities under *Garza* while complying with the Hyde Amendment.

Regarding comments on the Hyde Amendment's implications for transportation, ORR refers readers to the September 2022 memo from the Department of Justice Office of Legal Counsel,[272] which states that ''the Hyde Amendment is best read to permit expenditures to fund transportation for women seeking abortions where HHS otherwise possesses the requisite authority and appropriations,'' and ''best read to prohibit only direct expenses for the'' discrete medical procedure of abortion ''itself and not indirect expenses, such as those for transportation to and from the medical facility where the procedure is performed.'' In light of OLC's interpretation, ORR's policy providing transportation for medical services is consistent with the Hyde Amendment.

Comment: Many commenters did not support ORR's proposal to provide access to medical care, specifically abortion, because in their view abortions are not in the best interests of unaccompanied children and could have detrimental impacts on their health. Commenters expressed concern that ORR would force unaccompanied children to have unwanted abortions, including through potential miscommunication due to language barriers, or that the policy might encourage human traffickers to force unaccompanied children to have abortions.

Response: ORR has determined that it should facilitate access to legal abortions for unaccompanied children in ORR custody in light of ORR's statutory responsibility to ensure that the interests of unaccompanied children are considered in decisions and actions relating to their care and custody and to implement policies with respect to the care of unaccompanied children.[273] The unaccompanied child, in consultation with medical professionals, will make the decision whether to access legally-permissible medical services requiring heightened ORR involvement, including abortion. ORR also notes that this proposal pertains to unaccompanied children in ORR custody and therefore, ORR does not believe that there are human trafficking risks associated with this proposal.

Regarding the commenter's concerns regarding language barriers, ORR reiterates that it is finalizing at § 410.1306(g), that while unaccompanied children are receiving healthcare services, care provider facilities would be required to ensure that unaccompanied children are able to communicate with physicians, clinicians, and healthcare staff in their native or preferred language, depending on the unaccompanied children's preference, and in a way they effectively understand. Further, under § 410.1801, ORR is finalizing that EIFs must deliver services, including medical services requiring heightened ORR involvement, in a manner that is sensitive to the age, culture, native language, religious preferences and practices, and other needs of each unaccompanied child. ORR believes these provisions protect unaccompanied children against miscommunication with care providers.

Comment: A few commenters did not support ORR's proposal to provide access to medical care, specifically abortion, because they believed that this proposal may negatively impact unaccompanied children and their

families. Commenters believed that ORR would provide abortions to unaccompanied children without the knowledge or consent of their parents or legal guardians. Finally, commenters believed this proposal would limit families' ability to access records of unaccompanied children and that children may be separated from their siblings if one of them seeks an abortion.

Response: Under current ORR policies, if a State-licensed physician seeks consent from ORR to provide an abortion to an unaccompanied child, neither ORR nor a care provider may provide consent to provide abortions to unaccompanied children.[274] Rather, the child would need to obtain such consent from the appropriate individual identified under State law (typically the parent or legal guardian) or, if available, seek a judicial bypass of parental notification and consent. ORR Federal staff and ORR care providers are required to ensure unaccompanied children have access to medical appointments related to pregnancy in the same way they would with respect to other medical conditions.

ORR believes that safeguarding and maintaining the confidentiality of unaccompanied children is critical to carrying out ORR's responsibilities under the HSA and TVPRA. For further information on confidentiality policies, ORR refers readers to the ORR Policy Guide, Policy Memorandum on Medical Services Requiring Heightened ORR Involvement, and Field Guidance #21 where ORR provides greater detail on information sharing policies and how ORR will address circumstances in which State laws may require parental notification. Finally, ORR notes that in the case of related children, where at least one of the related children is pregnant and requests an abortion, ORR will make every effort to keep related children together while considering the best interests of each child as described in Field Guidance #21.

Comment: A few commenters did not support ORR's proposal to provide access to medical care, specifically abortion, because they believed that ORR should provide the fetus with the same level of care as provided to pregnant unaccompanied children.

Response: ORR carries out its statutory responsibilities for the care and custody of unaccompanied children as established in the TVPRA and the HSA, and consistent with its responsibilities under the FSA. Under these authorities, ORR must prioritize the best interests and individualized needs of unaccompanied children, including pregnant youth, in ORR custody. This includes facilitating access to medical services, including access to abortions when requested by a pregnant individual in ORR custody, consistent with relevant appropriations restrictions (*e.g.,* the ''Hyde Amendment'') and in compliance with the requirements of the RFRA, Title VII of the Civil Rights Act of 1964, and all applicable Federal conscience protections, as well as all applicable Federal civil rights laws and HHS regulations. To the extent the commenters are suggesting that ORR owes statutory duties to the fetus such that ORR facilitating pregnant individuals' access to abortion is legally impermissible, that theory is not supported by ORR's statutory authority.[275]

Comment: Many commenters did not support ORR's proposal to provide unaccompanied children with transportation and access to medical care, specifically abortions, because they believed this policy violates or circumvents State laws that place restrictions on abortion. Commenters requested that ORR clarify the federalism implications of its proposals and whether this proposal means to preempt State laws. A few commenters expressed concerns regarding ORR's proposal to require ORR employees to abide by the Federal duties if there are conflicts between ORR's regulations and State law. Additionally, one commenter believed that if programs are State licensed as required by the FSA, then they must follow State licensure requirements if there are potential conflicts between ORR regulations and State law. One commenter requested ORR clarify if ''ORR employees'' includes grantee and contract staff, and another commenter believed that ORR has misconstrued the Supremacy Clause in a manner that enables ORR to overstep its authority by overriding State laws when conflicts arise.

Response: ORR clarifies that the phrase ''ORR employees'' means Federal employees of ORR and does not include grantee and contract staff. Such individuals, who are care provider facility or other service provider staff, are not Federal employees. ORR notes that it expects and requires, under §§ 410.1302(a) and (b) of this final rule, that standard program and secure facility employees will follow State licensure requirements. However, ORR Federal employees must abide by their Federal duties in the limited circumstances where ORR regulations and State laws may conflict, subject to Federal conscience protections discussed below. Further, ORR refers readers to the Regulatory Impact Analysis in the NPRM where ORR explains that the proposed regulations do not have significant federalism implications and would not substantially affect the relationship between the National Government and the States (88 FR 68976). In proposing these regulations, ORR was mindful of its obligations to ensure that it implements its statutory responsibilities while also minimizing conflicts between State law and Federal interests.

ORR refers readers to its Policy Memorandum on Medical Services Requiring Heightened ORR Involvement and Field Guidance #21—Compliance with *Garza* Requirements and Procedures for Unaccompanied Children Needing Reproductive Healthcare for further information on alignment with State law. ORR does not intend for this rulemaking to preempt general State law restrictions on the availability of abortions. For example, this rulemaking does not authorize any pregnant individual in ORR custody to obtain an abortion in a State where the abortion is illegal under that State's laws. This rulemaking does contemplate, however, that State law cannot restrict ORR employees in carrying out their Federal duties, including, when appropriate and consistent with religious freedom and conscience protections, transferring pregnant individuals in ORR custody to States where abortion is lawful. This approach is fully consistent with principles of federalism, given States' different approaches to regulating abortion within their borders.

Comment: Many commenters did not support ORR's proposal to provide unaccompanied children with transportation and access to medical care, specifically abortions, because they believed it does not adequately safeguard the religious freedom and conscience protections of ORR staff and requested that ORR modify this proposal to more expressly protect these rights. Commenters asserted that ORR staff and contractors would be required to facilitate access to abortions under this proposal, even if it violates their personal beliefs, religion, or conscience. Commenters requested that ORR discuss specific religious freedom and conscience protections such as the Religious Freedom Restoration Act, Title VII of the Civil Rights Act of 1964, and the First Amendment and explicitly explain how ORR will operate the UC Program in compliance with these laws. These commenters also requested that ORR incorporate these religious freedom and conscience protection provisions into the regulatory text, in addition to the preamble of the rule. One

commenter also expressed concerns that ORR will discriminate or disadvantage faith-based providers when awarding grants or contracts for the UC Program.

Response: ORR reiterates that it operates and will continue to operate the UC Program in compliance with the requirements of RFRA, Title VII of the Civil Rights Act of 1964, and all applicable Federal religious freedom and conscience protections, as well as all applicable Federal civil rights laws and HHS regulations. Additionally, consistent with ORR's Policy Memorandum on Medical Services Requiring Heightened ORR Involvement [276] and Field Guidance #21,[277] ORR will provide legally required accommodations to care provider facilities who maintain a sincerely held religious objection to abortion. ORR also refers readers to other regulations, such as the Equal Participation of Faith-Based Organizations in the Federal Agencies' Programs and Activities Final Rule [278] and the Safeguarding the Rights of Conscience as Protected by Federal Statutes Final Rule,[279] which establish rules and mechanisms for ensuring religious freedom and conscience protections for faith-based providers participating in Federal programs, such as the UC Program. Moreover, as to its own employees, ORR highlights 29 CFR parts 1605 and 1614, which contain religious discrimination and accommodation protections available to Federal employees, including those of ORR. Pursuant to these regulations, ORR will continue to provide legally required religious accommodations to requesting employees. ORR anticipates that non-objecting staff will be available to perform those duties. Given these existing protections for religious freedom for participating facilities, providers, and employees, ORR does not believe it is necessary to create new or additional policies. However, ORR is updating § 410.1307(c) to clarify that ORR employees must abide by their Federal duties if there is a conflict between ORR's regulations and State law, subject to applicable Federal religious freedom and conscience protections.

Final Rule Action: After consideration of public comments, ORR is codifying a provision at § 410.1307(b)(11) to state that unaccompanied children experiencing urgent dental issues, such as acute tooth pain, should receive care as soon as possible and should not wait for the initial dental exam. ORR believes this addition is consistent with its current policies and will help ensure unaccompanied children receive necessary dental care that is foundational to their health and well-being. ORR is also amending § 410.1307(c) in three ways. First, it is adopting clarifying language to include language that was in the preamble at § 410.1307(c)(2) to the regulation text at § 410.1307(c) to underscore that ''ORR must not prevent unaccompanied children in ORR care from accessing healthcare services, including medical services requiring heightened ORR involvement and family planning services. ORR must make reasonable efforts to facilitate access to those services if requested by the unaccompanied child.'' Second, ORR is moving language previously included at § 410.1307(c)(2) to § 410.1307(c), with edits such that in the final rule that paragraph contains the following additional sentences: ''Further, if there is a potential conflict between the standards and requirements set forth in this section and State law, such that following the requirements of State law would diminish the services available to unaccompanied children under this section and ORR policies, ORR will review the circumstances to determine how to ensure that it is able to meet its responsibilities under Federal law. If a State law or license, registration, certification, or other requirement conflicts with an ORR employee's duties within the scope of their ORR employment, the ORR employee is required to abide by their Federal duties, subject to applicable Federal religious freedom and conscience protections, to ensure unaccompanied children have access to all services available under this section and ORR policies.'' Third, at § 410.1307(c)(1)(i), ORR is amending the text to state that ORR ''shall consider'' a child's individualized needs, in contrast to the NPRM text, which provided that ''ORR considers'' the child's individualized needs. ORR is finalizing all other paragraphs of § 410.1307 as proposed.

Section 410.1308 Child Advocates

ORR proposed in the NPRM, at § 410.1308(a), to codify standards and requirements relating to the appointment of independent child advocates for child trafficking victims and other vulnerable unaccompanied children (88 FR 68946 through 68948). The TVPRA, at 8 U.S.C. 1232(c)(6), authorizes HHS to appoint child advocates for child trafficking victims and other vulnerable unaccompanied children. In 2016, the Government Accountability Office (GAO) carried out an assessment of the ORR child advocate program [280] and recommended improving ORR monitoring of contractor referrals to the program and improving information sharing with child advocates regarding the unaccompanied children assigned to them. ORR noted that the need for child advocates in helping to protect the interests of unaccompanied children has continued to grow over time, especially given the increasing numbers of unaccompanied children who are referred to ORR custody. Under § 410.1308, ORR proposed in the NPRM to codify specific child advocates' roles and responsibilities which are currently described primarily in ORR policy documents.

At § 410.1308(b), ORR proposed in the NPRM to define the role of child advocates as third parties who identify and make independent recommendations regarding the best interests of unaccompanied children. The recommendations of child advocates are based on information obtained from the unaccompanied children and other sources (including the unaccompanied child's parents, family, potential sponsors/sponsors, government agencies, legal service providers, protection and advocacy system representatives in appropriate cases, representatives of the unaccompanied child's care provider, health professionals, and others). Child advocates formally submit their recommendations to ORR and/or the immigration court as written best interest determinations (BIDs). ORR considers BIDs when making decisions regarding the care, placement, and release of unaccompanied children, but it is not bound to follow BID recommendations.

ORR considered several ways to strengthen or expand the role of child advocates, including: granting child advocates rights of access to ORR records and information on unaccompanied children (in order to advocate for unaccompanied children more effectively); allowing advocates to be present at all ORR hearings and interviews with their client (except meetings between an unaccompanied child and their attorney or DOJ Accredited Representative); and expanding the child advocates program to operate at more locations, or expanding eligibility for the program to allow unaccompanied children who age past their 18th birthday to continue receiving advocates' services. ORR noted that, as required by the TVPRA, it already provides child advocates with access to materials necessary to effectively advocate for the best interests of unaccompanied children. In particular, per current ORR policies, child advocates have access to their clients and to their clients' records.

Child advocates may access their clients' entire original case files at care provider facilities, or request copies from care providers. Further, they may participate in case staffings, which are meetings organized by an unaccompanied child's care provider with other relevant stakeholders to help discuss and plan for the unaccompanied child's care. In drafting the NPRM, ORR believed that the language at § 410.1308(b) (together with other paragraphs proposed in § 410.1308) represented an appropriate balance in codifying the role of child advocates. ORR invited comment on these issues, and on the proposals of § 410.1308(b).

At paragraph § 410.1308(c), ORR proposed in the NPRM to specify the responsibilities of child advocates, which include (1) visiting with their unaccompanied children clients; (2) explaining the consequences and potential outcomes of decisions that may affect the unaccompanied child; (3) advocating for the unaccompanied child client's best interest with respect to care, placement, services, release, and, where appropriate, within proceedings to which the child is a party; (4) providing best interest determinations, where appropriate and within a reasonable time to ORR, an immigration court, and/or other interested parties involved in a proceeding or matter in which the child is a party or has an interest; and (5) regularly communicating case updates with the care provider, ORR, and/or other interested parties in the planning and performance of advocacy efforts, including updates related to services provided to unaccompanied children after their release from ORR care.

Consistent with the TVPRA at 8 U.S.C. 1232(c)(6)(A), ORR proposed in the NPRM under § 410.1308(d), that it may appoint child advocates for unaccompanied children who are victims of trafficking or are especially vulnerable. Under § 410.1308(d)(1), ORR proposed in the NPRM that an interested party may refer an unaccompanied child to ORR for a child advocate after notifying ORR that a particular unaccompanied child in or previously in ORR's care is a victim of trafficking or is especially vulnerable. As used in this section, ''interested parties'' means individuals or organizations involved in the care, service, or proceeding involving an unaccompanied child, including but not limited to, ORR Federal or contracted staff; an immigration court judge; DHS staff; a legal service provider, attorney of record, or DOJ Accredited Representative; an ORR care provider; a healthcare professional; or a child advocate organization.

Under § 410.1308(d)(2), ORR proposed in the NPRM that it would make an appointment decision within five (5) business days of referral for a child advocate, except under exceptional circumstances including, but not limited to, natural disasters (such as hurricane, fire, or flood) or operational capacity issues due to influx which may delay a decision regarding an appointment. ORR typically would consider the available resources, including the availability of child advocates in a particular region, as well as specialized subject-matter expertise of the child advocate, including disability expertise, when appointing a child advocate for unaccompanied children in ORR care. ORR would appoint child advocates only for unaccompanied children who are currently in or were previously in ORR care.

Under § 410.1308(d)(3), ORR proposed in the NPRM that child advocate appointments would terminate upon the closure of the unaccompanied child's case by the child advocate, when the unaccompanied child turns 18, or when the unaccompanied child obtains lawful immigrant status. Regarding the appointment of child advocates, ORR considered allowing that any stakeholder should be able to make a confidential referral of an unaccompanied child for child advocate services, and also that any termination of such services should be determined in collaboration with the unaccompanied child and the unaccompanied child's parent or legal guardian (if applicable).

In terms of referrals, proposed § 410.1308(d) would allow for referrals for child advocate services from a broad range of possible individuals. Regarding terminating child advocate services, ORR considered making terminations contingent on a collaborative process between the child advocate, the unaccompanied child, and the unaccompanied child's sponsor, but ORR believed that the proposal at § 410.1308(d)(3) would impose reasonable limits for the termination of child advocate services, and that termination itself otherwise falls within the role and responsibilities of child advocates when advocating for an unaccompanied child's best interests.

Under § 410.1308(e), ORR proposed in the NPRM standards concerning child advocates' access to information about unaccompanied children for whom they are appointed. After a child advocate is appointed for an unaccompanied child, the child advocate would be provided access to materials to effectively advocate for the best interest of the unaccompanied child.[281] Consistent with existing policy, child advocates would be provided access to their clients during normal business hours at an ORR care provider facility in a private area, would be provided access to all their client's case file information, and may request copies of the case file directly from the unaccompanied child's care provider without going through ORR's standard case file request process, subject to confidentiality requirements described below. A child advocate would receive timely notice concerning any transfer of an unaccompanied child assigned to them.

Under § 410.1308(f), ORR proposed in the NPRM standards for a child advocate's responsibility with respect to confidentiality of information. Notwithstanding the access to their clients' case file information granted to child advocates under paragraph (e), child advocates would be required to keep the information in the case file, and information about the unaccompanied child's case, confidential. Child advocates would be prohibited from sharing case file information with anyone except with ORR grantees, contractors, and Federal staff. Child advocates would not be permitted to disclose case file information to other parties, including parties with an interest in a child's case. Other parties are able to request an unaccompanied child's case file information according to existing procedures. ORR proposed in the NPRM these protections consistent with its interest in protecting the privacy of unaccompanied children in its care, and for effective control and management of its records. Also, under § 410.1308(f), ORR proposed to establish that, with regard to an unaccompanied child in ORR care, ORR would allow the child advocate of that unaccompanied child to conduct private communications with the child, in a private area that allows for confidentiality for in-person and virtual or telephone meetings. In drafting § 410.1308(f), ORR considered suggestions that a child advocate should be protected from compelled disclosure of any information concerning an unaccompanied child shared with them in the course of their advocacy work and that unaccompanied children and child advocates must have access to private space to ensure confidentiality of in-person meetings and virtual meetings. ORR noted that § 410.1308(f) is to be read consistently with the TVPRA requirement that child advocates ''shall not be compelled to

testify or provide evidence in any proceeding concerning any information or opinion received from the child in the course of serving as a child advocate.'' [282] Also, ORR sought comment on specific ways to ensure confidentiality of unaccompanied child-child advocate meetings, and invited public comment on that issue, in particular on appropriate ways to ensure privacy, as well as on the text of § 410.1308(f) generally.

Under § 410.1308(g), ORR proposed in the NPRM that it would not retaliate against a child advocate for actions taken within the scope of their responsibilities. For example, ORR would not retaliate against a child advocate because of any disagreement with a best interest determination or because of a child advocate's advocacy on behalf of an unaccompanied child. ORR noted that § 410.1308(g) is intended to be read consistently with its statutory obligation to provide access to materials necessary to effectively advocate for the best interest of the child, and consistently with a presumption that the child advocate acts in good faith with respect to their advocacy on behalf of the child.[283] At the same time, ORR has the responsibility and authority to effectively manage its unaccompanied children's program, which includes, for example, ensuring that the interests of the child are considered in decisions and actions relating to care and custody, implementing policies with respect to the care and placement of unaccompanied children, and overseeing the infrastructure and personnel of facilities in which unaccompanied children reside.[284]

Comment: A few commenters expressed broad opposition to the § 410.1308 proposals concerning child advocates. One commenter opined that under historical practice, ORR has released unaccompanied children to sponsors prior to effectively coordinating with the Office on Trafficking in Persons, in order to determine whether an unaccompanied child has been trafficked. The commenter therefore concluded that ORR has demonstrated an inability and unwillingness to prevent child trafficking, such as to make moot the proposed standards concerning child advocates. Another commenter raised similar concerns, as well as concerns about expanding bureaucracy and inefficiency, in opposing proposed § 410.1308 on child advocates.

Response: As described more fully in comment responses under subpart A, under historical practice and consistent with statutory mandates under the TVPRA, ORR has long coordinated with other Federal authorities, including the Office on Trafficking in Persons, when carrying out its responsibility for caring for unaccompanied children in its custody. ORR is committed to protecting unaccompanied children in its care from any further victimization through child trafficking. The proposals under § 410.1308, by codifying and strengthening the role of child advocates, will have the impact of protecting vulnerable children, particularly with regard to child trafficking risks. ORR believes that these proposals are well-calibrated to achieve this impact, and that the proposals will strengthen ORR's operations and care for unaccompanied children.

Comment: A few commenters expressed general concern about the importance of independence for child advocates under the proposed rule. A few other commenters recommended strengthening the language of § 410.1308(b) on the role of child advocates, in order to better protect advocates' independence. In support of these recommendations, the commenters observed that the independence of child advocates from other service providers was sufficiently important that such independence was called out explicitly under the TVPRA. The commenters also recommended making additional changes to § 410.1308, to ensure that best interests determinations are informed by trusted adults in children's lives, citing best practices in child-centered advocacy in support of this recommendation.

Response: ORR agrees with the commenters that protecting the independence of child advocates is important, and ORR recognizes that TVPRA addresses this issue by authorizing the appointment of advocates. ORR, believes that proposed § 410.1308 strikes the correct balance in outlining the role and responsibilities for child advocates, in ways that will enhance the independence of the child advocacy function, and thereby contribute to protecting the best interests of unaccompanied children. While ORR respects best practices in child-centered advocacy, ORR believes that proposed § 410.1308 already stipulates that best interest determinations may draw on information from trusted adults in a child's life, and that the proposed rule is consistent with related best practices in child-centered advocacy. ORR will take under consideration issuing additional future guidance regarding child advocates, the standards for best interest determinations, and best practices in child-centered advocacy.

Comment: One commenter recommended that all government actors be required to consider an unaccompanied child's best interests at each decision along the continuum of a child's case, from apprehension, to custody, to release.

Response: ORR believes that it is beyond the scope of this rule, and also beyond the scope of ORR's authority, to mandate the use of best interest determinations by other government authorities, across a wide range of enforcement and judicial proceedings that might intersect with the full continuum of the case for any and all specific unaccompanied children.

Comment: A few commenters recommended changes to the proposed rule at § 410.1308(c), to codify that child advocates have an obligation to submit best interest determinations to any official or agency that has the power to make decisions about a child.

Response: ORR believes that the language of § 410.1308(c), as proposed, strikes the correct balance in outlining and illustrating the responsibilities for child advocates, but without limitation to those responsibilities. ORR will take under consideration issuing additional future guidance regarding child advocates, and standards for best interest determinations made by child advocates.

Comment: A few commenters recommended changing proposed regulatory language at § 410.1308(c), to remove any implication that children ''belong'' to child advocates, by amending each reference to ''their child'' under the rule.

Response: ORR believes that § 410.1308(c) makes it clear that child advocates stand in a professional-to-client relationship with unaccompanied child clients, rather than in an ownership relationship with them. When read in its entirety, ORR does not believe that there is any implication of ownership in the phrasing of § 410.1308. However, for clarity and consistency of expression, ORR has added the word ''client'' after ''unaccompanied child'' at the end of § 410.1308(c)(2).

Comment: Several commenters recommended expanding ORR's obligations to appoint child advocates for unaccompanied children under § 410.1308(d) of the rule. A few commenters recommended making the appointment of child advocates mandatory for all unaccompanied children, on the grounds that all are vulnerable, and that all would benefit from having child advocates. Several commenters recommended making the appointment of child advocates

mandatory by ORR with regard to specific sub-groups of unaccompanied children, on grounds of heightened vulnerability, including a few commenters each recommending the appointment of child advocates for LGBTQI+ children; or for children who have been sex-trafficked; or for children lacking the capacity to make decisions regarding their own cases; or for certain youth beyond the age of 18 (when youth age is in dispute, or when the government's actions or inactions have put the 18-year-old in a dangerous situation).

Response: ORR recognizes the importance of child advocates in protecting the interests of child trafficking victims and other especially vulnerable unaccompanied children. As described in this final rule's discussion in subpart A, availability of child advocates is dependent on appropriations. For this reason, ORR believes that proposed § 410.1308(d) strikes an important balance in seeking to align child advocacy services with the children who are most in need of them. Further, ORR specifically chose not to specify detailed standards under § 410.1308(d) for exactly which children will be considered ''especially vulnerable.'' ORR will consider addressing more detailed standards on this issue in future policymaking. Finally, ORR notes that the current language of § 410.1308(d) makes it clear that child advocate appointments terminate when an unaccompanied child turns 18. In recognition of ORR's limited resources, statutory mandates, and the primary aim of § 410.1308(d) in protecting especially vulnerable children, ORR believes that limiting child advocate appointments to unaccompanied children under the age of 18 is reasonable and appropriate under the rule.

Comment: A few commenters recommended modifying § 410.1308(d) to allow for appointment of child advocates to unaccompanied children who were never transferred to ORR custody, or else who passed through ORR custody only briefly, before being immediately reunified with accompanying adult family members. The commenters argued that the TVPRA statute, in authorizing the appointment of child advocates, did not specifically constrain this authority based on ORR custody. The commenters also argued that allowing for appointment of child advocates for vulnerable children without regard to ORR custody status could help to limit the number of children unnecessarily transferred to ORR custody when such transfer is not in a child's best interests, and when that transfer could result in a significant expense to the government.

Response: ORR believes that as written, § 410.1308(d) allows for appointment of child advocates for unaccompanied children who have passed through, but who are not currently in, ORR custody (subject to other applicable standards, such as being ''especially vulnerable''). As for the recommendation made by a few commenters to extend the appointment of child advocates to unaccompanied children who have never been in ORR custody, it is beyond the scope of this rule to address, since this rule focuses on children referred to ORR custody from other Federal agencies.

Comment: One commenter expressed concern about the lack of requirements in proposed § 410.1308(d) for the qualifications and training of child advocates in the appointments process. The commenter recommended that ORR add those requirements to the proposals in § 410.1308(d).

Response: The child advocate program is operated through a contract that includes specific and comprehensive requirements for relevant qualifications and skills, which includes, but is not limited to, bilingual skills, minimum and advanced college degree requirements, and minimum years of experience in child and family welfare, immigration law, social work, trauma-informed approaches to advocacy, and program management. Additionally, ORR's child advocate contract requires the contractor to undergo and provide ongoing training and professional development in areas such as cultural competency, case confidentiality, child development theory, trauma-informed care, child abuse and neglect reporting, issues around family separation, human trafficking reporting, and health and mental health issues. Because standards for the qualification and training of child advocates are set by ORR under contract, ORR has chosen not to codify those standards as a part of this rule.

Comment: A few commenters objected to the language of § 410.1308(d) of the proposed rule allowing ORR discretion to determine which unaccompanied cases are appointed child advocates, rather than empowering the child advocate contractor to make independent decisions about this. The commenters also argued that the proposed rule would require an unnecessarily duplicative process for an interested stakeholder to notify ORR of a referral before submitting the referral to the child advocate contractor, and that this would involve adding costs and delays to current ORR practice. The commenters recommended instead that ORR maintain the current, well-established system, in which the child advocate contractor receives all referrals, and then submits referrals to ORR for a decision to appoint or decline to appoint.

Response: The language at § 410.1308(d) that allows ORR to appoint child advocates is consistent with the TVPRA, which grants the Secretary of HHS the authority to appoint child advocates. As discussed in the background section, the Secretary's authority under the TVPRA has been delegated to the Director of ORR. It is ultimately ORR's responsibility and under its authority to appoint child advocates, and the language at § 410.1308(d) is consistent with that.

ORR has decided, after review, that the proposed language in § 410.1308(d) that described the referral process for child advocates was unnecessarily detailed, in a way that could unintentionally contribute to inefficiency in ORR's processes. Accordingly, ORR in this final rule has streamlined the language of § 410.1308(d)(1), to say that ''an interested party may refer an unaccompanied child for a child advocate, when that unaccompanied child is or previously was in ORR's custody, and when that child has been determined to be a victim of trafficking or especially vulnerable.'' This rephrasing remains consistent with the intent of the original proposal language and is also consistent with ORR's operations and current policies in how referrals for child advocate appointments are carried out.

Comment: A few commenters recommended adding proposal language to § 410.1308(d), to allow for ORR to make child advocate appointment decisions more rapidly than the five-day standard, in specific time-sensitive cases. The commenters recommended language allowing for ORR to make child advocate appointment decisions within 24 hours of receiving a recommendation to appoint, in time-sensitive cases including when unaccompanied children are at-risk of aging out of ORR custody, or have complex medical needs, or are facing upcoming court hearings or agency interviews.

Response: There is nothing in § 410.1308(d) to preclude ORR from making child advocacy appointment decisions more rapidly than the five-day standard, especially given the context of time-sensitive circumstances being referred to by commenters above. ORR

likewise believes that there is no conflict between § 410.1308(d), and recent ORR practices concerning expedited appointment of child advocates in time-sensitive circumstances. For these reasons, ORR believes that the § 410.1308(d) proposals are reasonable and appropriate in their current form.

Comment: One commenter recommended that as a matter of equity under § 410.1308(d), ORR should ensure that all stakeholders, community-based service providers, consulates, other children in custody, and children's family members or proposed sponsors, are able to make referrals for child advocate services for an unaccompanied child.

Response: As proposed, § 410.1308(d) establishes that interested parties may refer an unaccompanied child to ORR for a child advocate, and then the proposal goes on to define ''interested parties'' broadly, including individuals or organizations involved in the care, service, or proceeding involving an unaccompanied child. ORR believes that the language of § 410.1308(d) is appropriate and well-balanced as currently proposed and will allow a broad range of interested stakeholders to initiate referrals for child advocacy services.

Comment: A few commenters recommended modifying the proposed § 410.1308(e), to ensure that child advocates will be able to access their unaccompanied child clients on weekends, evenings, and outside of business hours. The commenters observed that unaccompanied children often prefer to meet with their child advocates on weekends or evenings, when not in classes and when there tends to be less facility-based programming. The commenters also noted that child advocates may need to meet with children on weekends or evenings to address urgent situations, such as transfers, releases, court dates, and other time-sensitive matters.

Response: Although proposed § 410.1308(e) establishes that child advocates shall be provided access to their clients during normal business hours at an ORR care provider facility, the provision would not preclude or prevent care provider facilities from granting child advocates access to their clients outside of normal business hours or on weekends, particularly given the context of urgent situations such as transfers, releases, court dates, etc. ORR believes it is reasonable to only require access during business hours, given the potential burden on the facilities to provide access to the facilities on evenings or weekends, but will take under consideration addressing more detailed standards or considerations for access outside of formal business hours, in future policymaking, as necessary.

Comment: A few commenters recommended that the provisions under § 410.1308(e) be modified to emphasize that child advocates need to be given prompt access to all information related to a child's case. The commenters argued that child advocates may need to act urgently when a situation affecting a child's safety or well-being arises, which necessitates their having rapid access to the records, even outside of business hours. A few commenters also argued that timeliness of information access and advance notice for child advocates is critical in some situations, including before a child is transferred over their objection, is stepped up to a more restrictive facility, is required to appear in court to request voluntary departure, or is at risk of receiving a court order of removal.

Response: ORR agrees that prompt access for child advocates to the case file records of their clients is important to protecting the interests of unaccompanied children, in a range of time-sensitive circumstances. The current language of § 410.1308(e) establishes minimum requirements for access by child advocates to the case file records of their clients, including that advocates shall be provided access to such case file information during normal business hours at an ORR care provider facility, and that advocates may request copies of the case file directly from the care provider facility. This language does not preclude child advocates from accessing their clients' records quickly, nor does it exempt ORR care provider facilities from being responsive to requests by child advocates for rapid access to records (including outside of regular business hours) when time-sensitive circumstances create a need for such access. Again, ORR believes the requirements of § 410.1308(e) are reasonable given the burden to care provider facilities. However, ORR will consider whether it should address more detailed standards or considerations for expedited access by child advocates to the case file records of their clients in ORR care facilities in future policymaking.

Comment: One commenter recommended superseding and amending the proposal at § 410.1308(e) with a new consolidated proposal on data safeguarding.

Response: After considering different approaches to drafting the regulation, ORR concluded that the language of § 410.1308(e) (on child advocates' access to information), § 410.1303(h) (on safeguarding each individual unaccompanied child's case file) and at subpart F (on data and reporting requirements) is reasonable and appropriate, and offers clarity with regard to the intersection between data safeguarding issues, and with regard to the powers and responsibilities of child advocates, in particular. For these reasons, ORR has chosen to proceed with finalizing § 410.1308(e), § 410.1303(h), and subpart F as described in this final rule.

Comment: One commenter recommended that ORR should codify a legal obligation recently recognized in the *Ms. L* settlement agreement, to ensure that in cases where the Federal Government has separated a parent and child who traveled together, the Federal Government must provide ORR with information regarding the separation at the time of the child's transfer to ORR custody, and furthermore, that ORR is then required to provide this information within three business days to any appointed child advocate. The commenter argued that it is critical for child advocates of separated children in ORR custody to have access to all available information regarding the government's separation of the child from their parent.

Response: ORR acknowledges the settlement agreement that addresses these issues but believes that there is no conflict or inconsistency between the proposed rule under § 410.1308 and that settlement agreement.[285]

Comment: Several commenters recommended that ORR revise its proposals at § 410.1308(f) on the confidentiality obligations of child advocates, in order to establish that child advocates may disclose information in an unaccompanied child's case file, either with the child's consent or based on a best interests determination, for a variety of purposes, including in State court proceedings, in Federal court proceedings, as well as to attorneys considering representation of unaccompanied children, when such representation has been determined by a child advocate to be in a child's best interests. Several commenters also asserted that the proposed rule should reflect that child advocates shall keep communications with an unaccompanied child confidential, except where the child advocate determines that sharing of information is required to ensure the child's safety or otherwise to serve the child's best interests.

Response: Under the language of § 410.1308 as proposed, ORR did not intend for there to be any conflict

between § 410.1308(c) (which establishes that the responsibilities of a child advocate include providing best interest determinations and advocating in a proceeding or matter in which the unaccompanied child is a party or has an interest) and § 410.1308(f) (which otherwise imposes confidentiality requirements on child advocates, with respect to information in the unaccompanied child's case file). Per § 410.1308(c), child advocates have both the responsibility and authority to advocate in the manner and in proceedings as described under that paragraph. Apart from and beyond that responsibility, both ORR and child advocates also have broader duties to protect the confidentiality of the case file records of their unaccompanied child clients, as specified under § 410.1308(f). In ORR's view, the language of §§ 410.1308(c) and (f), read in totality, serves to empower child advocates to appropriately advocate for their unaccompanied child clients through best interest determinations and in a range of proceedings where those clients have an interest, while also imposing appropriate confidentiality obligations on child advocates in other contexts. Consistent with the originally proposed intent for § 410.1308(f), ORR has decided to clarify the language of that provision to read, in relevant part, ''Child advocates must keep the information in the case file, and information about the unaccompanied child's case, confidential. A child advocate may only disclose information from the case file with informed consent from the child, when this is in the child's best interests.'' These updates reflect ORR's dual intent (1) to emphasize that child advocates must be given appropriate access to materials necessary to effectively advocate for the best interest of the child, consistent with the TVPRA; and (2) to express ORR's responsibility to safeguard unaccompanied children's case files. See above preamble discussion regarding § 410.1303(h). ORR may engage in additional policymaking to further refine the application of these principles, but for purposes of this rule ORR underscores its commitment to ensuring that child advocates retain their ability to effectively advocate for the best interest of the child.

Comment: One commenter recommended modifying proposed § 410.1308(f) to prohibit a child advocate from being compelled to testify or otherwise provide evidence. That commenter specifically recommended that the proposed rule cross-reference the proceedings contemplated by proposed §§ 410.1902 and 410.1903 and clarify that child advocates cannot be compelled to testify in these proceedings. The commenter stated that the statutory provisions of the TVPRA establish that child advocates shall not be compelled to testify or provide evidence in any proceeding concerning any information or opinion received from a child in the course of serving as a child advocate.

Response: ORR acknowledges that the TVPRA states that a ''child advocate shall not be compelled to testify or provide evidence in any proceeding concerning any information or opinion received from the child in the course of serving as a child advocate.'' [286] With regard to the proceedings contemplated by proposed §§ 410.1902 and 410.1903 of this rule, the intent of those proceedings is to provide an unaccompanied child review of a restrictive placement decision made by ORR. In these administrative proceedings, an unaccompanied child may ask their child advocate to assist in their representation. Neither the unaccompanied child nor ORR can compel a child advocate to testify or provide evidence in any proceeding concerning any information or opinion received from the child in the course of serving as a child advocate. However, a child advocate may choose to participate in the proceeding when doing so is in the child's best interest. ORR will consider providing more detailed standards for child advocates in these administrative proceedings in future guidance.

Comment: A few commenters expressed support for the § 410.1308(g) proposal to protect child advocates from retaliation by ORR. The commenters noted that because child advocates make best interest determinations for unaccompanied children, this sometimes results in the advocates challenging ORR's decisions with regard to unaccompanied children. The commenters expressed appreciation for the inclusion by ORR of language in the rule to prohibit retaliation against child advocates, but also called for strengthening the proposal language to be consistent with other laws prohibiting retaliation. One commenter went further, by recommending the addition of specific regulatory language to define ''retaliation'' against a child advocate as including any adverse action impacting the child advocate's ability to fulfill their role, including with regard to access to unaccompanied children, referrals, or timely appointment decisions.

Response: ORR recognizes the importance of non-retaliation against child advocates by ORR as a necessary foundation in order for child advocates to carry out their function. ORR believes that the proposed language of § 410.1308(g) in protecting advocates from ''retaliation for actions taken within the scope of their duties'' is both sufficient and well-tailored to accomplish this purpose.

Final Rule Action: After consideration of public comments, ORR is revising § 410.1308(c)(2) to add the word ''client'' after the phrase ''unaccompanied child;'' is revising § 410.1308(d)(1) to clarify that an interested party may refer an unaccompanied child for a child advocate when the unaccompanied child is currently, or was previously in, ORR's care and custody; and is revising § 410.1308(f) to clarify that a child advocate may only disclose information from the case file with informed consent from the child when this is in the child's best interests. ORR is otherwise finalizing this section as proposed.

Section 410.1309 Legal Services

ORR proposed in the NPRM, at § 410.1309, standards and requirements relating to the provision of legal services to unaccompanied children following entry into ORR care (88 FR 68948 through 68951). The proposals under § 410.1309 also included standards relating to ORR funding for legal service providers for unaccompanied children.

ORR believes that legal service providers who represent unaccompanied children undertake an important function by representing such children while in ORR care and in some instances after release. The proposals under § 410.1309 are built on current ORR policies, which articulate standards for legal services for unaccompanied children. ORR strives for 100 percent legal representation of unaccompanied children and will continue to work towards that goal to the extent possible. ORR invited public comment as to whether and how to broaden representation for unaccompanied children (88 FR 68948).

In the NPRM, ORR noted that under the TVPRA, at 8 U.S.C. 1232(c)(5), the Secretary of HHS must ''ensure, to the greatest extent practicable and consistent with section 292 of the INA (8 U.S.C. 1362),'' that all unaccompanied children who are or have been in its custody or in the custody of DHS, with exceptions for children who are habitual residents of certain countries, have counsel ''to represent them in legal proceedings or matters and protect them from mistreatment, exploitation, and trafficking.'' The Secretary of Health and

Human Services ''shall make every effort to utilize the services of pro bono counsel who agree to provide representation to such children without charge.'' The INA, 8 U.S.C. 1362, provides, ''In any removal proceedings before an immigration judge and in any appeal proceedings before the Attorney General from any such removal proceedings, the person concerned shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose.''

Thus, under the TVPRA, HHS has an obligation, ''to the greatest extent practicable,'' to ensure that unaccompanied children have counsel in (1) immigration proceedings and (2) to protect them from mistreatment, exploitation, and trafficking. Because 8 U.S.C. 1232(c)(5) states these responsibilities are ''consistent with'' 8 U.S.C. 1362, ORR read these provisions together as establishing that, while the statute establishes HHS's obligations in relation to legal services, there is not a right to government-funded counsel under 8 U.S.C. 1232(c)(5). Rather, ORR understands that it has a duty to ensure to ''the greatest extent practicable'' that unaccompanied children have counsel at no expense to the government, for both purposes described by the TVPRA. Further, the second sentence of 8 U.S.C. 1232(c)(5) states that the Secretary of HHS shall, ''to the greatest extent practicable,'' make every effort to utilize the services of pro bono counsel. ORR understands this requirement as establishing the preferred means by which counsel is provided to unaccompanied children, but also that the Secretary has authority to utilize other types of services—namely services that are not pro bono—in areas where pro bono services are not available. In summary, insofar as it is not practicable for the Secretary of HHS to utilize the services of pro bono counsel for all unaccompanied children specified at 8 U.S.C. 1232(c)(5), and insofar as appropriations are available, the Secretary has discretion under that section also to fund client representation for counsel for the unaccompanied children both (1) in immigration proceedings, and (2) to protect them from mistreatment, exploitation, and trafficking—as such concerns may arise outside the context of immigration proceedings (*e.g.,* other discrete services outside the context of immigration proceedings as described in the paragraphs below).

ORR proposed in the NPRM, at § 410.1309(a)(1), that ORR would ensure, to the greatest extent practicable and consistent with section 292 of the INA (8 U.S.C. 1362), that all unaccompanied children who are or have been in ORR care, and who are not subject to special rules for children from contiguous countries, have access to legal advice and representation in immigration legal proceedings or matters, consistent with current policy and as further described in this section. ORR stated in the NPRM that it understood ''to the greatest extent practicable'' to reflect that the provision of legal services must be subject to available resources, as determined by ORR, and otherwise practicable (88 FR 68949).

ORR proposed in the NPRM, at § 410.1309(a)(2), that an unaccompanied child in ORR care receive (1) a presentation concerning the rights and responsibilities of unaccompanied children in the immigration system, including information about protections under child labor laws and educational rights, presented in the language of the unaccompanied child and in an age-appropriate manner; (2) information regarding availability of free legal assistance, and that they may be represented by counsel, at no expense to the Government; [287] (3) notification of the ability to petition for SIJ classification, to request that a State juvenile court determine dependency or placement, and notification of the ability to apply for asylum or other forms of relief from removal; (4) information regarding the unaccompanied child's right to a removal hearing before an immigration judge, the ability to apply for asylum with USCIS in the first instance, and the ability to request voluntary departure in lieu of removal; and (5) a confidential legal consultation with a qualified attorney (or paralegal working under the direction of an attorney, or DOJ Accredited Representative) to determine possible forms of legal relief in relation to the unaccompanied child's immigration case. ORR also proposed in § 410.1309(a)(2) that an unaccompanied child in ORR care be able to communicate privately with their attorney of record, DOJ Accredited Representative, or legal service provider, in a private enclosed area that allows for confidentiality for in-person and virtual or telephone meetings. ORR noted that these proposed services go beyond that which is required under the FSA. For example, although both the FSA and proposed § 410.1309(a)(2) require that unaccompanied children receive information regarding their legal rights and availability of free legal assistance, § 410.1309(a)(2) would provide additional specificity about the type of information that would be provided. Additionally, ORR noted that § 410.1309(a)(2) goes beyond the scope of what is required under the FSA by providing that unaccompanied children receive not just information regarding the availability of legal counsel, but also requiring that unaccompanied children receive a confidential legal consultation with a qualified attorney (or paralegal working under the direction of an attorney, or a DOJ Accredited Representative) to help them understand their individual immigration case. Finally, although the FSA requires that unaccompanied children have ''a reasonable right to privacy,'' which includes the right to talk privately on the phone and meet privately with guests (as permitted by the facility's house rules and regulations), FSA Exhibit 1 at paragraph 12A, § 410.1309(a)(2) would go beyond the FSA's requirement to make explicit that communications and meetings with the unaccompanied child's attorney of record, DOJ Accredited Representative, and legal service provider must be held in enclosed designated spaces, without reference to any limitation on such rights by the facility's house rules and regulations.

With respect to the confidential legal consultation, ORR noted the importance of allowing unaccompanied children and their legal service providers, attorneys of record, or DOJ Accredited Representatives access to private space, to ensure that any communications or meetings about legal matters can be held confidentially. In addition, in developing the proposal to require a presentation on the rights of unaccompanied children in the immigration system, ORR considered including a requirement for additional presentations for unaccompanied children who remain in ORR care beyond six months.

At § 410.1309(a)(3), ORR proposed in the NPRM that it would require this information, regarding unaccompanied children's legal rights and access to services while in ORR care, to be posted in an age-appropriate format and translated into each child's preferred language consistent with proposed § 410.1306, in any ORR contracted or grant-funded facility where unaccompanied children are in ORR care.

ORR proposed in the NPRM, at § 410.1309(a)(4), that to the extent that appropriations are available, and insofar as it is not practicable to secure pro bono counsel for unaccompanied children as specified at 8 U.S.C. 1232(c)(5), ORR would fund legal service providers to provide direct

immigration legal representation to certain unaccompanied children subject to ORR's discretion to the extent it determines appropriations are available. Examples of direct immigration legal representation include, but are not limited to, (1) for unrepresented unaccompanied children who become enrolled in ORR URM Programs, provided they have not yet obtained lawful status or reached 18 years of age at the time of retention of an attorney; (2) for unaccompanied children in ORR care who must appear before EOIR, including children seeking voluntary departure, or who must appear before U.S. Citizenship and Immigration Services (USCIS); (3) for unaccompanied children released to a sponsor residing in the defined service area of the same legal service provider who provided the child legal services in ORR care, to promote continuity of legal services; and (4) for other unaccompanied children, in ORR's discretion.

Under § 410.1309(b), ORR proposed in the NPRM that it would fund legal services for the protection of an unaccompanied child's interests in certain matters not involving direct immigration representation, consistent with its obligations under the HSA, 6 U.S.C. 279(b)(1)(B), and the TVPRA, 8 U.S.C. 1232(c)(5). In addition to the direct immigration representation outlined in § 410.1309(a)(4), to the extent ORR determines that appropriations are available and use of pro bono counsel is impracticable, ORR proposed in the NPRM that it may (but is not required to) make funding for additional access to counsel available for unaccompanied children in the following enumerated situations for proceedings outside of the immigration system when appropriations allow and subject to ORR's discretion in no particular order of prioritization: (1) ORR appellate procedures, including the Placement Review Panel (PRP) related to placement in restrictive facilities under § 410.1902, risk determination hearings under § 410.1903, and the denial of a release to the child's parent or legal guardian or close relative potential sponsor under § 410.1206; (2) for unaccompanied children upon their placement in ORR long-term home care or in an RTC outside a licensed ORR facility and for whom other legal assistance does not satisfy the legal needs of the individual child; (3) for unaccompanied children with no identified sponsor who are unable to be placed in ORR long-term home care or ORR transitional home care; (4) for purposes of judicial bypass or similar legal processes as necessary to enable an unaccompanied child to access certain lawful medical procedures that require the consent of the parent or legal guardian under State law and the unaccompanied child is unable or unwilling to obtain such consent; (5) for the purpose of representing an unaccompanied child in State juvenile court proceedings, when the unaccompanied child already possesses SIJ classification; and (6) for the purpose of helping an unaccompanied child to obtain an employment authorization document. ORR invited comment on these proposals under § 410.1309(b), and with regard to how a mechanism might be incorporated into the rule to help prevent, or reduce the likelihood of, the zeroing-out of funding for legal representation, while also ensuring sufficient funding for capacity to address influxes.

At § 410.1309(c), ORR proposed in the NPRM to establish relevant requirements and expectations for the provision of the legal services described at § 410.1309(a) and (b). ORR proposed in the NPRM at § 410.1309(c)(1) that in the course of funding legal counsel for any unaccompanied children under § 410.1309(a)(4) or (b)(2), in-person meetings would be preferred, although unaccompanied children and their representatives would be able to meet by telephone or teleconference as an alternative option when needed and when such meetings can be facilitated in such a way as to preserve the unaccompanied child's privacy. Either the unaccompanied child's attorney of record or DOJ Accredited Representative or an ORR staff member or care provider would always accompany the unaccompanied child to any in-person hearing or proceeding, in connection with any legal representation of an unaccompanied child pursuant to § 410.1309.

When developing § 410.1309(c)(1), ORR considered the alternatives of enacting a requirement that an unaccompanied child's attorney of record or DOJ Accredited Representative always be required to attend court hearings and proceedings in-person with the unaccompanied child, or that the attorney of record or DOJ Accredited Representative always engage in in-person meetings with the unaccompanied child while representing them, absent a good cause reason not to do so (88 FR 68950). ORR concluded that the proposal at § 410.1309(c)(1) reflected a balance between ensuring that unaccompanied children have effective access to legal representation and services, while establishing a preference for in-person meetings, and ensuring that unaccompanied children will not have to walk into physical proceedings alone.

Under § 410.1309(c)(2), ORR proposed in the NPRM to require the sharing of certain information with an unaccompanied child's representative, including certain notices. Under paragraph (c)(2), upon receipt by ORR of (1) proof of representation and (2) authorization for release of records signed by the unaccompanied child or other authorized representative, ORR would, upon request, share the unaccompanied child's complete case file apart from any legally required redactions to assist with legal representation of that child. Section 410.1309(c)(2) reflected current ORR policy guidance describing the process by which an individual will be recognized by ORR as the attorney of record or DOJ Accredited Representative for an unaccompanied child. Under current practice, ORR recognizes an individual as an unaccompanied child's attorney of record or DOJ Accredited Representative through the submission of an ORR form, the ORR Notice of Attorney Representation. ORR noted that this form is not identified specifically in the proposed regulatory text to preserve operational flexibility for ORR to accept different forms of proof as appropriate. ORR also considered the importance of timely notice by ORR to the unaccompanied child's representative to allow for effective legal representation, in connection with law enforcement events, age redetermination processes, and allegations of sexual abuse or harassment.

ORR sought public comment on these issues, including the scope of reportable events or interactions with law enforcement and scope of notice depending on the unaccompanied child's involvement in the reportable event (*i.e.,* as an alleged victim, alleged perpetrator, or as a witness). With allegations or accusations of sexual abuse or harassment, ORR solicited public comment on privacy concerns and other considerations. ORR also solicited comments on the appropriate timeframes for various types of notification (88 FR 68950).

As discussed in section III.B of this final rule, the Secretary's authority under 8 U.S.C. 1232 has been delegated to the ORR Director. As discussed above, ORR understands that in addition to expanding access to pro bono services and funding legal services in immigration-related proceedings or matters, it may also promote pro bono services and fund legal services for

broader purposes that relate to protecting unaccompanied children from mistreatment, exploitation, and trafficking. Consistent with the TVPRA, ORR makes every effort to use pro bono legal services to the greatest extent practicable to secure counsel for unaccompanied children in these contexts. Specifically, ORR-funded legal service providers may help coordinate a referral to pro bono services, and ORR provides each unaccompanied child with lists of pro bono legal service providers by State and pro bono services available through a national organization upon admission into a care provider facility.[288] That said, in some cases it is impracticable for ORR to secure pro bono legal services for unaccompanied children. For example, it may be impracticable to secure pro bono services if the demand for such services exceeds the supply of pro bono services, as may occur at certain locations or during times of influx. To the extent pro bono legal services are unavailable or impracticable to secure because ORR has limited resources, ORR must be selective in the kinds of legal services it funds. As a result, ORR proposed in the NPRM to establish its discretion to fund legal services for specific purposes, based on its judgment and priorities.

In terms of funding legal services, at § 410.1309(d), ORR also proposed, in its discretion and subject to available resources, to make available funds (if appropriated) to relevant agencies or organizations to provide legal services for unaccompanied children who have been released from ORR care and custody. ORR would establish authority to make available grants–including formula grants distributed geographically in proportion to the population of released unaccompanied children–or contracts for immigration legal representation, assistance, and related services to unaccompanied children.

To prevent retaliation against legal service providers, at § 410.1309(e), ORR proposed in the NPRM that it shall presume that legal service providers are acting in good faith with respect to their advocacy on behalf of unaccompanied children, and ORR shall not retaliate against a legal service provider for actions taken within the scope of the legal service provider's responsibilities. For example, ORR shall not engage in retaliatory actions against legal service providers or any other representative for reporting harm or misconduct on behalf of an unaccompanied child. As noted at § 410.1309(e), ORR will not retaliate against legal service providers; however, ORR has the responsibility and authority to effectively manage its unaccompanied children's program which includes, for example, ensuring that the interests of the child are considered in decisions and actions relating to care and custody, implementing policies with respect to the care and placement of unaccompanied children, and overseeing the infrastructure and personnel of facilities in which unaccompanied children reside.

Comment: Several commenters suggested that ORR should provide additional language access to unaccompanied children by ensuring that legal services are provided in the child's ''native or preferred'' language. One commenter explained that this is especially important for indigenous unaccompanied children so that they can make informed legal decisions and file complaints with the correct oversight bodies.

Response: ORR agrees with the commenters that good quality legal advice and representation for all children depends on the child's ability to effectively communicate with their attorney in their native or preferred language. After considering the public comments, ORR is revising § 410.1309(a)(2)(i) to state ''native or preferred language of the unaccompanied child'' rather than ''the language of the unaccompanied child.''

Comment: ORR sought public comments regarding whether and how to broaden representation for unaccompanied children in its care. ORR received multiple comments supporting the expansion of legal services for unaccompanied children and offering ideas about how ORR could do so. ORR also received multiple comments questioning ORR's legal authority to pay for legal services for unaccompanied children and suggesting that ORR not use taxpayer dollars to fund legal representation for unaccompanied children.

Response: ORR recognizes that most unaccompanied children need legal services to resolve their immigration status and that representation appears to have a significant impact on both the court appearance rate and the outcome of cases for unaccompanied children. As ORR has explained, pursuant to the TVPRA, HHS has an obligation, ''to the greatest extent practicable,'' and consistent with section 292 of the Immigration and Nationality Act, to ensure that unaccompanied children have counsel in their immigration proceedings. But as explained in the preamble, the fact that the statute says that the Secretary shall make every effort to utilize the services of pro bono counsel to ''the greatest extent practicable'' makes clear that HHS also has authority to pay for legal services beyond what is available from pro bono counsel when meeting the Secretary's statutory obligations.[289]

ORR understands that some commenters would like ORR to fully fund legal services to all unaccompanied children while others do not believe tax dollars should be spent on legal services for unaccompanied children. After reviewing the various comments, ORR has determined that its approach to providing legal services to unaccompanied children by enabling them to access pro bono counsel ''to the greatest extent practicable'' and funding legal services for additional unaccompanied children, as resources allow, is consistent with ORR's statutory obligations.

ORR believes that the commenters who challenged whether ORR has the authority to pay for legal representation are mistaken. INA section 292 does not prohibit ''aliens in removal proceedings'' from receiving Government-funded representation. Instead, section 292 establishes that aliens have a privilege to be represented by counsel of their choice, if the counsel is authorized to practice in immigration proceedings, but that the aliens do not have a right to counsel paid for by the Government. It does not place any limitation on the Government's discretion to fund client representation and therefore does not limit the Secretary's authority to fund such representation under section 235(c)(5) of the TVPRA.

Several commenters suggested that ORR should commit to fully funding legal representation for all unaccompanied children or should include language in the rule that requires appointment of an attorney for every child in ORR's custody.

Response: While ORR does seek to expand legal representation for unaccompanied children and will continue to seek appropriations from Congress to make this possible,[290] ORR cannot, by regulation, commit itself to pay for representation without regard to whether Congress has appropriated sufficient funds to do so. ORR has clarified at § 410.1309(a)(2), however, its responsibility to provide unaccompanied children with a list and contact information for pro bono attorneys and assist them with retaining an attorney as needed.

Comment: Several commenters provided specific ideas for expanding access to legal services short of mandated funding. One commenter

suggested using collaborative intake hubs which co-locate legal services providers with other types of social services providers for unaccompanied children. The commenter argued that such hubs can reduce the need for children to engage in extensive outreach to numerous providers to access both legal and social services, and that hubs enable efficiencies in referring cases and screening children for eligibility for relief. Several commenters also encouraged the use of the ImportaMi program via Apps like WhatsApp, Facebook, and Facebook Messenger. These commenters argued that these modes of communication are more regularly used by unaccompanied children than telephone or email, and that children have had greater success in finding counsel with help from ImportaMi than by using ORR's conventional lists of legal service providers. Another comment suggested deepening and retaining pools of talented attorneys and legal staff through partnerships and fellowships dedicated to public interest immigration representation. The commenter also recommended convening regular stakeholder engagements on a local and regional basis to gather feedback about specific representation landscapes, barriers, and opportunities. Another commenter argued that trainings and outreach should be continuously available, with particular focus on trauma-informed interviewing techniques, child-centered practices, cultural responsiveness, and fluency or proficiency in languages commonly spoken by unaccompanied children.

Response: ORR is considering these and additional options but has deliberately not specified the specific mechanisms of service delivery or the technical details of the modes of communication that an unaccompanied child may use to communicate with or retain an attorney given that technology platforms and applications continuously change over time.

Comment: Multiple commenters suggested expanding the scope of legal services orientations and information provided to children about their rights. One commenter recommended that children should be provided with information about avoiding exploitative situations, legal rights in the context of labor exploitation, and local resources where children can turn to for assistance. Several commenters recommended including in a legal rights orientation notice information regarding the right to counsel, steps for finding counsel, the right to confidential meetings with counsel, and the right to counsel in step-up proceedings.

A few commenters indicated that telephonic and video legal services orientations should only be permitted in rare instances and only to protect the health and wellness of children in ORR's care. One commenter argued that telephonic and video orientations limit presenters' ability to gauge children's comprehension, engage children throughout the orientation, and minimize external distractions. A commenter pointed out that orientations serve to inform children of critical information about the legal process and their rights, but also lay a foundation for a child to begin to establish trust with a legal service provider.

A few commenters offered feedback and recommendations on the posting of legal services orientation information. One commenter recommended that the rule should be expanded to incorporate specific examples of what age-appropriate legal rights postings should look like, for different age groups.

Response: ORR is committed to ensuring that all unaccompanied children receive a comprehensive orientation and information about their legal rights in an age-appropriate format. ORR believes that the rule recognizes the minimal foundational requirements for the orientation and accessibility of information while also providing ORR with flexibility on how to operationalize it. Having said that, ORR recognizes the benefit of providing unaccompanied children specific notification of and information regarding their right to a risk determination hearing during such orientations to ensure that they are aware of this right and the process for exercising this right. Given the multiple comments suggesting that ORR expand the scope of legal services orientations and information provided to unaccompanied children about their rights, ORR is adding new paragraph (a)(2)(vii) to § 410.1309 to provide that as part of a child's orientation, the child shall receive information regarding the child's right to a hearing before an independent HHS hearing officer, to determine, through a written decision, whether the unaccompanied child would present a risk of danger to self or to the community if released, as described at § 410.1903(a) and (b).

ORR appreciates the benefits of providing legal orientations in-person. However, the feasibility of providing in-person orientations may vary, particularly given the need to do so in a timely manner, and the need to do so in each unaccompanied child's native or preferred language. ORR anticipates that sometimes there may be unavoidable trade-offs between providing a timely legal services orientation versus providing an in-person legal services orientation. Rather than establish detailed requirements or standards to address this issue, ORR's proposal under § 410.1309(a)(2)(i)(A) deliberately leaves these details unspecified, in anticipation of future ORR guidance, contracting terms, and the likelihood that ORR's policies and standards regarding in-person versus telephonic or video legal services orientations may need to be updated over time.

Comment: One commenter argued that the term ''in an age-appropriate manner'' in § 410.1309(a)(2) does not adequately address the differences between age and development. The commenter recommended replacing this language with the phrase ''in an age, developmentally, and culturally appropriate matter.''

Response: ORR intends that the phrase ''age-appropriate,'' as used in § 410.1309(a)(2), is synonymous with the term ''developmentally appropriate.'' ORR is revising the paragraph to state that the required presentation must be presented in the native or preferred language of the unaccompanied child, which ORR believes would cover the language being culturally appropriate.

Comment: One commenter expressed support for the proposal under § 410.1309(a)(2) for confidential legal consultations for unaccompanied children, and for the proposal for a second consultation for some children once identified as falling into one of several enumerated, high-risk categories. Several commenters recommended modifying the proposals under § 410.1309(a)(2) to require ORR to allow at least one additional legal consultation for all unaccompanied children to the extent practicable, rather than only to those children at heightened risk as specified under § 410.1309(a)(2)(v). The commenters argued that, based on trauma-informed care experience, a substantial number of contacts with an unaccompanied child may be necessary to establish the rapport and trust needed for the child to feel safe enough to disclose the difficult details of the events that may make them eligible for various forms of relief. Another commenter argued that it was over-inclusive for the proposal to require a second legal consultation for those unaccompanied children at heightened risk as specified under § 410.1309(a)(2)(v), because for many of those children, the heightened risk factors might already have been identified during the first legal consultation, so as to render a second consultation duplicative. The commenter recommended making the

second consultation subject to ORR's discretion, while adding an additional category of children for whom ORR could permit a second follow-up legal consultation to apply in other circumstances in which ORR learns of new information or particular vulnerabilities that suggest a child might benefit from additional information or advice about their legal options.

Response: ORR believes that access to a confidential legal consultation under § 410.1309(a)(2)(v) constitutes an important protection for the rights and welfare of unaccompanied children in ORR care, and that a second (repeated) legal consultation can be very valuable in protecting high-risk unaccompanied children, both by helping to establish trust through repeated contact, and also by allowing for more tailored discussion of an unaccompanied child's legal situation, as new facts and vulnerabilities concerning the child are discovered. In ORR's view, the current language of § 410.1309(a)(2)(v) strikes a reasonable balance in making confidential legal consultations available to unaccompanied children, while prioritizing mandatory access to a second consultation when children are identified as falling into a high-risk category. ORR also notes that § 410.1309(a)(2)(v) says that legal consultations shall occur or shall be requested by ORR under stated conditions, but this does not preclude ORR from requesting additional legal consultations for other unaccompanied children, when deemed appropriate (*e.g.,* when ORR learns of new information that suggests a child might benefit from additional advice about legal options). In sum, ORR believes that the current proposal language of § 410.1309(a)(2)(v) provides flexibility for providing confidential legal consultations to unaccompanied children, based on their needs and sensitive to changing conditions and new information about the vulnerability of specific children in ORR custody.

Comment: A few commenters recommended changing the proposal under § 410.1309(a)(2), which requires a legal services orientation to occur within 10 business days of a child's admission to ORR, or transfer to a new ORR facility other than long-term home care or transitional home care. The commenters observed that the exception for unaccompanied children in long-term care makes sense, because most or all such children receive direct, full-scope representation by a legal service provider upon their placement. However, the commenters argued that the same is not true for children placed in transitional foster care, which is typically short term, and for which it does not make sense to forego the requirement for a timely refresher legal services orientation. The commenters therefore recommended dropping the exception regarding unaccompanied children placed in transitional home care.

Response: In ORR's view, one of the defining attributes of a placement for an unaccompanied child in transitional home care is that such placements are short-term and will therefore typically be followed in the short-term by another transfer, or by placement into long-term home care, or by a release from ORR custody to a suitable sponsor. As written, the exception in § 410.1309(a)(2) contemplates this and compels a follow-up legal services orientation to take place in the short-term, in those situations where an unaccompanied child is once again transferred by ORR out of the transitional home care setting, while remaining in ORR custody. Taken in this light, ORR believes that the § 410.1309(a)(2) exception to the requirement for a legal services orientation, in the case of transfers to transitional home care, is reasonable and appropriate.

Comment: One commenter recommended, regarding § 410.1309(a)(2), that ORR should require facilities to set aside sufficient space for attorneys to meet confidentially with their clients. The commenter asserted that many facilities do not have designated space for legal screenings and scramble at the last minute to find such space. The commenter argued that as a result, legal screenings often take place in a variety of inappropriate spaces. The commenter further argued that to address these issues, ORR should provide clear guidelines to shelters about the number of appropriate confidential spaces for legal screenings and meetings that are needed, based on facility capacity.

Response: ORR notes that § 410.1309(a)(2)(vi) provides that an unaccompanied child in ORR care shall be able to conduct private communications with their attorney of record, DOJ Accredited Representative, or legal service provider in a private enclosed area that allows for confidentiality for in-person, virtual, or telephonic meetings. While ORR does agree with the importance of providing unaccompanied children with access to private spaces for the conduct of confidential legal meetings with counsel and is requiring it, ORR believes that it is beyond the scope of § 410.1309(a)(2) to address this issue with detailed physical plant requirements for care facilities.

Comment: One commenter recommended a change to the proposed language at § 410.1309(a)(2)(v) (which requires a legal consultation meeting within 10 business days of a child's transfer to a new ORR facility, either with a qualified attorney, supervised paralegal, or DOJ Accredited Representative), by arguing that clarity would be enhanced by stating that an ORR care provider facility should not retain a child in its care solely to fulfill this requirement, if the child is ready for unification before the 10-day mark. Another commenter recommended revising the language of this proposal, by replacing the word ''paralegal'' with ''other legal professional working under the supervision of an attorney,'' regarding the types of professionals who can carry out legal consultation meetings with unaccompanied children. The commenter argued in support that many legal service providers now serving unaccompanied children employ qualified non-attorney legal services professionals who do not carry the specific title of ''paralegal.''

Response: In ORR's view, there is nothing in the text of § 410.1309(a)(2)(v) to compel a provider to hold unaccompanied children in custody who are otherwise ready for unification for the sole purpose of ensuring that a legal consultation meeting occurs and it is not ORR's intent that a child otherwise ready to be released to a sponsor should ever remain in custody on the basis of the need for a legal services orientation. Regarding the use of the term ''paralegal'' in § 410.1309(a)(2)(v), and those categories of persons who are authorized to engage in confidential legal consultations with an unaccompanied child: ORR intended, when using the term ''paralegal,'' to refer to legal services professionals with technical skills and experience akin to those possessed by a traditional paralegal. ORR will consider issuing more detailed technical guidance in the future, to address licensing, experience, and supervision requirements for legal services professionals in this context, including paralegals.

Comment: One commenter expressed concern about the lack of quality standards for legal counsel to unaccompanied children under proposed § 410.1309(a)(4). The commenter argued, by analogy, that in the commenter's view, there can be quality concerns within the criminal justice system regarding public defenders. The commenter questioned whether the same deficiencies might be

true of appointed counsel in unaccompanied children's immigration cases.

Response: ORR notes that attorneys are licensed and monitored by State licensing authorities and that DOJ Accredited Representatives are accredited according to DOJ standards. It is beyond the scope of this rulemaking to address detailed quality standards for legal counsel to unaccompanied children in immigration cases.

Comment: A few commenters expressed opposition to language in proposed § 410.1309(a)(4) that would exclude from potential funding for legal representation unaccompanied children in the URM Program who have reached the age of 18. One commenter argued that under this proposed language, a child might turn 18 before being able to complete their applications for relief, and that this result would be contrary to the stated aims of the TVPRA statute. The commenter recommended that, in order to uphold both the TVPRA and the mission of the URM program, ORR should eliminate age-based restrictions on counsel for children in URM. Another commenter made several additional arguments against excluding children from legal representation based on turning 18, including that there might not be LSP capacity to serve a child close to her 18th birthday; that indigenous language speakers might face greater challenges in communicating with LSPs, leading to added delays in accessing counsel; that the States are varied in recognizing the age of majority, such that some States do not recognize the age of majority until 21; and that recent neuroscientific evidence suggests that adult brain development and reasoning skills are not achieved until age 25. The commenter concluded that ORR should allow unaccompanied children in URM custody to continue to be eligible for legal representation until the age of 25, or at the very least until age 21.

Response: ORR does recognize that the language in proposed § 410.1309(a)(4), with regard to unaccompanied children in the URM Program, may result in some children, who would otherwise be eligible for legal representation funded by ORR, turning 18 before attaining legal representation. However, ORR notes that similar problems could also arise under any other bright-line eligibility criterion, based on age, for access by unaccompanied children to legal counsel. Based on ORR's analysis of § 235(c)(5) of the TVPRA and § 292 of the INA, ORR believes that the language under § 410.1309(a)(4) for funding for immigration legal counsel for unaccompanied children is reasonable and appropriate, including the exclusion from funding for legal representation of unaccompanied children in the URM Program who have reached the age of 18 before retention of an attorney.

Comment: A few commenters recommended modifying the proposals at § 410.1309(c)(2), to expand on ORR's obligations regarding disclosing information from an unaccompanied child's case file to the child's attorney. One commenter recommended adding an explicit list of types of information that ORR is required to disclose to a child's attorney, including all interactions with law enforcement; all allegations or accusations of sexual harassment or abuse; and any information that can or will be shared with any enforcement agencies. One commenter argued that the current proposal does not specify a reasonable timeframe for the delivery of the case file, and recommended that at a minimum, the case file must be provided to counsel in a reasonable timeframe before any applicable hearing. A few commenters recommended that information from the case file regarding contact with law enforcement or allegations of abuse and harassment should be turned over no later than 30 days after the incident, or in the case of investigations or reports, not more than 30 days after the creation of the document. These commenters went on to assert that all interactions with law enforcement or allegations of harassment should be shared with counsel for the child, because such interactions and allegations will likely be relevant to the child's immigration relief. A few commenters recommended that the proposed language in § 410.1309(c)(2) (regarding disclosures of case file information by ORR to an unaccompanied child's legal counsel) should be harmonized with current ORR policy, which permits care provider facilities to share certain information directly with a child's attorney, subject to the child's consent and as related to the child's legal case.

Response: Under § 410.1309(c)(2), as proposed, ORR ''shall share, upon request, the unaccompanied child's complete case file, apart from any legally required redactions.'' In ORR's view, this language makes it clear that ORR will disclose, and is required to disclose, all aspects of an unaccompanied child's case file to that child's attorney of record, including, without limitation, contacts with law enforcement and abuse and harassment allegations. In order to clarify this point under the rule, ORR is revising § 410.1309(c)(2) to read, in pertinent part, that ''. . . ORR shall share, upon request and within a reasonable timeframe to be established by ORR, the unaccompanied child's complete case file, apart from any legally required redactions, to assist in the legal representation of the unaccompanied child.'' Because the rule contemplates that ORR will disclose the entire case file to the attorney of record or DOJ Accredited Representative within a reasonable time frame, it is ORR's judgment and intent that this policy will usually result in full disclosure well before a 30-day disclosure deadline would apply. It is also ORR's judgment that it is better policy for ORR to retain discretion through future guidance about what constitutes a reasonable timeframe for disclosure of the complete case file upon request by the attorney of record or DOJ Accredited Representative, since this may need to be revisited by ORR from time to time, particularly as circumstances change.

Furthermore, to clarify ORR's responsibility to provide access by unaccompanied children and their attorney of record or DOJ Accredited Representative to key documents from the case file on an expedited basis, in the context of time-sensitive proceedings, ORR is revising § 410.1309(c) to add two new sub-paragraphs, to define what an ''expedited basis'' situation refers to, and to establish that ''If an unaccompanied child's attorney of record or DOJ Accredited Representative properly requests their client's case file on an expedited basis, ORR shall, within seven calendar days, unless otherwise provided herein, provide the attorney of record with key documents from the unaccompanied child's case file, as determined by ORR.''

In addition, ORR is also clarifying at § 410.1309(c)(2) its responsibility to share with an attorney of record or DOJ Accredited Representative, upon request, the name and telephone number of all potential sponsors who have submitted a completed Family Reunification Application to ORR, if the sponsors have provided consent to release their information.

Further, in response to comments about providing complete documentation to attorneys of record, DOJ Accredited Representatives, and unaccompanied children, ORR has clarified at § 410.1309(c)(2) that it will allow an unaccompanied child to review, upon request and in the company of their attorney of record or DOJ Accredited Representative, if any, such papers or writings as the child possessed at the time they were

apprehended by DHS or came into the custody of the relevant Federal department or agency, if those papers or writings are in ORR's or an ORR care provider facility's possession. Specifically, ORR has revised § 410.1309(c)(2) to include the following language: ''Absent a reasonable belief based upon articulable facts that doing so would endanger an unaccompanied child, ORR shall ensure that unaccompanied children are allowed to review, upon request and in the company of their attorney of record or DOJ Accredited Representative if any, such papers, notes, and other writings they possessed at the time they were apprehended by DHS, or another Federal department or agency, that are in ORR or an ORR care provider's possession.''

Finally, and to ensure that ORR is aware of and responsive to any problems in timely disclosure of information to attorneys of record or DOJ Accredited Representatives, as well as any other complaints or problems from legal representatives regarding emerging issues, ORR is further revising § 410.1309 by adding a new paragraph (f), as follows: ''*Resource email box.* ORR shall create and maintain a resource email box for feedback from legal services providers regarding emerging issues related to immediate performance of legal services at care provider facilities. ORR shall address such emerging issues as needed.''

Comment: One commenter recommended that ORR should codify in the NPRM, at § 410.1309(c)(2), certain requirements specified in the recent *Ms. L* litigation relating to family separations, including a requirement that where the Department of Homeland Security (DHS) has separated a parent and child who traveled together, DHS must provide ORR with information regarding the separation at the time of the child's transfer to ORR custody. This information includes information regarding DHS' reason for separation and the location and contact information for the parent or legal guardian. ORR is then required to provide this information, within three business days, to the facility where the child is being held, to the child's attorney of record and/or DOJ Accredited Representative, and to any appointed child advocate. The commenter argued that ORR should codify this legal obligation in the regulations to ensure that separated children's counsel and advocates are promptly provided with the information they need to effectively advocate for them, and to facilitate prompt unification of the child with their parent whenever possible.

Response: ORR welcomed the judicial approval of the settlement in the *Ms. L* litigation, which, among other things, established important restrictions on future family separations and specified a set of significant procedural protections when separations do occur. ORR appreciates the importance of ORR receiving information about the reasons for separations and sharing that information with the child's attorney, child advocate, and the program in which a separated child is placed. ORR is not codifying requirements of the *Ms. L* settlement in this rule because they were not subject to notice and comment procedures, but intends to fully comply with those requirements, and believes that there is no conflict or inconsistency between the proposed rule under § 410.1309(c)(2) and ORR's obligations under the settlement agreement.

Comment: A few commenters recommended additional steps that ORR should take, moving beyond what is currently proposed under § 410.1309(d), in order to increase the likelihood of ORR meeting its goal of ensuring legal representation for all unaccompanied children by 2027. A few commenters objected to the proposed funding mechanism described in the rule, ''based on the historic proportion of the unaccompanied child population in the State within a lookback period determined by the Director [of ORR].'' The commenters argued that reliance on past apportioning across States could fail to account for current referral volumes and recommended that ORR modify its proposal to determine grant funding to States based in part on current ORR and CBP referrals. The commenters also objected to giving discretion to the ORR Director to determine the lookback period for determining apportionment based on States' historical data, as creating another opportunity for bias and gaming in funding decisions.

Response: Under § 410.1309(d), ORR may make grants or contracts, in its discretion and subject to available resources—including formula grants distributed geographically in proportion to the population of released unaccompanied children—as determined by ORR in accordance with the eligibility requirements outlined in the authorizing statute, for the purpose of providing legal representation. ORR would note that this language broadly describes what ORR may do, rather than what it must do, by way of grant and contract funding mechanisms for immigration legal services to unaccompanied children. In ORR's view, the proposal at § 410.1309(d) is appropriate and consistent with its statutory authorities.

Comment: A few commenters expressed support for the proposals at § 410.1309(e), codifying ORR's duty not to retaliate against legal service providers who represent unaccompanied children. The commenters observed that this safeguard is needed to uphold children's right to receive independent legal counsel, and to ensure that their attorneys can exercise their professional and ethical obligations free of intimidation or interference.

Response: ORR thanks the commenters for their support of proposed § 410.1309(e) on non-retaliation against legal service providers. ORR is correcting a typo in the language of § 410.1309(e), by adding an apostrophe to the expression ''for actions taken within the scope of the legal service provider's . . . responsibilities.''

Final Rule Action: After consideration of public comments, ORR is revising § 410.1309(a)(2)(i) to refer to the native or preferred language of the unaccompanied child; § 410.1309(a)(2)(ii) to require that when an unaccompanied child requests legal counsel, ORR will ensure that the child is provided with a list and contact information for pro bono counsel, and reasonable assistance to ensure that the child is able to successfully engage an attorney at no cost to the Government; § 410.1309(a)(2) to add new paragraph (a)(2)(vii) to provide that as part of a child's orientation, the child shall receive information regarding the child's right to a hearing before an independent HHS hearing officer, to determine, through a written decision, whether the unaccompanied child would present a risk of danger to self or to the community if released, as described at § 410.1903(a) and (b); § 410.1309(c)(2) to clarify that ORR shall share, upon request and within a reasonable timeframe to be established by ORR, the unaccompanied child's complete case file, apart from any legally required redactions; § 410.1309(c)(2) to require that ORR share information with an attorney of record or DOJ Accredited Representative, upon request, the name and telephone number of all potential sponsors who have submitted a completed Family Reunification Application, if the sponsors have provided consent to release their information; § 410.1309(c)(2) to clarify that ORR shall, absent a reasonable belief based upon articulable facts that doing so would endanger an

unaccompanied child, ensure that unaccompanied children are allowed to review, upon request and in the company of their attorney of record or DOJ Accredited Representative, if any, such papers, notes, and other writings they possessed at the time they were apprehended by DHS or another Federal department or agency, that are in ORR or an ORR care provider's possession; § 410.1309(c) by adding two new sub-paragraphs (3) and (4), to define what an ''expedited basis'' situation refers to, and to establish that if an unaccompanied child's attorney of record or DOJ Accredited Representative properly requests their client's case file on an expedited basis, ORR shall, within seven calendar days, unless otherwise provided herein, provide the attorney of record or DOJ Accredited Representative with key documents from the unaccompanied child's case file, as determined by ORR; § 410.1309(e), by adding an apostrophe to the phrase ''legal service provider's,'' to clarify that ORR shall not retaliate against a legal service provider for actions taken within the scope of that person's responsibilities; and adding § 410.1309(f) to state that ORR shall create and maintain a resource email box for feedback from legal services providers regarding emerging issues related to immediate performance of legal services at care provider facilities, and that ORR shall address such emerging issues as needed; and is otherwise finalizing this section as proposed.

Section 410.1310 Psychotropic Medications

ORR proposed in the NPRM requirements related to the administration of psychotropic medications to unaccompanied children while in ORR care (88 FR 68951). ORR noted that the third of the five plaintiff classes certified by the United States District Court for the Central District of California in the *Lucas R.* case, as discussed in section III.B.4. of this final rule, is the ''drug administration class.'' The class is comprised of unaccompanied children in ORR custody ''who are or will be prescribed or administered one or more psychotropic medications without procedural safeguards[.]'' [291] At the time of this writing, the parties in the *Lucas R.* case have negotiated a proposed settlement agreement that would resolve this claim. The settlement agreement was preliminarily approved by the Court on January 5, 2024,[292] and the final approval hearing is scheduled for May 3, 2024.

The proposed rule stated ORR's belief that psychotropic medications should only be administered appropriately and in the best interest of the child and with meaningful oversight (88 FR 68951). Therefore, ORR proposed in the NPRM in § 410.1310(a) that, except in the case of a psychiatric emergency, ORR must ensure that, whenever possible, authorized individuals provide informed consent prior to the administration of psychotropic medications to unaccompanied children. In § 410.1310(b), ORR proposed in the NPRM that it would ensure meaningful oversight of the administration of psychotropic medication(s) to unaccompanied children. Examples of such oversight are the review of cases flagged by care providers, and secondary retrospective reviews of the administration of psychotropic medication(s) in certain circumstances, such as based on the child's age, the number of psychotropic medications that have been prescribed, or the dosages of such psychotropic medications.

Comment: One commenter recommended ORR strengthen due process protections for unaccompanied children and provide enhanced safeguards for children who are administered psychotropic medications.

Response: ORR agrees that safeguards for unaccompanied children who are administered psychotropic medications are important and believes that ensuring unaccompanied children have assistance of legal counsel can help ensure their protection. Therefore, ORR is adding a new § 410.1310(c) that ORR shall permit unaccompanied children to have the assistance of counsel, at no cost to the Federal Government, with respect to the administration of psychotropic medications.

Comment: A few commenters emphasized that in non-psychiatric emergencies, ORR must ensure that an authorized individual provides informed consent prior to the administration of psychotropic medication and requested that ORR removed the term ''whenever possible'' from § 410.1310(a) since the regulatory text already includes an exception for psychiatric emergencies.

Response: ORR agrees and is therefore removing the term ''whenever possible'' from § 410.1310(a) so that it states, ''Except in the case of a psychiatric emergency, ORR shall ensure that authorized individuals provide informed consent prior to the administration of psychotropic medications to unaccompanied children.''

Comment: Several commenters stated that ORR should define who can be an ''authorized consenter'' and recommended that it should be a child's parent or legal guardian, whenever reasonably available, followed by a close relative sponsor, and then the unaccompanied child themself (if the child is of sufficient age and permitted to consent under State law). They also stated that care provider staff must never be considered authorized individuals for the purpose of informed consent to psychotropic medication. One commenter requested clarification if ORR intended that authorized consent should be obtained according to authorized consent laws in the State where the program operates.

Response: ORR agrees that additional detail regarding who can provide authorized consent would provide additional clarity. Therefore, ORR is clarifying at § 410.1310(a)(1) that three categories of persons can serve as an ''authorized consenter'' and provide informed consent for the administration of psychotropic medication to unaccompanied children in ORR custody: the child's parent or legal guardian, followed by a close relative sponsor, and then the unaccompanied child themself if the child is of sufficient age and a doctor has obtained informed consent. ORR believes that this additional language clarifies that care provider facility staff are not ''authorized consenters'' for the purposes of providing informed consent prior to the administration of psychotropic medications to unaccompanied children. Finally, ORR recognizes that medical providers are required to operate within their respective State's licensing laws and regulations.

Comment: One commenter stated that ORR should require that consent be obtained voluntarily, without undue influence or coercion. A few commenters recommended that ORR include language that care provider facilities must not retaliate against an unaccompanied child or an authorized consenter for withholding consent or refusing to take any psychotropic medication, including, as noted by one commenter, when consent is initially given, but the unaccompanied child or authorized consenter later changes their mind. A few commenters also noted that refusing to consent should not be used to step-up youth to more restrictive placements or to coerce youth into taking medication as a condition of placement.

Response: ORR agrees and is therefore incorporating a requirement at § 410.1310(a)(2) that consent must be

obtained voluntarily, without undue influence or coercion, and ORR will not retaliate against an unaccompanied child or an authorized consenter for refusing to take or consent to any psychotropic medication. ORR notes that this would include when consent is initially given, but then retracted later. ORR further notes that it believes the terms ''voluntarily, without undue influence or coercion'' encompasses that refusal to consent should not be used to step-up children to a more restrictive placement, or that taking medication should not be used as a condition of placement.

Comment: A few commenters specified that ORR, in the instance of a psychiatric emergency, should require that any emergency administration of psychotropic medication be documented, that the child's authorized consenter be notified as soon as possible, and that the care provider and ORR review the incident to ensure compliance with ORR policies and avoid future emergency administrations of medication.

Response: ORR agrees and is therefore adding § 410.1310(a)(3) requiring that any emergency administration of psychotropic medication be documented, the child's authorized consenter be notified as soon as possible, and the care provider and ORR must review the incident to ensure compliance with ORR policies to reasonably avoid future emergency administrations of medication.

Comment: One commenter emphasized that psychotropic medications should not be used as a behavior management tool in lieu of or as a substitute for identified psychosocial or behavioral supports required to meet an unaccompanied child's mental health needs. They noted that serious incidence reports have been used by care provider facilities to document psychotropic medication non-compliance in ways that suggest that youth who refuse to take their medications are being difficult or oppositional. One commenter expressed that care provider facilities should not use psychotropic medications to address an unaccompanied child's history of trauma.

Response: ORR believes that a variety of behavioral supports and trauma-informed approaches should support unaccompanied children with mental health needs or those with a history of trauma, and that psychotropic medications should only be used when medically appropriate and when authorized consent is given by an authorized consenter. Accordingly, psychotropic medications should not be used as a replacement for effective and evidence-based behavior management tools. ORR notes that it is adding under § 410.1310(a)(2) that consent must be obtained voluntarily, without undue influence or coercion, and ORR will not retaliate against an unaccompanied child or an authorized consenter for refusing to take or consent to any psychotropic medication, and further notes that this includes the use of serious incident reports as retaliation for refusing to take psychotropic medication and applies to how such refusal is documented by care provider facilities.

Comment: One commenter requested that ORR provide additional clarification on what ''meaningful oversight'' will entail. The commenter recommended including examples such as reviewing cases flagged by care providers and conducting additional reviews of the administration of psychotropic medications in high-risk circumstances, including but not limited to cases involving young children, simultaneous administration of multiple psychotropic medications, and high dosages.

Response: ORR agrees and is modifying § 410.1310(b) to clarify that ''meaningful oversight'' includes reviewing cases flagged by care providers and conducting additional reviews of the administration of psychotropic medications in high-risk circumstances, including but not limited to cases involving young children, simultaneous administration of multiple psychotropic medications, and high dosages.

Comment: A few commenters recommended that ORR must also engage a child and adolescent psychiatrist as part of its oversight function because they are qualified professionals who are able to oversee prescription practices and provide guidance to care providers.

Response: ORR agrees that qualified professionals are needed for proper oversight of prescription practices and to provide guidance to care providers. These qualified professionals may include child and adolescent psychiatrists. Given the scarcity of child and adolescent psychiatrists around the country, ORR is retaining some flexibility to rely on other qualified professionals with similar backgrounds, expertise, and educational experiences to child and adolescent psychiatrists. Accordingly, ORR is revising § 410.1310(b) to clarify that ORR will engage qualified professionals who are able to oversee prescription practices and provide guidance to care providers, such as a child and adolescent psychiatrist.

Comment: One commenter recommended that ORR gather data on unaccompanied children who are administered psychotropic medications for oversight and so that ORR can understand how psychotropic medications are administered across its network and within individual care provider facilities. Another commenter expressed concern over ORR's ability to monitor and assess patterns and trends relating to unaccompanied children's needs for psychotropic medications.

Response: ORR agrees is incorporating additional data collection requirements related to the administration of psychotropic medications at § 410.1501 (Data on unaccompanied children). Specifically, ORR is requiring that care providers report information to ORR relating to the administration of psychotropic medications, including children's diagnoses, the prescribing physician's information, the name and dosage of the medication prescribed, documentation of informed consent, and any emergency administration of medication. Such data must be compiled and aggregated in a manner that enables ORR to track how psychotropic medications are administered across its network and in individual facilities. ORR believes this data collection will enable ORR to monitor potential patterns and trends related to the use of psychotropic medications.

Final Rule Action: After consideration of public comments, ORR is finalizing its proposal with the following modifications: At § 410.1310(a) ORR is removing the phrase ''whenever possible'' and is adding § 410.1310(a)(1) that defines ''authorized consenter,'' which is a person who can provide informed consent for the administration of psychotropic medication to unaccompanied children in ORR custody: the child's parent or legal guardian, followed by a close relative sponsor, and then the unaccompanied child themself if the child is of sufficient age and a doctor has obtained informed consent; § 410.1310(a)(2) requires that consent must be obtained voluntarily, without undue influence or coercion, and ORR will not retaliate against an unaccompanied child or an authorized consenter for refusing to take or consent to any psychotropic medication; and § 410.1310(a)(3) that requires that any emergency administration of psychotropic medication be documented, that the child's authorized consenter be notified as soon as possible, and that the care provider and ORR review the incident

to ensure compliance with ORR policies and avoid future emergency administrations of medication. ORR is also revising § 410.1310(b) to require that ''meaningful oversight'' of the administration of psychotropic medication(s) to accompanied children includes reviewing cases flagged by care providers and conducting additional reviews of the administration of psychotropic medications in high-risk circumstances, including but not limited to cases involving young children, simultaneous administration of multiple psychotropic medications, and high dosages. Section 410.1310(b) also requires that ORR must engage qualified professionals who are able to oversee prescription practices and provide guidance to care providers, such as a child and adolescent psychiatrist. ORR is adding a new § 410.1310(c) that ORR shall permit unaccompanied children to have the assistance of counsel, at no cost to the Federal Government, with respect to the administration of psychotropic medications.

Section 410.1311 Unaccompanied Children With Disabilities

ORR believes that protection against discrimination and equal access to the UC Program is inherent to ensuring that unaccompanied children with disabilities receive appropriate care while in ORR custody. In the NPRM, ORR noted that the *Lucas R.* case, discussed in the Background of this rule, is relevant to this topic area and that ORR will be bound by any potential future court decisions or settlements in the case (88 FR 68951). The fifth of the five plaintiff classes certified by the United States District Court for the Central District of California in *Lucas R.* is the ''disability class'' that includes unaccompanied children ''who have or will have a behavioral, mental health, intellectual, and/or developmental disability as defined in 29 U.S.C. 705, and who are or will be placed in a secure facility, medium-secure facility, or [RTC] because of such disabilities [(*i.e.,* the 'disability class')].'' [293] The Court's Preliminary Injunction ordered on August 30, 2022, did not settle this claim and, as stated in the NPRM, as of April 2023, ORR remained in active litigation regarding this claim. ORR proposed in the NPRM requirements to ensure the UC Program's compliance with the HHS section 504 implementing regulations at 45 CFR part 85. ORR therefore proposed at § 410.1311(a) to provide notice of the protections against discrimination assured to unaccompanied children with disabilities by section 504 at 45 CFR part 85 while in the custody of ORR and the available procedures for seeking reasonable modifications or making a complaint about alleged discrimination against children with disabilities in ORR's custody (88 FR 68951).

ORR understands its obligations under section 504 to administer programs and activities in the most integrated setting appropriate to the needs of qualified unaccompanied children with disabilities.[294] ORR proposed in the NPRM at § 410.1311(b) to administer the UC Program in the most integrated setting appropriate to the needs of children with disabilities, in accordance with 45 CFR 85.21(d), unless ORR can demonstrate that this would fundamentally alter the nature of its UC Program. As noted, the most integrated setting is a setting that enables individuals with disabilities to interact with non-disabled individuals to the fullest extent possible.[295]

ORR proposed in the NPRM at § 410.1311(c) to provide reasonable modifications to the UC Program for each unaccompanied child with one or more disabilities as needed to ensure equal access to the UC Program. ORR would not, however, be required to take any action that it can demonstrate would fundamentally alter the nature of a program or activity. Under § 410.1311(d), ORR proposed in the NPRM to require that services, supports, and program modifications being provided to an unaccompanied child with one or more disabilities be documented in the child's case file, where applicable.

Under § 410.1311(e), in addition to the requirements for release of unaccompanied children established elsewhere in this regulation and through any subregulatory guidance ORR may issue, ORR proposed in the NPRM requirements regarding the release of an unaccompanied child with one or more disabilities to a sponsor. Section 410.1311(e)(1) would require that ORR's assessment under § 410.1202 of a potential sponsor's capability to provide for the physical and mental well-being of the unaccompanied child must include explicit consideration of the impact of the child's disability or disabilities. Under § 410.1311(e)(2), in conducting PRS, ORR and any entities through which ORR provides PRS shall make reasonable modifications to their policies, practices, and procedures if needed to enable released unaccompanied children with disabilities to live in the most integrated setting appropriate to their needs, such as with a sponsor. ORR is not required, however, to take any action that it can demonstrate would fundamentally alter the nature of a program or activity. Additionally, ORR would affirmatively support and assist otherwise viable potential sponsors in accessing and coordinating appropriate post-release, community-based services and supports available in the community to support the sponsor's ability to care for the unaccompanied child with one or more disabilities, as provided for under § 410.1210. Under § 410.1311(e)(3), ORR would not delay the release of an unaccompanied child with one or more disabilities solely because post-release services are not in place prior to the child's release.

Comment: A few commenters recommended that ORR designate an ORR staff member as a section 504 coordinator to oversee ORR's compliance with section 504 and ORR's treatment of unaccompanied children with disabilities. These commenters also recommended this role have authority to respond to complaints and approve additional resources for unaccompanied children with disabilities. Many commenters also recommended that ORR coordinate with Protection and Advocacy agencies (P&As) to ensure independent oversight regarding the rights of unaccompanied children with disabilities. These commenters recommended that ORR cooperate with P&As across its network, providing reasonable access to facilities as well as information regarding disability law compliance.

Response: ORR agrees that Protection and Advocacy agencies are often a valuable resource and partner considering their access to facilities and expertise in disability law compliance. ORR also refers readers to subpart K regarding the Office of Ombuds and its role in responding to complaints and independent oversight of ORR's compliance with applicable laws. Additionally, as noted in the Background section, ORR will work with experts to undertake a year-long comprehensive needs assessment to evaluate the adequacy of services, supports, and resources currently in place for children with disabilities in ORR's custody across its network, and to identify gaps in the current system, which will inform the development of a disability plan and future policymaking that best address how to meet the needs of children with disabilities in ORR's care and custody effectively. These efforts will provide ORR with an opportunity to consider commenters' recommendations in greater depth.

Comment: Commenters recommended, consistent with the proposed *Lucas R.* settlement agreement related to children with disabilities in

ORR's custody, that ORR create a mailbox for concerns raised by or on behalf of unaccompanied children with suspected or identified disabilities, and that ORR respond to concerns within no more than 30 days explaining what, if any, steps were taken or are planned to address the concerns.

Response: Regarding the process for making a complaint, ORR again refers readers to the provisions related to the Office of the Ombuds at § 410.2002(a)(1) that enables the Ombuds to receive ''reports from unaccompanied children, potential sponsors, other stakeholders in a child's case, and the public regarding ORR's adherence to its own regulations and standards.''

Comment: Many commenters recommended that ORR include language requiring that notices of rights and procedures are provided to unaccompanied children in a manner accessible to children with disabilities.

Response: ORR agrees that a notice of rights must be accessible to children with disabilities to be consistent with section 504. ORR is therefore adding a requirement to § 410.1311(a) that the notice must be provided in a manner that is accessible to children with disabilities.

Comment: Some commenters recommended that ORR specify it will set up procedural safeguards, which are analogous to 34 CFR 104.36, for requesting reasonable accommodations or modifications or for making a complaint about disability discrimination, including easily accessible, child-friendly procedures, and promptly respond to any requests or complaints. Commenters recommended that ORR have a clear process for requesting and receiving auxiliary aids or services in a timely manner as well as require training for providers to ensure effective communication.

Response: ORR notes that 34 CFR 104.36 does not apply to ORR but appreciates that it is an example of the codification of procedural safeguards. ORR may consider commenters' feedback related to the process for requesting reasonable modifications or for making a complaint in future policymaking, which may be informed by the anticipated comprehensive disability needs assessment process, and the development of the disability plan.

Comment: Many commenters expressed general support for the recognition of ORR's legal obligation to administer the UC Program in the most integrated setting appropriate to the needs of unaccompanied children and recommended that ORR adopt more specific requirements regarding unaccompanied children with disabilities. Many commenters recommended that ORR clarify that the most integrated setting for unaccompanied children with disabilities will always be in a community setting, and in a family setting wherever possible. Many commenters recommended that unaccompanied children with disabilities be prioritized for community-based placement to ensure that unaccompanied children with disabilities are served in the most integrated setting appropriate to their needs. These commenters also recommended that ORR prioritize grants and outreach to community-based care providers that can serve children with disabilities.

Some commenters expressed concern that they believe placement decisions for unaccompanied children with disabilities are often made quickly, by staff without training and who have limited information on resources and services. These commenters requested that a review process be put in place to ensure stays in congregate care are as short as possible, believing that such placements can cause significant harm to unaccompanied children with disabilities. These commenters also noted that unaccompanied children with disabilities should never be placed in residential treatment centers for things like medication management and therapeutic services.

Response: ORR prefers to place unaccompanied children in transitional and long-term foster care settings rather than large congregate care facilities when possible and is making efforts to move toward a community-based care model. Accordingly, ORR will provide children with disabilities equal access to community-based placements such as individual family homes and believes children with disabilities should be included among the groups prioritized for community-based placement. ORR intends to prioritize outreach and grants to community-based care providers that can serve children with a variety of disabilities as part of its efforts to move towards a community-based care model. ORR's response to concerns expressed by commenters about placement of children with disabilities who have serious mental or behavioral health issues in RTCs are addressed at length in responses to comments under § 410.1105.

Comment: Although many commenters expressed support for the proposed requirements under § 410.1311(c), these commenters recommended that the proposed regulations should set out more specific requirements for unaccompanied children with disabilities. These commenters also recommended that ORR explicitly incorporate the consideration of reasonable modifications and auxiliary aids and services to facilitate less restrictive placement. These commenters recommended that such a determination should be made by clear and convincing evidence that a less restrictive placement with additional modifications or services is not possible. Commenters also recommended that reasonable modifications for unaccompanied children with disabilities should include delivery of crisis intervention and stabilization services in a non-secure setting.

Response: ORR is revising § 410.1311(c) in this rule to state more explicitly that ORR shall make reasonable modifications to its programs, including the provision of services, equipment, and treatment, so that an unaccompanied child with one or more disabilities can have equal access to the program in the most integrated setting appropriate to their needs. In addition, ORR notes that it is finalizing § 410.1105(a)(1) and (b)(1) to state that restrictive placement determinations under paragraphs (a) and (b) must be made based on clear and convincing evidence documented in the unaccompanied child's case file. ORR may also consider in future policymaking commenters' recommendation that reasonable modifications for unaccompanied children with disabilities should include delivery of crisis intervention and stabilization services in a non-secure setting, consideration which may be informed by the anticipated year-long comprehensive disability needs assessment and development of a disability plan.

Comment: Commenters recommended that § 410.1311(e)(1) specify more context and instruction on how ORR evaluates the unaccompanied child's disability as part of determining the potential sponsor's suitability because, the commenters argued, the provision as proposed could result in discrimination against unaccompanied children with disabilities by adding obstacles to release not faced by unaccompanied children without disabilities. These commenters noted that ORR has a legal obligation to ensure unaccompanied children with disabilities have an equal opportunity to prompt release. These commenters also recommended, consistent with the *Lucas R.* settlement agreement and caselaw, the final rule specify ORR's consideration of the impact of an unaccompanied child's disability or disabilities must also

include explicit consideration of the potential benefit to the unaccompanied child of release to a community placement and/or a sponsor.

Response: ORR agrees that a potential sponsor's capability to provide for the physical and mental well-being of the child must necessarily include explicit consideration of the impact of the child's disability or disabilities. Under § 410.1202(f)(5), ORR is finalizing that it will evaluate any individualized needs of the unaccompanied child, including those related to disabilities or other medical or behavioral/mental health issues, and under § 410.1202(h)(1) assess the sponsor's understanding of the child's needs as part of determining the sponsor's suitability. ORR agrees that unaccompanied children with disabilities should have an equal opportunity for prompt release, and for that reason proposed under § 410.1311(e)(3) that release will not be delayed solely because PRS is not in place. Finally, ORR agrees that consideration must be given to the explicit benefits of community-based settings and is therefore modifying § 410.1311(e)(1) to state that ORR must consider the potential benefits to the child of release to a community-based setting.

Comment: Many commenters expressed support for the proposed language in § 410.1311(e)(2) requiring reasonable modifications in the provision of PRS to enable unaccompanied children to live in integrated settings with their sponsors. One commenter recommended that ORR revise the regulatory language to incorporate reasonable modifications for unaccompanied children with disabilities as part of the release and PRS planning process to ensure prompt release.

Response: ORR agrees that reasonable modifications should be made as part of the release process. Accordingly, ORR is modifying § 410.1311(e)(2) to add ''planning for a child's release,'' so that it requires ORR and any entities through which ORR provides PRS to make reasonable modifications in their policies, practices, and procedures in planning for a child's release and conducting PRS.

Comment: Many commenters recommended that unaccompanied children with disabilities who wish to receive more intensive PRS should receive service planning that develops a plan of services and supports such as case management, community-based mental health services, and medical care. Commenters recommended the final rule clarify that ORR document its efforts to educate the sponsor about the unaccompanied child's needs and assist the sponsor in accessing and coordinating PRS and supports, and recommended the final rule state that ORR will not deny release to sponsors prior to such education and assistance being offered. One commenter also recommended that ORR explicitly state that unaccompanied children will not be denied release solely based on a finding that the unaccompanied child is a danger to themself, and that ORR should affirmatively support sponsors in accessing PRS for unaccompanied children with serious mental health needs.

Response: ORR notes that § 410.1311(e)(2) as proposed in the NPRM states that ORR will affirmatively assist sponsors in accessing PRS to support the disability-related needs of a child upon release (88 FR 68952, 68997). ORR believes that a child's disability is not a reason to delay or deny release to a sponsor unless there is a significant risk to the health or safety of the child that cannot be mitigated through the provision of services and reasonable modifications, and ORR has documented its efforts to educate the sponsor about the child's disability-related needs and coordinated PRS. Related to findings of dangerousness and release, ORR may take the commenter's feedback into consideration for future policymaking.

Comment: One commenter noted that PRS would be especially important for unaccompanied children with disabilities, and that these services should include a focus on insurance eligibility in the State to which the child will be released.

Response: ORR agrees that unaccompanied children may need particular services and treatment due to a disability but reiterates that not all unaccompanied children with disabilities necessarily require particular services and treatment. As such, ORR proposed in the NPRM under § 410.1311(e)(2) that it would affirmatively support and assist otherwise viable potential sponsors in accessing and coordinating appropriate post-release, community-based services and supports available in the community to support the sponsor's ability to care for the unaccompanied child with one or more disabilities, as provided for under § 410.1210. ORR notes that existing PRS services may include informing released children and sponsor families of medical insurance options, including supplemental coverage, and assist them in obtaining insurance, if possible, so that the family is able to manage the child's health-related needs effectively.

Comment: Many commenters expressed support for proposed § 410.1311(e)(3) and recommended that ORR further specify that a pending assessment for unaccompanied children with a disability or service plan development will not delay a child's release to an otherwise suitable sponsor. One commenter also recommended that the final rule clarify that an unaccompanied child's disability is not a reason to delay or deny release to a sponsor unless there is a significant risk to the health or safety of the unaccompanied child that cannot be mitigated through the provision of services and reasonable modifications.

Response: ORR agrees that a child's disability is not a reason to delay or deny release to a sponsor unless there is a significant risk to the health or safety of the child that cannot be mitigated through the provision of services and reasonable modifications, and ORR has documented its efforts to educate the sponsor about the child's disability-related needs and coordinated PRS. ORR further agrees that a pending assessment for an unaccompanied child should likewise not delay a child's release to an otherwise suitable sponsor. ORR notes that, pursuant to § 410.1311(e)(2), ORR will affirmatively assist sponsors in accessing PRS to support the disability-related needs of a child upon release.

Final Rule Action: After consideration of public comments, ORR is finalizing its proposal as proposed with additions to § 410.1311(a) to require that notices must be provided ''in a manner that is accessible to children with disabilities;'' to § 410.1311(c) to specify that ''ORR shall make reasonable modifications to its programs, including the provision of services, equipment, and treatment, so that an unaccompanied child with one or more disabilities can have equal access to the UC Program in the most integrated setting appropriate to their needs,'' and to state more clearly that ''ORR is not required, however, to take any action that it can demonstrate would fundamentally alter the nature of a program or activity;'' to § 410.1311(e)(1) to require ORR to correspondingly consider the potential benefits to the child of release to a community-based setting; and to § 410.1311(e)(2) to add ''planning for a child's release'' as an activity for which ORR is required to provide reasonable modifications in their policies, practices, and procedures, in addition to conducting PRS.

Subpart E—Transportation of an Unaccompanied Child

Section 410.1400 Purpose of This Subpart

This subpart concerns the safe transportation of each unaccompanied child while in ORR's care (88 FR 68952). ORR noted in the NPRM that ORR generally does not provide transportation for initial placements upon referral from another Federal agency, but rather, it is the responsibility of other Federal agencies to transfer the unaccompanied child to ORR custody within 72 hours of determining the individual is an unaccompanied child.[296] ORR, or its care provider facilities, provides transportation while the unaccompanied child is in its care including, in the following circumstances: (1) for purposes of service provision, such as for medical services, immigration court hearings, or community services; (2) when transferring between facilities or to an out-of-network placement; (3) group transfers due to an emergency or influx; and (4) for release of an unaccompanied child to a sponsor who is not able to pick up the unaccompanied child, as approved by ORR. Subpart E provides certain requirements for such transportation while unaccompanied children are under ORR care.

Comment: One commenter requested clarification on the expected accountability of the transportation provider when transporting unaccompanied children from DHS to ORR and the expectations for communication between the transportation provider and care provider facility.

Response: ORR reiterates that the TVPRA [297] places the responsibility for the transfer of custody of unaccompanied children on referring Federal agencies. Therefore, the referring Federal agency with custody of the child is responsible for the transportation of the child to ORR and ensuring such accountability. ORR custody begins when it assumes physical custody of the unaccompanied child from the referring Federal agency as discussed at § 410.1101(e). However, ORR does collaborate closely with referring Federal agencies during the referral of unaccompanied children to ORR custody. ORR refers readers to § 410.1101 for further information on the placement and referral process. Also, ORR notes that the ORR Policy Guide provides more detailed information on placement and transfer of unaccompanied children in ORR care provider facilities. In this guidance, ORR states that it remains in contact with care provider facilities to identify, designate, and confirm placements during initial referrals.

Final Rule Action: After consideration of public comments, ORR is finalizing § 410.1400 as proposed.

Section 410.1401 Transportation of an Unaccompanied Child in ORR's Care

ORR proposed in the NPRM transportation requirements for care provider facilities to help ensure that unaccompanied children are safely transported during their time in ORR care (88 FR 68952). ORR proposed in the NPRM at § 410.1401(a) to require care provider facilities to transport an unaccompanied child in a manner that is appropriate to the child's age and physical and mental needs, including proper use of car seats for young children, and consistent with proposed § 410.1304. For example, individuals transporting unaccompanied children would be able to use de-escalation or other positive behavior management techniques to ensure safety, as explained in the discussion of proposed § 410.1304(a). As discussed in § 410.1304(f), care provider facilities may only use soft restraints (*e.g.,* zip ties and leg or ankle weights) during transport to and from secure facilities, and only when the care provider facility believes the child poses a serious risk of physical harm to self or others or a serious risk of running away from ORR custody. As discussed in § 410.1304(e)(2), secure facilities, except for RTCs, may restrain a child for their own immediate safety or that of others during transportation to an immigration court or an asylum interview. ORR stated that it believes the requirements at § 410.1401(a) are important to ensuring the safety of unaccompanied children as well as those around them while being transported in ORR care.

ORR proposed in the NPRM at § 410.1401(b), to codify a requirement in the FSA that it assist without undue delay in making transportation arrangements where it has approved the release of an unaccompanied child to a sponsor, pursuant to §§ 410.1202 and 410.1203. ORR also proposed that it would have the authority to require the care provider facility to transport an unaccompanied child. In these circumstances, ORR may, in its discretion, reimburse the care provider facility or pay directly for the child and/or sponsor's transportation, as appropriate, to facilitate timely release.

To further ensure safe transportation of unaccompanied children, ORR proposed in the NPRM at § 410.1401(c) to codify existing ORR policy that care provider facilities shall comply with all relevant State and local licensing requirements and State and Federal regulations regarding transportation of children, such as meeting or exceeding the minimum staff/child ratio required by the care provider facility's licensing agency, maintaining and inspecting all vehicles used for transportation, etc. If there is a potential conflict between ORR's regulations and State law, ORR will review the circumstances to determine how to ensure that it is able to meet its statutory responsibilities. ORR proposed in the NPRM at § 410.1401(d), however, that if a State law or license, registration, certification, or other requirement conflicts with an ORR employee's duties within the scope of their ORR employment, the ORR employee is required to abide by their Federal duties. ORR proposed in the NPRM at § 410.1401(e), to require the care provider facility to conduct all necessary background checks for drivers transporting unaccompanied children, in compliance with § 410.1305(a). Finally, ORR proposed in the NPRM at § 410.1401(f) to codify existing ORR policy that if a care provider facility is transporting an unaccompanied child, then at least one transport staff of the same gender as the unaccompanied child being transported must be present in the vehicle to the greatest extent possible under the circumstances.

Comment: A few commenters supported ORR's proposals to provide safe transportation of unaccompanied children while in ORR care. Commenters believed these requirements will help ensure the safety and well-being of unaccompanied children, establish high minimum standards for facilities that transport unaccompanied children while in ORR care, and enhance public transparency on the operations of the UC Program. A few commenters specifically supported ORR's proposal at § 410.1401(f) that would require transport staff and unaccompanied children to be of the same gender to the greatest extent possible under the circumstances.

Response: ORR thanks commenters for their support. ORR agrees with commenters and believes that these requirements are important to ensuring the safety of unaccompanied children transported in ORR care.

Comment: A few commenters requested clarification on ORR's proposals to provide for the safe transportation of unaccompanied children in ORR care. One commenter requested ORR provide more detail on the transportation of unaccompanied children to heightened security facilities, and another commenter

requested information on the payment and planning processes for transporting children. One commenter requested that ORR provide clarity on the proposal at § 410.1401(d) that requires ORR employees to abide by their Federal duties if there are potential conflicts between ORR's regulations and State law and inquired as to whether ORR employees include care providers, grantees, and/or contractor staff. Additionally, one commenter requested more information on if the transportation requirements at proposed § 410.1401(f) apply to transfers, releases, or all circumstances in which a child is being transported and whether children, deemed age-appropriate, are permitted to travel alone for unification purposes.

Response: ORR refers commenters to the requirements proposed at §§ 410.1401 and 410.1601 regarding the transportation and transfer of unaccompanied children to heightened supervision facilities, and notes that under current ORR policies, referring and receiving care providers will coordinate the logistics of the transfer. ORR also clarifies that ''ORR employees'' means Federal employees of ORR and does not include care provider facility staff or other service providers who are not employed by ORR. As described in § 410.1400, ORR reiterates that the proposed transportation requirements would apply in all circumstances where unaccompanied children in ORR care require transportation, including: (1) for purposes of service provision; (2) when transferring between facilities or to an out-of-network placement; (3) group transfers due to an emergency or influx and (4) for release of an unaccompanied child to a sponsor who is not able to pick up the unaccompanied child. The transportation requirements would apply while unaccompanied children are in ORR care, and therefore, children would not be able to travel alone, even for unification purposes. ORR believes this requirement is necessary to ensure the safe transportation of unaccompanied children while in ORR care. ORR also notes that subregulatory guidance and other communications from ORR to care provider facilities provide more detailed and specific guidance on transportation requirements, such as information regarding the planning and payment processes for transporting unaccompanied children.

Comment: A few commenters requested that ORR make technical changes or clarifications to the rule. One commenter recommended that ORR include language at proposed § 410.1401(c) to clarify that State-licensed programs must follow State licensure requirements if there is a potential conflict between ORR's regulations and State law. Another commenter noted an inconsistency between the preamble and regulation text at proposed § 410.1401(b). In the preamble, ORR states that it may have the authority to ''require'' a care provider facility to transport an unaccompanied child when releasing an unaccompanied child to a sponsor whereas the regulation text states that ORR may have the authority to ''request'' a care provider facility to transport an unaccompanied child. The commenter recommended using the term ''require'' consistently in the preamble and regulation text. Lastly, one commenter recommended ORR define the term ''gender'' to provide clarification whether this term includes ''gender identity'' or to replace the word ''gender'' with ''sex.''

Response: ORR has updated the language at § 410.1401(b) to state that ORR may ''require'' a care provider facility to transport an unaccompanied child for release to a sponsor. ORR believes this update ensures consistency between the preamble and regulation text. Further, ORR reiterates that § 410.1401(c) requires that care provider facilities comply with all relevant State and local licensing requirements and State and Federal regulations regarding transportation of children. Care provider facilities means any facility in which an unaccompanied child may be placed while in the custody of ORR and are operated by an ORR-funded program that provides residential services for children. Additionally, ORR clarifies that, consistent with § 410.1302(a), all standard programs and secure facilities are required to be State-licensed as long as State licensing is available where they are located. Even where State licensure is not available, under this final rule, such programs must still meet the requirements established by the relevant State licensing authority. ORR also expects and requires under §§ 410.1302(a) and (b) of this final rule that standard program and secure facility employees will follow State licensure requirements. If a State law or license, registration, certification, or other requirement conflicts with an ORR employee's duties within the scope of their ORR employment, the ORR employee is required to abide by their Federal duties. Lastly, ORR notes that it uses the term ''gender'' in a way that aligns with its current policies and follows the definitions of the terms ''gender'' and ''sex'' as defined in existing Federal regulations governing ORR at 45 CFR 411.5.

Comment: A few commenters expressed concerns related to the safety and well-being of unaccompanied children during transportation. One commenter expressed concern with the proposal regarding of the use of restraints while transporting unaccompanied children at § 410.1401(a). The commenter stated that the use of restraints could pose serious risk of harm to and traumatization of children and recommended that ORR conduct holistic evaluations of children's needs before using restraints during transportation. The commenter also recommended that ORR codify existing policies to ensure children are afforded due process when restraints are used, such as notifying the child's legal services provider when restraints are being considered for court appearances and documenting any use of restraints. Another commenter expressed concerns about the lack of staffing for providing unaccompanied children with transportation to religious services. The commenter recommended ORR add an explicit requirement to ensure care provider facilities maintain sufficient staffing to allow equal access to religious services. One commenter recommended that ORR establish additional safeguards to protect children during transportation, including equipping vehicles with GPS capabilities to enable facilities to track vehicles, requiring more than one staff person to accompany children during transportation, and notifying children's attorneys or legal representatives of the transportation schedule. Another commenter recommended that ORR transport children to an ORR care provider facility nearest to the location of the child's sponsor, while another recommended restricting the transportation of unaccompanied children with detained adults.

Response: ORR notes that § 410.1401(a) is aligned with existing ORR policy and with § 410.1304, where ORR enumerates limited circumstances under which restraints may be used. For example, staff may only use soft restraints during transportation to and from secure facilities only when the care provider facility believes the child poses a serious risk of physical harm to self or others or is a serious risk of running away from ORR custody. Also, ORR staff will employ de-escalation and positive behavior management techniques before using restraints during transportation. ORR believes these requirements regarding the use of restraints are important to ensure the safety of

unaccompanied children and those around them while being transported in ORR care. ORR policy describes additional guidance on the use of restraints during transportation, including due process protections. ORR did not propose to adopt each of its existing requirements into the Foundational rule because maintaining subregulatory guidance in this area will allow ORR to make more appropriate, timely, and iterative updates in keeping with best practices. It also allows ORR to continue to be responsive to the needs of unaccompanied children and care provider facilities.

Regarding access to religious services, ORR reiterates that at § 410.1305(b), care provider facilities are required to meet the staff-to-child ratios established by their respective States. ORR believes that this requirement would provide care provider facilities with adequate staff to ensure access to minimum standards, including religious services, as described at § 410.1302(c)(9). Further, in the event ORR has identified a suitable sponsor for an unaccompanied child, ORR assists without undue delay in making transportation arrangements for release. Consistent with the FSA paragraph 26, ORR will provide assistance in making transportation arrangements for the release of unaccompanied children to the nearest location of the person or facility the child is released to, as described at § 410.1401(b). Additionally, ORR agrees with the commenter that unaccompanied children should not be transported with detained adults, consistent with the FSA. ORR does not have adults in custody. ORR reiterates that unaccompanied children's attorneys or legal representatives will be notified of all transfers within 48 hours prior to the unaccompanied child's physical transfer, as discussed at proposed § 410.1601(a)(3). However, such advance notice is not required in unusual and compelling circumstances which are further detailed at proposed § 410.1601(a)(3). Regarding commenters' requests for additional transportation safeguards, such as equipping vehicles with GPS capabilities, ORR notes that these are not required by statute or the FSA nor are they current ORR practice. ORR may consider the commenters' recommendations on additional transportation safeguards for future policymaking.

Comment: A few commenters did not support the proposal to provide for the safe transportation of unaccompanied children while in ORR care due to concerns about the risk of child trafficking while transporting unaccompanied children.

Response: ORR acknowledges the commenters' concerns, but ORR believes that the proposal will not increase the risk of child trafficking. Instead, ORR believes the proposal will help ensure the safety of unaccompanied children being transported in ORR care. For example, ORR believes that § 410.1401(e), which requires care provider facilities to conduct background checks for all drivers, will help promote child safety and well-being and reduce the risk of child trafficking. ORR notes that it is updating § 410.1401(e) to require care provider facilities or contractors to conduct background checks for all individuals who may be transporting unaccompanied children. ORR believes this revision reflects ORR's use of transportation contractors that are not operated by a care provider facility and encompasses various modes of transportation in addition to driving.

Final Rule Action: After consideration of public comments, ORR is revising § 410.1401(b) to state that ORR may ''require'' a care provider facility to transport an unaccompanied child when releasing a child to a sponsor. Also, at § 410.1401(b), ORR is amending the text to state that ORR ''shall assist'' without undue delay in making transportation arrangements, in contrast to the NPRM text, which provided that ''ORR assists'' in making arrangements. ORR believes this revision ensures consistency with other requirements described in the rule. Additionally, ORR is updating § 410.1401(d) to clarify that ORR employees must abide by their Federal duties if there is a conflict between ORR's regulations and State law, subject to applicable Federal religious freedom and conscience protections. Also, at § 410.1401(d), ORR is amending the text to state that ORR ''shall review'' the circumstances to determine how to ensure that it is able to meet its statutory responsibilities, in contrast to the NPRM text, which provided that ''ORR reviews'' the circumstances. Finally, ORR is revising § 410.1401(e) to state that care provider facilities or contractors shall conduct all necessary background checks for individuals transporting unaccompanied children, in compliance with § 410.1305(a). ORR is finalizing the remaining paragraphs of § 410.1401 as proposed.

Subpart F—Data and Reporting Requirements

45 CFR part 410, subpart F, provides guidelines for care provider facilities to report information such that ORR may compile and maintain statistical information and other data on unaccompanied children (88 FR 68952 through 68953).

Section 410.1500 Purpose of This Subpart

The HSA requires the collection of certain data about the children in ORR's care and custody.[298] Specifically, ORR is required to maintain statistical and other information on unaccompanied children for whom ORR is responsible, including information available from other Government agencies and including information related to a child's biographical information, the date the child entered Federal custody due to immigration status, documentation of placement, transfer, removal, and release from ORR facilities, documentation of and rationale for any detention, and information about the disposition of any actions in which the child is the subject.

Comment: Many commenters expressed general support for the requirements proposed under subpart F. One commenter believed that codifying data requirements will improve accountability and public transparency.

Response: ORR thanks the commenters for their support.

Comment: Many commenters expressed concern that ORR is not capable of collecting and properly storing data on unaccompanied children. Many commenters also expressed concern regarding the reliability of data collected by ORR because commenters believe that ORR does not have appropriate data collection tools. Many commenters noted that sometimes case information may be contained in multiple systems and recommended that ORR use one official system of record to ensure data integrity.

Response: ORR notes that subpart F generally codifies and implements existing ORR requirements under the HSA. ORR is already substantively complying with these data collection and recordkeeping requirements.

Comment: Many commenters recommended that ORR publicly report aggregate data collected, noting that public data reporting is an important step towards transparency given the absence of FSA monitoring. Many commenters believed that ORR should require public reporting on the demographics of unaccompanied children, their status with respect to ORR programs, and the quality of care that ORR provides. Many commenters also noted that ORR currently publishes a significant quantity of aggregated information on its website and recommended that ORR include guarantees that this publication will

continue and that currently available data will remain accessible. The commenters also expressed concern that the proposed rule also does not address the breadth, specificity, frequency of publication, quality, or purpose of information that ORR must make publicly available in the future and recommended that subpart F include a new section that would require public reporting of ORR data in a manner that is reliable, frequent, and regular, and guarantee the continued public availability of critical information about unaccompanied children and their care.

Response: ORR thanks the commenters for their recommendations and will take them into consideration in future policymaking. Regarding commenters' requests for more information or additional requirements related to public reporting of ORR data, ORR notes that the scope of data and reporting requirements proposed under subpart F would codify and implement existing ORR requirements under the HSA. Although additional requirements regarding public reporting of ORR data are not required by statute or the FSA, ORR may provide additional information or guidance regarding publicly available ORR data in future policymaking.

Comment: Many commenters noted that ORR's data protections are found elsewhere in the NPRM and recommended that ORR consolidate all data collection requirements and protections into a single location for ease of reference and to eliminate ambiguity.

Response: ORR appreciates the commenters' recommendation but notes that data collection and recordkeeping requirements are organized in a way that aligns with the requirements of the parties responsible for data collection and reporting requirements.

Comment: Many commenters expressed concern that the proposed rule does not contemplate how ORR should handle information about unaccompanied children that it learns through routes other than its own service providers, contractors, and grantees, nor the necessity of recording, codifying, and protecting such information. These commenters suggested that the proposed rule include a new section addressing information that arrives from these other sources (such as information included in referrals or investigations from other Government agencies, media reports, legal case information, or other information that is available to ORR but is not directly provided to ORR by care provider facilities). The commenters also recommended that ORR should be required to record that information in a manner allowing it to be aggregated, analyzed, disaggregated, and reported out, as appropriate.

Response: ORR thanks the commenters for their comments and acknowledges their concerns. ORR notes that nothing in the Foundational Rule would preclude ORR from collecting and recording information obtained through certain data sources not specified in subpart F and does not believe that additional requirements regarding the treatment of such data are necessary at this time. However, ORR will continue to monitor the requirements finalized under subpart F as they are implemented and may consider providing additional guidance, as necessary, regarding the treatment of such information obtained through unspecified data sources through future policymaking.

Comment: Many commenters expressed concern that the proposed rule would prevent the sharing of relevant data with law enforcement or other agencies. Many commenters also recommended that ORR share information with State and local law enforcement entities to provide additional oversight.

Response: ORR notes that the data collection and reporting requirements proposed under subpart F provide guidelines for care provider facilities to report information such that ORR may compile and maintain statistical information and other data on unaccompanied children. Accordingly, the requirements proposed under subpart F are not relevant to ORR's obligations relating to sharing data with law enforcement entities. ORR also notes that it is establishing the Office of the Ombuds under subpart K of this final rule, which will provide additional oversight as an independent, impartial office with authority to receive reports, including confidential and informal reports, of concerns regarding the care of unaccompanied children; to investigate such reports; to work collaboratively with ORR to potentially resolve such reports; and issue reports concerning its efforts.

Final Rule Action: After consideration of public comments, ORR is finalizing this section as proposed.

Section 410.1501 Data on Unaccompanied Children

ORR proposed in the NPRM at § 410.1501 to implement the HSA by requiring care provider facilities to maintain and periodically report to ORR data described in § 410.1501(a) through (e): biographical information, such as an unaccompanied child's name, gender, date of birth, country of birth, whether of indigenous origin and country of habitual residence; the date on which the unaccompanied child came into Federal custody by reason of immigration status; information relating to the unaccompanied child's placement, removal, or release from each care provider facility in which the child has resided, including the date and to whom and where placed, transferred, removed, or released in any case in which the unaccompanied child is placed in detention or released, an explanation relating to the detention or release; and the disposition of any actions in which the child is the subject (88 FR 68953). In addition, for purposes of ensuring that ORR can continue to appropriately support and care for children in its care throughout their time in ORR care provider facilities, as well as to allow additional program review, ORR proposed in the NPRM at § 410.1501(f) and (g) that care provider facilities also document and periodically report to ORR information gathered from assessments, evaluations, or reports of the child and data necessary to evaluate and improve the care and services for unaccompanied children. ORR noted that some of the information described in this section, such as requirements described at paragraphs (f) and (g), or reporting regarding whether an unaccompanied child is of indigenous origin, is not specifically enumerated at 6 U.S.C. 279(b)(1)(J). Nevertheless, ORR proposed in the NPRM including such information in the rule text because it understands maintaining such information to be consistent with other duties under the HSA to coordinate and implement the care and placement of unaccompanied children.

Comment: Many commenters expressed support for ORR's commitment to codifying the minimum data that care providers are required to maintain and report to ORR.

Response: ORR thanks the commenters for their support.

Comment: Many commenters recommended that ORR include additional provisions under § 410.1501 to expand data collection and reporting requirements to include children separated from parents/guardians, children separated from family members (not parents or legal guardians), as well as data collection on children with disabilities and their needs.

Response: ORR thanks the commenters for their recommendations. ORR believes that such data is included in the reporting requirements in § 410.1501. However, ORR also notes that § 410.1501 specifies minimum

requirements and does not preclude adding additional categories over time. ORR will continue to monitor the regulatory requirements as they are implemented and will consider whether additional clarification is required through future policymaking.

Comment: Many commenters recommended that ORR require care providers to collect and report data on children who identify as LGBTQI+ to ORR, noting the importance of tracking how many children in custody identify as LGBTQI+ to better meet the needs and placement preferences of LGBTQI+ children. One commenter recommended that such data reporting requirement should be limited to unaccompanied children who voluntarily disclose such information.

Response: ORR thanks the commenters for their recommendations. ORR agrees with commenters' recommendation that improving data collection on LGBTQI+ children in ORR custody is a tool for strengthening service delivery, and accordingly will finalize § 410.1501(a) with a revision to implement reporting of voluntarily disclosed data regarding self-identified LGBTQI+ status or identity. ORR notes that the terms ''gender'' and ''sex'' are not synonymous and are separately defined in the existing Federal regulations governing ORR at 45 CFR 411.5. Therefore, ORR declines to list ''sex'' as a factor in lieu of ''gender'' in this rule. ORR believes that data collection about ''gender'' is sufficient and will maintain that requirement. ORR also emphasizes that data collection related to a child's LGBTQI+ status or identity pursuant to an Assessment for Risk under 45 CFR 411.41(a) is intended only for purposes of reducing the risk of sexual abuse or sexual harassment among unaccompanied children. Use and maintenance of this information is also subject to the privacy safeguards in 45 CFR 411.41(d) ''in order to ensure that sensitive information is not exploited to the [unaccompanied child's] detriment by staff or other [unaccompanied children].'' Additionally, ORR's information collection and sharing practices comport with Privacy Act requirements to ensure that any information sharing is pursuant to ''a purpose which is compatible with the purpose for which it was collected.'' 5 U.S.C. 552a(a)(7).

Comment: One commenter recommended that ORR utilize additional resources to determine what data to gather on unaccompanied children, their families, and sponsors, recommending that ORR collect data regarding race and nationality, LGBTQI+ status or identity, disability status, native language, and language preference.

Response: ORR thanks the commenter for their recommendations. ORR notes that information regarding an unaccompanied child's family and potential sponsors may be collected as part of the release requirements provided under §§ 410.1201 and 410.1202. ORR notes that, under § 410.1501(a), care provider facilities would be required to report biographical data including information related to an unaccompanied child's nationality and LGBTQI+ status or identity. Under § 410.1501(c) and § 410.1501(f), care provider facilities would be required to report information that may include a child's native language and language preference. Finally, under § 410.1501(f) and § 410.1501(g)(2), care provider facilities would be required to report information related to a child's disability status.

Comment: Commenters recommended that to ensure meaningful oversight of psychotropic medications, care provider facilities should be required to report information relating to the administration of psychotropic medications, including the child's diagnoses, the prescribing physician's information, the name and dosage of the medication prescribed, documentation of informed consent, and any emergency administration of medication, and commenter states that ORR should compile this data in a manner that enables ORR to track how psychotropic medications are administered across facilities and among individual families.

Response: ORR agrees with commenters, and for that reason, is incorporating requirements at § 410.1501 that care providers must report information relating to the administration of psychotropic medications, including children's diagnoses, the prescribing physician's information, the name and dosage of the medication prescribed, documentation of informed consent, and any emergency administration of medication. Such data must be compiled in a manner that enables ORR to track how psychotropic medications are administered across the network and in individual facilities.

Comment: Many commenters stated the proposed rule is unclear whether the data reporting requirements under § 410.1501 include sufficient information to enable ORR to provide effective oversight of the treatment of unaccompanied children with disabilities. Several commenters recommended, consistent with the *Lucas R.* settlement, required data include, at a minimum: whether an unaccompanied child has been identified as having a disability; the unaccompanied child's diagnosis; the unaccompanied child's need for reasonable modifications or other services; and information related to release planning. These commenters also recommended data regarding unaccompanied children with disabilities be compiled in a manner that enables ORR to track how many unaccompanied children with disabilities are in its custody, where they are placed, what services they are receiving, and their lengths of stay in order to facilitate ORR's ongoing oversight to ensure unaccompanied children with disabilities are receiving appropriate care in while ORR care.

Response: ORR agrees that such data collection could be useful for the purpose of identifying children with disabilities in order to ensure they are receiving appropriate care and services, and for that reason, is incorporating requirements at § 410.1501 that care providers must report information relating to the treatment of unaccompanied children with disabilities, including whether an unaccompanied child has been identified as having a disability; the unaccompanied child's diagnosis; the unaccompanied child's need for reasonable modifications or other services; and information related to release planning. Such data must be compiled in a manner that enables ORR ongoing oversight to ensure unaccompanied children with disabilities are receiving appropriate care while in ORR care across the network and in individual facilities. ORR will also be working with experts on a year-long comprehensive needs assessment of ORR's disability services and developing a disability plan. Such efforts may inform future policymaking concerning data collection and reporting to enhance the care of children with disabilities in ORR's custody.

Comment: A few commenters recommended that ORR collect information in addition to the information enumerated in the rule, such as information on biographical relatives, criminal history, number of unaccompanied children that access legal representation, the number of unaccompanied children that receive PRS, the number of unaccompanied children receiving home visits and well-being calls, and the number of unaccompanied children that ran away from sponsors after released. A few commenters recommended that ORR also collect data on child trafficking to track the extent of the problem and effectiveness of intervention efforts.

Response: ORR thanks the commenters for their recommendations and may take them into consideration in future policymaking. ORR currently collects some of this information in various capacities as part of its operations relating to placement, minimum services, and release and PRS. ORR notes that § 410.1501 specifies minimum requirements and does not preclude adding additional information collection requirements over time. However, ORR is not required by the HSA or the FSA to collect such information, and does not believe additional information collection requirements recommended by the commenters are necessary at this time.

Comment: One commenter recommended removing ''whether of Indigenous origin'' from § 410.1501(a) and adjusting to recognize their Indigenous Nation, Native Identity, or Tribal affiliation to recognize distinct nations with unique rights. This commenter noted the need for more accurate data collection to determine how many Indigenous unaccompanied children are migrating, as well as the Tribal affiliation and Indigenous Nation of the unaccompanied child and recommended that experts should be consulted to ensure proper collection and analysis of data regarding Indigenous unaccompanied children. The commenter stressed the importance of Indigenous identity being identified so that the Indigenous unaccompanied child's rights as members of their Native Nations can be upheld and ensure that their best interest is considered during placement.

Response: ORR thanks the commenter for their recommendations but believes the proposed section of the rule as written adequately captures the data element that ORR uses on a daily basis. ORR notes that requiring care provider facilities to report such information goes beyond the scope of current obligations specifically enumerated at 6 U.S.C. 279(b)(1)(J). ORR agrees that it is important to collect data on Indigenous unaccompanied children in order to better support their needs, and that is why such biographical information is included under § 410.1501(a). Although nothing precludes care provider facilities from reporting more specific data pertaining to a child's individual Indigenous Nation, Native Identity, or Tribal Affiliation, ORR believes that the current language is sufficient for ORR's data collection purposes. However, ORR will continue to monitor the regulatory requirements as they are implemented and will consider whether additional clarification is required through future policymaking.

Comment: Many commenters recommended aligning the list of required data from care provider facilities with requirements elsewhere in the final rule noting that § 410.1302(c)(2)(iv) requires providers to assess ''whether [the child is] an indigenous language speaker'' and asserting that proposed § 410.1501(a) should align so that preferred language can be aggregated and captured population-wide.

Response: ORR thanks commenters for their recommendation. ORR notes that because data regarding the unaccompanied child's preferred language is required to be collected pursuant to an individualized needs assessment under § 410.1302(c)(2), such data would be required to be reported to ORR under § 410.1501(f).

Comment: Many commenters expressed concern that proposed § 410.1501(b) contemplates a basic data input for the duration of a child's stay in custody which is potentially operationalized by time of DHS apprehension rather than transfer to ORR care and recommended that the rule should include both date of DHS apprehension and date of placement into HHS custody.

Response: ORR acknowledges the commenters' concerns and has updated the language in § 410.1501(b) to clarify that such data includes the date on which the unaccompanied child came into ORR custody.

Comment: Although many commenters appreciated that proposed § 410.1501(d) requires documentation for when an ''unaccompanied child is placed in detention or released,'' commenters noted that internal transfers to heightened supervision facilities, restrictive placements, and out-of-network facilities should also require documentation of the justification. These commenters also recommended that § 410.1501(d) should add ''removals'' to ensure data fidelity for a future circumstance in which another agency (such as DHS) effectuates a removal that it believes does not meet the definitional requirements for detention.

Response: ORR thanks the commenters for their recommendations. ORR notes that data relating to a child's placement, release, removal, or transfer would be required to be reported to ORR under § 410.1501(c). ORR will continue to monitor the regulatory requirements as they are implemented and will consider whether additional clarification is required through future policymaking.

Final Rule Action: After consideration of public comments, ORR is finalizing this section as proposed, with the exception of § 410.1501(a), § 410.1501(b), § 410.1501(c), and § 410.1501(g). ORR is finalizing language for § 410.1501(a) that is updated from the proposed rule in order to include, if voluntarily disclosed, self-identified LGBTQI+ status or identity as biographical information that care provider facilities are required to report. ORR is finalizing language for § 410.1501(b) that is updated from the proposed rule in order to clarify that such data includes the date on which the unaccompanied child came into ORR custody. ORR is finalizing language for § 410.1501(c) that is updated from the proposed rule to clarify that information relating to the unaccompanied child's placement, removal, or release from each care provider facility in which the unaccompanied child has resided includes the date on which and to whom the child is transferred, removed, or released. ORR is finalizing language for § 410.1501(g) that is updated from the proposed rule in order to specify that such data includes information relating to the administration of psychotropic medication and information relating to the treatment of unaccompanied children with disabilities.

Subpart G—Transfers

ORR proposed in the NPRM to codify requirements and policies regarding the transfer of an unaccompanied child in ORR care (88 FR 68953). The following provisions identify general requirements for the transfer of an unaccompanied child, as well as certain circumstances in which transfers are necessary, such as in emergencies.

Section 410.1600 Purpose of This Subpart

ORR proposed in the NPRM at § 410.1600 that the purpose of this subpart is to provide guidelines for the transfer of an unaccompanied child (88 FR 68953).

Comment: One commenter recommended that subpart G either reference back to subpart E (Transportation) for information regarding requirements for transportation or include those same standards in subpart G.

Response: ORR thanks the commenter but believes that subpart G adequately addresses ORR's requirements for the transfer of an unaccompanied child.

Final Rule Action: After consideration of public comments, ORR is finalizing this section as proposed.

Section 410.1601 Transfer of an Unaccompanied Child Within the ORR Care Provider Facility Network

ORR proposed in the NPRM, at § 410.1601(a), to codify general requirements for transfers of an unaccompanied child within the ORR care provider network (88 FR 68953 through 68954). ORR proposed in the NPRM that care provider facilities would be required to continuously assess an unaccompanied child in their care to ensure that unaccompanied child placements are appropriate. This requirement is consistent with the TVPRA, which provides that an unaccompanied child shall be placed in the least restrictive setting that is in their best interests, subject to considerations of danger to self or the community and runaway risk.[299] Additionally, care provider facilities would be required to follow ORR policy guidance, including guidance regarding placement considerations, when making transfer recommendations. ORR also proposed requirements for care provider facilities to ensure the health and safety of an unaccompanied child. The proposed requirements in the NPRM align with § 410.1307(b), where ORR proposed procedures related to placements upon the ORR transfer of an unaccompanied child to a facility that is able to accommodate the medical needs or requests of the unaccompanied child.

ORR proposed in the NPRM, at § 410.1601(a)(1), care provider facilities would be required to make transfer recommendations to ORR if they identify an alternate placement for a child that best meets a child's needs. Under § 410.1601(a)(2), when ORR transfers an unaccompanied child, the unaccompanied child's current care provider facility would be required to ensure that the unaccompanied child is medically cleared for transfer within three business days, provided the unaccompanied child's health allows and unless otherwise waived by ORR. For an unaccompanied child with acute or chronic medical conditions, or seeking medical services requiring heightened ORR involvement, the appropriate care provider facility staff and ORR would be required to meet to review the transfer recommendation. Should the unaccompanied child not be medically cleared for transfer within three business days, the care provider facility would be required to notify ORR. ORR would provide the final determination of a child's fitness for travel if the child is not medically cleared for transfer by a care provider facility. Should ORR determine the unaccompanied child is not fit for travel, ORR would be required to notify the unaccompanied child's current care provider facility of the denial and specify a timeframe for the care provider facility to re-evaluate the transfer of the unaccompanied child. ORR welcomed public comment on these proposals.

ORR proposed in the NPRM at § 410.1601(a)(3), notifications that would be required when ORR transfers an unaccompanied child to another care provider facility, including required timeframes for such notifications. Specifically, ORR proposed in the NPRM that within 48 hours prior to the unaccompanied child's physical transfer, the referring care provider facility would be required to notify all appropriate interested parties of the transfer, including the child, the child's attorney of record, legal service provider, or Child Advocate, as applicable. ORR noted, in addition, that interested parties may include EOIR. ORR proposed in the NPRM at § 410.1601(a)(3) that advanced notice shall not be required in unusual and compelling circumstances. In such a case, notice to interested parties must be provided within 24 hours following the transfer of an unaccompanied child in such circumstances. ORR is aware of concerns around notifications regarding the transfer of an unaccompanied child and believes that finalizing these proposed requirements provide an effective timeline and notice while still allowing for flexibility if there are unusual and compelling circumstances. ORR believes that § 410.1601(a)(3) of the NPRM is consistent with, and even goes beyond, the requirements set out in the FSA at paragraph 27, which requires only ''advance notice'' to counsel when an unaccompanied child is transferred but does not specify how much advance notice is required.

ORR proposed in the NPRM, at § 410.1601(a)(4) and (5), to codify requirements from paragraph 27 of the FSA that children be transferred with their possessions and legal papers, and any possessions that exceed the normally permitted amount by carriers be shipped in a timely manner to where the child is placed. ORR would also require that children be transferred with a 30-day supply of medications, if applicable. Consistent with existing practice, ORR would require that the accepting care provider is instructed in the proper administration of the unaccompanied child's medications.

ORR proposed in the NPRM, at § 410.1601(b) to codify current ORR practices regarding the review of restrictive placements. When unaccompanied children are placed in a restrictive setting (secure, heightened supervision, or Residential Treatment Center), the receiving care provider facility and ORR would be required to review their placement at least every 30 days to determine if another level of care is appropriate. Should the care provider facility and ORR determine that continued placement in a restrictive setting is necessary, the care provider facility would be required to document, and as requested, provide the rationale for continued placement to the child's attorney of record, legal service provider, and their child advocate.

ORR sought public comment on proposed § 410.1601(c), requirements related to group transfers. Group transfers are described as circumstances where a care provider facility transfers more than one child at a time, due to emergencies or program closures, for example. Under § 410.1601(c), when group transfers are necessary, care provider facilities would be required to follow ORR policy guidance and additionally be required to follow the substantive requirements provided in § 410.1601(a). ORR believed that clarifying these requirements for care provider facilities engaging in group transfers would help to ensure the safety and health of unaccompanied children in emergency and other situations that require the transfer of multiple unaccompanied children.

ORR proposed in the NPRM, at § 410.1601(d), requirements related to the transfer of an unaccompanied child in a care provider facility's care to an RTC. Under this proposed provision, care provider facilities would be permitted to request the transfer of an unaccompanied child in their care pursuant to the requirements of proposed § 410.1105(c).

ORR proposed in the NPRM, at § 410.1601(e), requirements concerning the temporary transfer of an unaccompanied child during emergency situations. In § 410.1601(e), ORR makes clear that, consistent with the HSA and TVPRA, an unaccompanied child remains in the legal custody of ORR and may only be transferred or released by ORR. As allowed under the FSA, ORR proposed in the NPRM, in emergency situations, to allow care provider facilities to temporarily change the physical placement of an unaccompanied child prior to securing permission from ORR. But in these situations, ORR would require the care provider to notify ORR of the change of placement as soon as possible, but in all cases within 8 hours of transfer.

ORR's intent in the NPRM, was to minimize the transfer of an unaccompanied child and limit transfers to situations in which a

transfer is necessary in order to promote stability and encourage establishment of relationships, particularly among vulnerable children in ORR care (88 FR 68954). ORR invited public comment on all of the proposals under subpart G, and solicited input regarding the specifics, language, and scope of additional provisions related to minimizing the transfers of an unaccompanied child and the placement of an unaccompanied child with disabilities.

Comment: Several commenters supported the proposal and recommended modifications to transfer procedures, including revising the proposal such that the care provider will submit a transfer request to ORR and ORR will be responsible for identifying the transfer program most appropriate for the unaccompanied child; provide oral and written notice of the transfer; provide the reason for the transfer, particularly for transfers from a family or small community-based program to a congregate shelter setting; and limit transfers that are outside of ORR's child welfare mandate and that go beyond the TVPRA.

Response: ORR did not propose codifying procedures that are beyond the general requirements for transfers of an unaccompanied child within the care provider network. Where the final regulation contains less detail, subregulatory guidance provides more specificity and will support future iteration that allows more timely responsiveness to the needs of unaccompanied children and care provider facilities.

Comment: A few commenters supported the proposal and recommend that ORR document modifications and auxiliary aids and services that could avert a restrictive placement and document reasons for a transfer to a restrictive facility, in alignment with the proposed policy concerning Restrictive Placement Case Reviews in § 410.1901, the proposed policy concerning Criteria for Placing a UC in a Restrictive Placement in § 410.1105, and the proposed definition of Notice of Placement in § 410.1001.

Response: ORR agrees that the consideration of reasonable modifications and auxiliary aids and services to facilitate less restrictive placement should be explicitly incorporated into the regulation text and apply both to an initial transfer decision and to a child's 30-day restrictive placement case review under proposed §§ 410.1105, 410.1601, and 410.1901. Accordingly, ORR is adding new § 410.1105(d) to state that for an unaccompanied child with one or more disabilities, consistent with section 504 and § 410.1311(c), ORR's determination under § 410.1105 whether to place the unaccompanied child in a restrictive placement shall include consideration whether there are any reasonable modifications to the policies, practices, or procedures of an available less restrictive placement or any provision of auxiliary aids and services that would allow the unaccompanied child to be placed in that less restrictive facility. Section 410.1105(d) further states that ORR's consideration of reasonable modifications and auxiliary aids and services to facilitate less restrictive placement shall also apply to transfer decisions under § 410.1601 and will be incorporated into restrictive placement case reviews under § 410.1901. Additionally, pursuant to § 410.1311(d), ORR shall document in the child's ORR case file any services, supports, or program modifications being provided to an unaccompanied child with one or more disabilities.

Comment: Several commenters supported ORR's proposal to codify the care provider facilities' requirements for transfer of an unaccompanied child and recommended that they notify the following individuals prior to the child's transfer: a parent, family member or guardian, sponsors who have completed a sponsorship packet, and the attorney, legal service provider, DOJ Accredited Representative, or accredited representative of the unaccompanied child.

Response: ORR thanks commenters for their support and notes the list of appropriate interested parties required to be notified prior to a transfer of an unaccompanied child is not limited to the examples noted in § 410.1601(a)(3). The proposed and final regulation's list of all appropriate interested parties to be notified is not all-inclusive. ORR may consider lengthening the list of appropriate interested parties in subsequent rulemaking or subregulatory guidance.

Comment: A few commenters supported the proposal to specify a timeframe for advance notice of a transfer but recommended advance notice modifications, including specifying 48 business hours, or providing a 72-hour rather than 48-hour timeframe.

Response: ORR believes requiring 48 hours of advance notice prior to an unaccompanied child's physical transfer goes beyond the requirements of the FSA (paragraph 27 of the FSA requires 24 hours of advance notice to the child's counsel), and is, therefore, adequate time for the referring care provider facility to notify all appropriate interested parties.

Comment: One commenter supported the requirement that the unaccompanied child is transferred with health records and recommended providing an attestation that all health records are in the UC Portal and provide the receiving program access to the records prior to the unaccompanied child's arrival, to protect against loss during transportation or duplication of paper copies.

Response: ORR thanks the commenter and may consider more specificity. Current ORR policy guidance requires all health records for unaccompanied children to be recorded in the UC Portal. ORR's policy guidance requires the sending medical coordinator or medical staff to complete a medical check list for transfers and place an electronic copy in the UC Portal so that a receiving care provider may review the medical check list within the unaccompanied child's transfer request file, and access the UC Portal information about the unaccompanied child prior to the physical transfer of the unaccompanied child. ORR will continue to use and update its existing guidance to provide detailed requirements for care provider facilities regarding the timely and complete availability of health records of unaccompanied children upon a transfer.

Comment: One commenter supported the proposal to continuously assess an unaccompanied child to ensure placements are appropriate and recommend adding factors, including diagnosed and undiagnosed disabilities, placement proximity to family, the unaccompanied child's language barriers at the facility, restrictiveness, family separation, and detention fatigue.

Response: ORR thanks the commenter and may consider additional factors in support of assessing an unaccompanied child to ensure the appropriateness of transfer in future policymaking. ORR directs readers to the considerations generally applicable to placement in § 410.1103 for the discussion about placement of an unaccompanied child with disabilities, the placement proximity of an unaccompanied child to family and the unaccompanied child's mental well-being. ORR directs readers to § 410.1105 for the discussion about the criteria for placing an unaccompanied child in a restrictive placement. ORR also directs readers to the minimum standards and required services that care provider facilities must meet and provide for the discussion in § 410.1306 about offering interpretation and translation services in an unaccompanied child's native or

preferred language. Additionally, ORR directs readers to the considerations generally applicable to placement in § 410.1103(b) for the discussion about placement of an unaccompanied child with disabilities, § 410.1306 for the discussion about an unaccompanied child's native or preferred language.

Comment: One commenter supported the proposal at § 410.1601(a)(2) and recommended a revision that the care provider facility shall ensure the unaccompanied child is medically cleared for transfer within three business days of ORR approving the transfer.

Response: ORR appreciates the comment and notes that the standard of care required to transfer an unaccompanied child to appropriate care provider facility includes the requirement that an unaccompanied child is medically cleared for transfer within three business days.

Comment: One commenter supported the transfer proposal and recommended a right for unaccompanied children to appeal the determination of an appropriate transfer and the procedures for such an appeal.

Response: ORR notes that pursuant to § 410.1902 as proposed in the NPRM and finalized, an unaccompanied child transferred to a restrictive placement (secure, heightened supervision or Residential Treatment Center) will be able to request reconsideration of such placement. Upon such request, ORR shall afford the unaccompanied child a hearing before the Placement Review Panel (PRP) at which the unaccompanied child may, with the assistance of counsel if preferred, present evidence on their own behalf. Further, when an unaccompanied child is placed in a restrictive setting, the care provider facility in which the child is placed and ORR shall review the placement at least every 30 days to determine whether a new level of care is appropriate for the child. If the care provider facility and ORR determine in the review that continued placement in a restrictive setting is appropriate, the care provider facility shall document the basis for its determination and, upon request, provide documentation of the review and rationale for continued placement to the child's attorney of record, legal service provider, and/or child advocate. While ORR did not propose codifying corresponding procedures for a child to request reconsideration of a transfer to a non-restrictive placement, ORR notes that, as is consistent with current subregulatory policy, it will consider information from stakeholders, including the child's legal service provider, attorney of record or child advocate, as applicable, when making transfer recommendations. Thus, under § 410.1601(a)(3) as proposed and finalized, within 48 hours prior to the unaccompanied child's physical transfer, the referring care provider facility shall notify all appropriate interested parties of the transfer, including the child's attorney of record or DOJ Accredited Representative legal service provider, or child advocate, as applicable (88 FR 68953). However, such advance notice is not required in unusual and compelling circumstances.

Comment: One commenter expressed concern about the scope of the interested parties in § 410.1601(a)(3)(iii) who may have the ability to waive advance notice of an unaccompanied child's transfer and recommended specific and explicit paperwork that the unaccompanied child can review before agreeing to the waiver of notice of transfer.

Response: As proposed and finalized in § 410.1003(d), ORR encourages unaccompanied children, as developmentally appropriate and in their best interests, to be active participants in ORR's decision-making processes relating to their care and placement. Additionally, the responsibilities of child advocates, as proposed and finalized in § 410.1308, include requirements that child advocates visit with their unaccompanied child client, explain consequences and outcomes of decisions that may affect the unaccompanied child, and advocate for the unaccompanied child's best interest with respect to placement. Thus, the interested parties, as proposed and finalized in § 410.1601(a)(3), would have access to materials necessary to effectively advocate for the best interests of an unaccompanied child, and their responsibilities could include a review of specific paperwork, explanation of consequences and outcomes of a transfer or a waiver of advance notice of a transfer.

Comment: One commenter requested the clarification that the § 410.1601(b) protections regarding automatic 30-day review of restrictive placement also are applicable to Out-of-Network RTC facilities.

Response: As discussed at § 410.1105(c), the clinical criteria for placement in or transfer to a residential treatment center would also apply to transfers to or placements in out-of-network residential treatment centers. As such, the protections regarding automatic 30-day review of restrictive placement also are applicable to out-of-network residential treatment facilities.

Comment: One commenter recommended that ORR cross reference the Restrictive Care Provider Facility Placements and Transfer provision in § 410.1601(b) with the proposed criteria for placing an unaccompanied child in a restrictive placement in § 410.1105, the proposed restrictive placement case reviews in § 410.1901, and the proposed practice of reviewing restrictive placements at least every 30 days in § 410.1103(d).

Response: While ORR does not explicitly cross reference § 410.1601(b) with §§ 410.1105, 410.1901, and 410.1103(d), as proposed in the NPRM and finalized in this rule, ORR acknowledges that those provisions which concern restrictive placements are interrelated and should be read in tandem with each other regardless.

Comment: One commenter recommended the Group Transfer proposal include language to protect the individual rights of an unaccompanied child within a group of unaccompanied children being transferred so that timelines or due process rights of each unaccompanied child is recognized.

Response: Group transfer procedures support circumstances where a care provider facility transfers more than one child at a time. As previously discussed in § 410.1302, care provider facilities, as discussed previously in § 410.1302, will continue to follow ORR policy to ensure that the best interests of unaccompanied children are met. As previously discussed in § 410.1308, child advocates for unaccompanied children are able to make independent recommendations regarding the best interest of an unaccompanied child. This includes advocating for the unaccompanied child's best interest with respect to their placement, and providing best interest determinations, where appropriate and within a reasonable time, to ORR in a matter in which the child is a party or has an interest.

Final Rule Action: After consideration of public comments, ORR is finalizing this section as proposed.

Subpart H—Age Determinations

In subpart H of this rule, ORR provides guidelines for determining the age of an individual in ORR care (88 FR 68954 through 68955). The TVPRA instructs HHS to devise, in consultation with DHS, age determination procedures for children in their respective custody.[300] Consistent with the TVPRA, HHS and DHS jointly developed policies and procedures to assist in the process of determining the correct age of individuals in Federal custody. Establishing the age of the individual is critical because, for

purposes of the UC Program, HHS only has authority to provide care to unaccompanied children, who are defined, in relevant part, as individuals who have not attained 18 years of age. ORR also notes that the FSA allows for age determinations in the event there is a question as to veracity of the individual's alleged age.

Section 410.1700 Purpose of This Subpart

In the NPRM, ORR acknowledged the challenges in determining the age of individuals who are in Federal care and custody (88 FR 68954). These challenges include, but are not limited to, lack of available documentation; contradictory or fraudulent identity documentation and/or statements; ambiguous physical appearance of the individual; and diminished capacity of the individual. As proposed in § 410.1700, the purpose of this subpart is to establish provisions for determining the age of an individual in ORR custody. ORR noted that under this section, and as a matter of current practice, it would only conduct age determination procedures if there is a reasonable suspicion that an individual is not a minor. ORR believes that the requirements and standards described within this subpart properly balance the concerns of children who are truly unaccompanied children with the importance of ensuring individuals are appropriately identified as a minor. ORR noted that § 410.1309 covers required notification to legal counsel regarding age determinations.

Comment: One commenter commended the protections incorporated into the proposed rule's section regarding age determinations. The commenter also suggested that to ensure that unaccompanied children are protected to the greatest extent possible through this process, ORR should add ''if there is a reasonable suspicion that an individual is not a minor'' to align with ABA UC Standards.

Response: ORR appreciates the input from the commenter. ORR believes that the standard requiring a reasonable belief that the individual is 18 years of age or older to determine that the individual is not a minor is already explicitly stated at § 410.1704. ORR notes that under this section, and as a matter of current practice, ORR would only conduct age determination procedures if there is a reasonable suspicion that an individual is not a minor.

Comment: One commenter agreed with the language in the NPRM considering the totality of the evidence in making age determinations rather than relying on any single piece of evidence to the exclusion of all others, stating that this aligns with international standards. The commenter further stated that international best practices indicate that age assessment procedures should be conducted only in cases where a child's age is in doubt. The commenter stated that while ORR's proposal in the NPRM incorporates many of the elements of international best practices, the commenter recommended that ORR strengthen the standards to specify that age determination should not be carried out immediately, but rather in a safe and culturally sensitive manner after the child has had time to develop a feeling of safety after crossing the border. The commenter urged ORR to emphasize considerations of the psychological maturity of the individual.

Response: ORR thanks the commenter for their additional considerations. ORR notes that age determinations are not carried out in all cases, but only when there is a reasonable suspicion that an individual is not a minor and in accordance with the procedures described in this section to make such a determination based on the totality of evidence presented. This is a process that would necessarily require time to initiate and would therefore not be carried out immediately. However, to meet the definition of an unaccompanied child and remain in ORR custody, an individual must be under 18 years of age. ORR believes that it is imperative to the safety and security of children in its custody to ensure that individuals who are under 18 years of age are not placed in facilities where they could be inadvertently sharing housing with adults who have reached the age of 18 years or older. These procedures will ensure that children in ORR's custody receive care in a safe and culturally sensitive manner per the standards described in §§ 410.1302 and 410.1801. Furthermore, the types of evidence accepted in this section are intended to take into account information that is culturally relevant to the individual, such as baptismal certificates and sworn affidavits from parents, guardians, and relatives. ORR appreciates that a child needs time to develop a feeling of safety; ORR's obligation is to ensure proper placement of a child without undue delay in a setting where they can receive adaptation and acculturation services in accordance with the standards described in this subpart. ORR does not believe that considering the psychological maturity of the individual should be a factor in the process for making an age determination, primarily because such considerations are highly subjective.

Comment: A few commenters disagreed with the reasonable suspicion standard as proposed in this section. One commenter recommended that ORR replace the ''reasonable suspicion'' standard required to initiate an age determination with the higher ''probable cause'' and that ORR require staff to provide probable cause that the child is an adult given the potential impact of an adverse finding on children. One commenter requested that ORR further clarify what constitutes reasonable evidence or suspicion of a falsely provided age. One commenter stated that § 410.1704 as proposed concludes that ORR will treat a person as an adult if a reasonable person concludes that the individual is an adult but argued that this does not sufficiently protect the due process rights of unaccompanied children.

Response: ORR thanks the commenters for their input. ORR notes that initiating an age determination based on a reasonable suspicion that an individual in custody is not a minor is a matter of current practice consistent with the ''reasonable person'' standard for age determinations under the FSA that ORR is now codifying under this section. In this context, ORR is concerned that limiting age determinations only to instances where there is probable cause would limit ORR's ability to consider factors such as lack of available documentation; contradictory or fraudulent identity documentation and/or statements; and ambiguous physical appearance of the individual. As noted earlier in this section, ORR will consider available documentation or statements from the presumed child in ORR's custody or the child's attorney. ORR notes that an individual would be treated as an adult under this section only when the totality of the evidence indicates that an individual in ORR custody is age 18 years or older.

Comment: One commenter requested that ORR provide additional information to clarify its age determination procedures, including questions surrounding what happens for a child while the age determination process is ongoing; what occurs in the event that the totality of evidence is inconclusive; what happens for children who claim to be adults or present paperwork as adults but are suspected to be minors; detail surrounding the use of social media, internet, and pictures in the process of age determination; and details surrounding protective plans in place in the event potential adults are

placed with children for a period of time.

Response: Upon referral to ORR's legal custody, ORR would only conduct an age determination in accordance with the procedures described in this section if ORR has a reasonable suspicion that the individual is not a minor. This section does not require ORR to conduct an age determination when an individual claims to be an adult, but in the event such a claim gives rise to a reasonable suspicion that the individual is not a minor, ORR may decide to conduct an age determination. In instances where the medical age assessment does not reach the 75 percent probability threshold at § 410.1703(b)(8) and is therefore ambiguous, debatable, or borderline, forensic examination results must be resolved in favor of finding the individual is a minor. At this time, ORR does not agree to consider social media, internet, and pictures as evidence of an individual's age because ORR does not believe that this type of documentation is as reliable as the types of evidence accepted under this section. In the event that potential adults are placed with children for a period of time, as provided in current ORR policy, an individual in ORR care or their attorney of record may, at any time, present new information or evidence that they are 18 or older for reevaluation of an age determination. If the new information or evidence indicates that an individual who is presumed to be an unaccompanied child is an adult, then ORR will coordinate with DHS to take appropriate actions, which may include transferring the individual out of ORR custody back to DHS custody. ORR further emphasizes that pursuant to minimum standards under §§ 410.1302 and 1801, programs must provide at least one individual counseling session per week conducted by certified counseling staff with the specific objectives of reviewing the unaccompanied child's progress, establishing new short and long-term objectives, and addressing both the developmental and crisis-related needs of each unaccompanied child.

Comment: One commenter recommended that ORR create standards of protection from discrimination such as standards for documenting concerns of age and having those concerns verified by multidisciplinary teams, suggesting that if a direct care staff member says they think a child is actually an adult, a second opinion from the case management supervisor or medical staff should be pursued before addressing anything with the client.

Response: ORR thanks the commenter for their recommendation. ORR notes that only when there is a reasonable suspicion that the presumed child in ORR custody is not a minor would ORR proceed with conducting an age determination, and not solely based upon an opinion. After initiating an age determination, ORR would follow the procedures in this section to collect and verify the available evidence, during which time there will be additional opportunities to present documentation and testimony, including medical assessments. ORR notes that during this process, the presumed child who remains in ORR's custody will not be treated as an adult until the age determination is resolved.

Final Rule Action: After consideration of public comments, ORR is finalizing this section as proposed.

Section 410.1701 Applicability

ORR proposed in the NPRM at § 410.1701 that this subpart would apply to individuals in the custody of ORR (88 FR 68954). This is consistent with 8 U.S.C. 1232(b)(4), which specifies that DHS' and HHS's age determination procedures ''shall'' be used by each department ''for children in their respective custody.'' Section 410.1701 also reiterates that under the statutory definition of an unaccompanied child,[301] an individual must be under 18 years of age.

Comment: One commenter stated concern that the adoption of a trauma-informed approach in verifying critical information such as age could inadvertently result in adults falsely claiming to be minors and accessing services meant for vulnerable children.

Response: ORR disagrees that providing trauma-informed services to children in its legal custody is an impediment to conducting an age determination when there is a reasonable suspicion when the individual in custody is not a minor. ORR believes that the requirements in this subpart properly balance the concerns of children who are truly unaccompanied children with the importance of ensuring individuals are appropriately identified as minors.

Final Rule Action: After consideration of public comments, ORR is finalizing this section as proposed.

Section 410.1702 Conducting Age Determinations

ORR proposed in the NPRM at § 410.1702 to codify general requirements for conducting age determinations (88 FR 68954). The TVPRA requires that age determination procedures, at a minimum, consider multiple forms of evidence, including non-exclusive use of radiographs. Given these minimum requirements, § 410.1702 would allow for the use of medical or dental examinations, including X-rays, conducted by a medical professional, and other appropriate procedures. The terms ''medical'' and ''dental examinations'' are taken from the FSA at paragraph 13, and ORR interprets them to include ''radiographs'' as discussed in the TVPRA. Under § 410.1702, ORR would require that procedures for determining the age of an individual consider the totality of the circumstances and evidence rather than rely on any single piece of evidence to the exclusion of all others.

Comment: A number of commenters expressed concern that proposed § 410.1702 is inconsistent with ORR policy updates to remove X-rays and other changes in April 2022.

Response: ORR thanks commenters for their input. ORR notes that it revised its policy to remove skeletal (bone) maturity assessments since DHS does not accept this form of medical age assessment for age determinations.[302] However, ORR also notes that the policy under the TVPRA requires that age determination procedures, at a minimum, consider multiple forms of evidence, including ''non-exclusive'' use of radiographs. Therefore, ORR is finalizing its proposal that X-rays for medical age assessments may be taken into account in totality of the evidence.

Final Rule Action: After consideration of public comments, ORR is finalizing this section as proposed.

Section 410.1703 Information Used as Evidence To Conduct Age Determinations

ORR proposed in the NPRM, at § 410.1703, information that ORR would be able to use as evidence to conduct age determination (88 FR 68954 through 68955). Under § 410.1703(a), ORR would establish that it considers multiple forms of evidence, and that it makes age determinations based upon a totality of evidence. Under § 410.1703(b), ORR may consider information or documentation to make an age determination, including, but not limited to, (1) birth certificate, including a certified copy, photocopy, or facsimile copy if there is no acceptable original birth certificate, and proposes that ORR may consult with the consulate or embassy of the individual's country of birth to verify the validity of the birth certificate presented; (2) authentic Government-issued documents issued to the bearer; (3) other documentation, such as baptismal certificates, school

records, and medical records, which indicate an individual's date of birth; (4) sworn affidavits from parents or other relatives as to the individual's age or birth date; (5) statements provided by the individual regarding the individual's age or birth date; (6) statements from parents or legal guardians; (7) statements from other persons apprehended with the individual; and (8) medical age assessments, which should not be used as a sole determining factor but only in concert with other factors.

Regarding the use of medical age assessments, ORR proposed in the NPRM at § 410.1703(b)(8), to codify a 75 percent probability threshold, that, when used in conjunction with other evidence, reflects a reasonable standard that would prevent inappropriate placements in housing intended for unaccompanied children. The examining doctor would be required to submit a written report indicating the probability percentage that the individual is a minor or an adult. If an individual's estimated probability of being 18 or older is 75 percent or greater according to a medical age assessment, then ORR would accept the assessment as one piece of evidence in favor of a finding that the individual is not an unaccompanied child. Consistent with the TVPRA, ORR would not be permitted to rely on such a finding alone; only if such a finding has been considered together with other forms of evidence, and the totality of the evidence supports such a finding, would ORR determine that the individual is 18 or older. The 75 percent probability threshold applies to all medical methods and approaches identified by the medical community as appropriate methods for assessing age. Ambiguous, debatable, or borderline forensic examination results are resolved in favor of finding the individual is a minor. ORR believes that requirements at § 410.1703 enable ORR to utilize multiple forms of evidence.

Comment: A number of commenters expressed the view that ORR is unable to verify the age of a purported unaccompanied child. A few commenters disagreed with the documentation that ORR proposes would allow it to make an age determination, stating concerns that ORR would accept unverified documents and copies which remove all security features. One commenter stated a concern that ORR's approach would trust a facsimile or a baptismal certificate sent via a messaging application, but diminish the use of medical age assessments.

Response: ORR recognizes the challenges in obtaining evidence to verify the age of individuals in ORR's legal custody due to the circumstances of entering the country unaccompanied and with undocumented status. It is for this reason that ORR will not make an age determination on the sole basis of one document or document type, but rather based on the totality of the evidence. ORR notes that a legible facsimile of a birth certificate is acceptable when the original is not available. ORR believes that types of evidence accepted under this section are aligned with standard documentation that are widely accepted to verify age across multiple Federal agencies. ORR disagrees that the requirements under this subpart diminish the use of medical age assessments; rather, forensic results are recognized and taken into consideration with other evidence.

Comment: A few commenters provided recommendations for preventing wrongful age determinations. A few commenters recommended that consulate-verified birth certificates be standard practice where possible for age determination to prevent errors. One commenter suggested that the Government invest in advanced document verification technology to ensure the authenticity of birth certificates and other identification documents, also stating that collaboration with foreign consulates and embassies, as mentioned in § 410.1703, should be expedited to verify the validity of documents presented.

Response: ORR thanks commenters for their recommendations. ORR notes that it may consult with the consulate or embassy of the individual's country of birth to verify the validity of the birth certificate presented. However, due to the variation in standards in other nations outside of the U.S. for document protections, ORR does not believe that it would be able to apply advanced document verification technology consistently and believes the current types of documents accepted as evidence of an individual's age are sufficient to proceed with an age determination.

Comment: One commenter recommended that ORR minimize the use of medical age assessments, and instead prioritize vulnerability-based assessments and incorporate the benefit of the doubt and the best interest principle in these assessments. The commenter recommended that ORR ensure the children have access to legal counsel and a child advocate during age assessments, so their rights and best interests are represented during the process, and ensure all relevant staff are trained on and have access to ORR policy on age assessments.

Response: ORR thanks the commenter for their input. While ORR believes that the use of medical age assessments is still relevant to making an age determination, ORR emphasizes that they are one kind of evidence considered in making a determination based on the totality of the evidence. Rather, medical age assessments are taken into consideration with the totality of evidence accumulated if there is a reasonable suspicion that an individual is not a minor. Additionally, as stated at § 410.1309(a)(2)(i)(B), ORR must provide an unaccompanied child access to legal representation before and during an age assessment to ensure their rights and best interests are represented. ORR agrees that all relevant staff should be trained on and have access to ORR policy on age assessments in accordance with provisions at § 410.1305, requiring that standard programs, restrictive placements, and post-release service providers shall provide training to all staff, contractors, and volunteers, to ensure that they understand their obligations under ORR regulations in this part and policies, and are responsive to the challenges faced by staff and unaccompanied children at the facility.

Comment: A few commenters recommended eliminating or reducing the use of medical age determinations altogether, stating the process is difficult and inaccurate, and expressing concerns about the consequences of an erroneous age determination, such as sending a child to an adult detention facility, causing them to lose access to the range of services and protections to which children are entitled. Specifically, a few commenters stated that the scientific community agrees that bone and dental radiographs are unreliable because children grow at different rates, with one commenter stating that radiographs can only provide an age range of the person in question and ORR should, therefore, not include them in the age determination process at all, given their limitations. Additionally, a few commenters questioned the reliability of dental examinations to determine age. One commenter stated that age assessments of adolescents based on wisdom teeth growth have an accuracy of only 2 to 4 years, also stating the timing of eruption of the third molar depends on ethnicity, gender, socio-economic status, and even birth weight. The commenter stated that for these reasons, all forensic examination results should be deemed debatable and

resolved in favor of finding that the individual is a child.

Response: ORR thanks the commenters for their input. Regarding the proposed use of medical age assessments, at proposed § 410.1703(b)(8), ORR is codifying a 75 percent probability threshold, that, when used in conjunction with other evidence, reflects a reasonable standard that would prevent inappropriate placements in housing intended for unaccompanied children (88 FR 68955). The examining doctor would be required to submit a written report indicating the probability percentage that the individual is a minor or an adult. If an individual's estimated probability of being 18 or older is 75 percent or greater according to a medical age assessment, then ORR would accept the assessment as one piece of evidence in favor of a finding that the individual is not an unaccompanied child. Consistent with the TVPRA, ORR would not rely on such a finding alone; only if such a finding has been considered together with other forms of evidence, and the totality of the evidence supports such a finding, would ORR determine that the individual is 18 or older. The 75 percent probability threshold applies to all medical methods and approaches identified by the medical community as appropriate methods for assessing age, including evidence such as bone and dental radiographs. ORR disagrees that all forensic examination results are deemed debatable because they are evidence that merit consideration, but as noted, they are one type of evidence considered in looking at the totality of the evidence. ORR believes that requirements at proposed § 410.1703 would enable ORR to utilize multiple forms of evidence.

Comment: A few commenters recommended that ORR use DNA testing in age determinations for unaccompanied children. One commenter cited an example from an Inspector General report [303] stating that ICE, HSI, and CBP officials stated that testing with Rapid DNA helped deter and investigate false claims about parent-child relationships and therefore recommended that ORR include a provision to clearly allow for rapid DNA testing, not only for age determinations, but also for verifying familial relationships to deter and detect fraud and abuse and better protect children.

Response: ORR thanks commenters for their recommendations and for their concern. The referenced report is applicable to law enforcement activities undertaken by immigration agencies and ORR does not believe universal use of DNA is required under ORR's obligations under the HSA to coordinate care and placement of unaccompanied children. For a discussion of considerations relating to use of DNA in the sponsor approval process, please see ORR's response to comments on § 410.1201.

Comment: A few commenters agreed with the regulations as proposed in this section, commending the protections incorporated in the NPRM regarding age determinations and stating that this framework for age determination can help protect children. One commenter agreed with the proposed regulation and requested that ORR clarify at § 410.1703(b)(8) that the medical age assessment report come from the examining doctor as stated in the beginning of this subsection.

Response: ORR thanks commenters for their support. ORR believes that the regulation text is sufficiently clear as proposed. However, ORR will continue to monitor the requirements as they are implemented and may provide additional clarification through future policymaking if needed.

Final Rule Action: After consideration of public comments, ORR is finalizing this section as proposed.

Section 410.1704 Treatment of an Individual Whom ORR Has Determined To Be an Adult

ORR proposed in the NPRM, at § 410.1704, to codify the substantive requirement from paragraph 13 of the FSA regarding treatment of an individual who appears to be an adult (88 FR 68955). Specifically, if the procedures in this subpart would result in a reasonable person concluding, based on the totality of the evidence, that an individual is an adult, despite the individual's claim to be under the age of 18, ORR would treat such person as an adult for all purposes. As provided in current ORR policy,[304] an individual in ORR care or their attorney of record may, at any time, present new information or evidence that they are 18 or older for re-evaluation of an age determination. If the new information or evidence indicates that an individual who is presumed to be an unaccompanied child is an adult, then ORR will coordinate with DHS to take appropriate actions, which may include transferring the individual out of ORR custody back to DHS custody.

Comment: One commenter stated that ORR must report all adults they uncover who fraudulently pose as minors in ORR facilities to ICE and State and local law enforcement.

Response: In cases where ORR has conducted an age determination and concludes that the individual is not a minor, ORR follows all required procedures including referral for a transfer evaluation with DHS/ICE. If the individual is determined to be an adult based on the age determination the individual is transferred to the custody of DHS/ICE.

Comment: One commenter recommended, ''for due process reasons,'' that the final rule provide for appeals of age determinations to an independent reviewer outside of ORR.

Response: ORR believes its age determination practices as codified in this section of the final rule are consistent with principles of due process. ORR has a significant interest in having age determination procedures not only to fulfill its statutory mandate,[305] but also because it is authorized only to care for unaccompanied children as defined in the HSA. With respect to the adequacy of ORR's age determination process, ORR relies not only on any information in its possession, but also gives the individual, in addition to notice, the opportunity to submit evidence in support of their claim to be a minor. Based on these considerations, ORR believes its current processes align with the principles of due process.

Final Rule Action: After consideration of public comments, ORR is updating the heading for § 410.1704 to clarify that it applies to an individual whom ORR ''has determined to be'' an adult rather than to an individual who ''appears to be'' an adult. ORR is otherwise finalizing § 410.1704 as proposed in the NPRM.

Subpart I—Emergency and Influx Operations

In subpart I of the NPRM, ORR proposed to codify requirements applicable to emergency or influx facilities that ORR opens or operates during a time of and in response to emergency or influx (88 FR 68955 through 68958). This subpart applies the requirement at paragraph 12C of the FSA to have a written plan that describes the reasonable efforts the former INS, now ORR, will take to place all unaccompanied children as expeditiously as possible.

As a matter of policy, and consistent with the discussion at § 410.1302 of this final rule, ORR has a strong preference to house unaccompanied children in standard programs. However, ORR recognizes that in times of emergency or influx additional facilities may be needed, on short notice, to house unaccompanied children. As used in this subpart, emergency means an act or event (including, but not limited to, a

natural disaster, facility fire, civil disturbance, or medical or public health concerns at one or more facilities) that prevents timely transport or placement of unaccompanied children, or impacts other conditions provided by this part. Influx means a situation in which the net bed capacity of ORR's standard programs that is occupied or held for placement of unaccompanied children meets or exceeds 85 percent for a period of seven consecutive days. In this final rule, ORR defines ''Emergency or Influx Facilities'' as a single term to encompass a care provider facility opened in response to either an emergency or influx and to propose that such a facility would meet the minimum requirements described in this subpart. These facilities may be contracted for and stood up in advance of an emergency or an influx in preparation of such an event, but no children would be placed in such a facility until an emergency or influx exists.

Importantly, this definition of ''influx'' departs from and sets a substantially higher threshold for what constitutes an influx that used in the FSA which defined ''influx'' as a situation in which 130 or more unaccompanied children were awaiting placement. In the NPRM, ORR stated that it takes a new approach to defining ''influx'' based on its experiences in the years after the settlement agreement and in light of the increased numbers of unaccompanied children over time. In this rule, ORR defines an ''influx'' without reference to a set number of unaccompanied children, but rather to circumstances reflecting a significant increase in the number of unaccompanied children that exceeds the standard capabilities of the Federal Government to process and transport them timely and/or to shelter them with existing resources. ORR believes that using the 85 percent threshold provides a reasonable measure to determine when bed capacity in the standard programs is strained to the point that accepting referrals from other Federal agencies within 72 hours becomes very challenging. ORR notes that this 85 percent threshold would align with ORR's current practices and is based on ORR's experience with influx trends and organizational capacity. During these times of emergency or influx, ORR may house unaccompanied children at emergency or influx facilities. ORR notes that, consistent with current policy, placements of unaccompanied children at emergency or influx facilities cease when net bed capacity in standard programs drops below 85 percent for a period of at least seven consecutive days.[306]

Section 410.1800 Contingency Planning and Procedures During an Emergency or Influx

ORR recognizes that during times of emergency or when there is an influx of unaccompanied children, it is important to have policies and procedures in place to ensure that all unaccompanied children have their needs met and receive appropriate care and protection. Because emergency or influx facilities are intended to be a temporary response to an influx or emergency, when speed may be critical, these facilities may be unlicensed or may be exempted from licensing requirements by State or local licensing agencies, or both. Although ORR's preference is to place unaccompanied children in standard programs whenever possible, these emergency or influx facilities may be used to house unaccompanied children temporarily to ensure children remain safe during an emergency and do not remain in CBP border stations, which are neither designed nor equipped to care for children, for prolonged periods of time during an influx. Regardless of licensure status, these facilities must meet ORR standards and must comply to the greatest extent possible with State child welfare laws and regulations. ORR proposed at § 410.1800 to codify guidelines for contingency planning and procedures to use during an emergency or influx (88 FR 68955 through 68956).

ORR proposed in the NPRM, at § 410.1800(a), to regularly reevaluate the number of placements needed for unaccompanied children to determine whether the number of shelters, heightened supervision facilities, and ORR transitional home care beds should be adjusted to accommodate an increased or decreased number of unaccompanied children eligible for placement in care in ORR custody provider facilities.

ORR proposed in the NPRM, at § 410.1800(b), consistent with paragraph 12A of the FSA, that in the event of an emergency or influx that prevents the prompt placement of unaccompanied children in standard programs, ORR shall make all reasonable efforts to place each unaccompanied child in a standard program as expeditiously as possible. As described in proposed § 410.1800(a) and consistent with ORR's preference to place unaccompanied children in standard care provider facilities, ORR's commitment to regularly reevaluating the number of placements needed will help this effort to place unaccompanied children in licensed programs quickly.

ORR proposed in the NPRM, at § 410.1800(c), that activities during an influx or emergency include the following: (1) ORR implements its contingency plan on emergencies and influxes, which may include opening facilities in times of emergency or influx; (2) ORR continually develops standard programs that are available to accept emergency or influx placements; and (3) ORR maintains a list of unaccompanied children affected by the emergency or influx including each unaccompanied child's: (i) name; (ii) date and country of birth; (iii) date of placement in ORR's custody; and (iv) place and date of current placement.

Comment: One commenter supported the updates to ORR's emergency preparedness and contingency planning, agreeing with the focus on placing children in standard programs first and ongoing efforts to further expand the availability of standard programs.

Response: ORR thanks the commenter for their support.

Comment: One commenter welcomed updates to the definition of an influx during which ORR can use unlicensed or emergency shelters that do not have to meet the same standards as its network of licensed facilities. The commenter also supported ORR's stated commitment to regularly reevaluating and expanding regular shelter capacity as needed to minimize the need to utilize influx facilities. The commenter stated that together these proposed sections work toward a reduction in use of unlicensed and large congregate care facilities and promote the best interests of the children in ORR's care.

Response: ORR appreciates the commenter's agreement with the updates in this section and agrees that such provisions will work towards ORR's stated commitment to minimize the need to utilize emergency or influx facilities.

Comment: Several commenters expressed concern that this section created ambiguity by not distinguishing between Emergency Intake Site (EIS) and Influx Care Facility (ICF). One commenter stated that the text seems to treat them interchangeably, and references regulations and policies applicable to the standard program, contributing to an additional lack of clarity. One commenter questioned the purpose of listing two program types within a single set of rules and requested that ORR clarify and define what constitutes an EIS and an ICF. A few commenters recommended that ORR remove EIS from this subpart and establish it as a distinct subpart, stating that EIS should be reserved exclusively for emergency declarations rather than

as an emergency response to sudden influx. The commenter stated that existing ICFs should be used to manage influx situations at the border.

Response: ORR intends for ''Emergency or Influx Facilities'' (''EIFs'') as a single term to encompass both care provider facilities that ORR opens in response to either an emergency (*e.g.,* a public health emergency), and facilities that ORR opens in response to an influx, as defined in this final rule. ORR notes that using a single term is consistent with the FSA which refers to emergencies and influx together.[307] EIFs will be subject to the minimum standards under this section for the safety and well-being of children as codified at § 410.1801. ORR notes that these standards are consistent with the requirements of Exhibit 1 of the FSA, even though the FSA does not require emergency or influx facilities to apply those standards. Further, the standards for EIFs are similar to the standards described at § 410.1302(a), though with some differences to allow for greater operational flexibility, which ORR believes are appropriate in order to relatively quickly provide child-appropriate care for unaccompanied children during times of emergency or influx. ORR further notes that all the regulations not related to licensure or minimum standards in this part would apply to all care provider facilities, including both standard and non-standard programs as defined below unless otherwise specified. ORR is not incorporating in this regulation the terms ''ICF'' or ''EIS,'' which are terms it has used in the past. Whatever terms ORR uses to describe facilities opened in the event of an emergency or influx, such facilities will be subject to the standards described in this section.

Comment: A few commenters suggested investment in or expanding licensed shelter beds. One commenter suggested that, instead of relying on influx shelter beds, ORR should favor contingency planning for onboarding of more licensed shelter beds and staff and focus on the expansion of small-scale shelter models and community-based models. Another commenter suggested that although under the FSA, the Government is not obligated to fund additional beds on an ongoing basis, such funding is necessary and may well be cost efficient. The commenter suggested that ORR conduct research and analyze whether funding additional beds on an ongoing basis would lead to cost savings when compared to the costs ORR incurs operationalizing massive influx facilities in a crisis environment. Another commenter expressed a concern that EIFs would be used to replace licensed facilities, including appropriate family and community-based placements.

Response: ORR thanks the commenters for their recommendations. ORR currently operates a network of 289 care provider facilities in 29 States,[308] and continually assesses its bed capacity and potential opportunities for additional standard bed capacity as appropriate in relation to trends in the rates of referrals of unaccompanied children to ORR. ORR also notes that EIFs are not to be used as substitutes for standard programs where such programs are available. EIFs are specifically for situations of emergency or influx. ORR has worked to build up its standard bed capacity, but because the frequency and size of influxes of unaccompanied children, and the timing of emergencies or conditions of influx are not always predictable, as a matter of prudent planning ORR requires the ability to quickly add bed capacity when circumstances require it to ensure child-appropriate placements. ORR continually assesses its bed capacity and considers the comparative costs between funding additional beds on an ongoing basis and placement in EIFs, and has issued Notices of Funding Opportunity (NOFOs) to qualified applicants to increase standard program capacity.

Comment: Several commenters expressed concern that § 410.1800(b) would not be compliant with the FSA's requirement to make licensed placements of unaccompanied children ''as expeditiously as possible.'' One commenter stated concerns that § 410.1800(b) introduces qualifying language that would permit a delay in licensed placement under circumstances inconsistent with the FSA. The commenter further argued that the FSA's reference to licensed placement ''as expeditiously as possible'' already provides ORR with leeway to delay licensed placement when it is operationally infeasible to place children within the FSA's time limits and stated that adding ''make all reasonable efforts'' weakens the ''as expeditiously as possible'' requirement for placement in a licensed program. The commenter suggested that ORR eliminate this additional qualifying language in order to comply with the requirements of the FSA. Several commenters stated the NPRM did not define ''expeditiously'' nor did it clearly specify a timeframe for placement in a licensed facility, and stated that this was in contravention of court decisions that have addressed this question. Several commenters stated that the proposed rule implies at § 410.1802(a)(1) that ''expeditiously'' is within a 30-day period but the U.S. Court of Appeals for the Ninth Circuit which is monitoring compliance of FSA has opined that a 20-day extension may be ''expeditious.'' The commenter argued that ORR's 30-day window for release from an ''emergency or influx facility'' may be considered noncompliance, especially if the facilities are unlicensed and do not meet minimum safety requirements of the FSA. One commenter stated that the court monitoring compliance of the FSA has suggested that it may be reasonable for ORR to exceed normal requirements up to 20 days in the event of an influx and to adopt this timeframe in the proposed rule.

Response: ORR thanks the commenters for their input, and notes that in this final rule it is updating § 410.1800(b), to strike ''make all reasonable efforts,'' and instead state that ORR shall place each unaccompanied child in a standard program ''as expeditiously as possible.'' ORR notes that the FSA itself does not establish a specific timeline for placement in a licensed program. Instead, the FSA requires ORR to place children ''as expeditiously as possible'' in a licensed placement. ORR would also note that EIFs are required to follow the minimum standards set forth at § 410.1801. Even though not required by the FSA, those standards essentially mirror the standards set forth at Exhibit 1 of the FSA. Finally, ORR notes that the commenter's reference to a 20-day period was in the court's discussion of standards applicable to children in DHS custody in the context of family detention,[309] which presents a different set of considerations than those applicable to expeditious transfer in conditions of emergency or influx for the UC Program.

Comment: Several commenters asserted that ORR inappropriately defined influx as an ''exceptional circumstance'' preventing the placement of a child from other Federal agencies within 72 hours permitted under Flores. One commenter argued that this proposal would allow ORR to absolve itself of the responsibility to comply with the terms of the FSA whenever it is presented with challenges to placing children in standard programs within 72 hours and was concerned that this would directly risk the safety of unaccompanied children for which the agreement was issued to protect.

Response: ORR notes that, although an exceptional circumstance under § 410.1101(d) would include an influx, this final rule also substantially raises

the threshold for influx above what is specified in the FSA. This final rule, at § 401.1001, defines influx as a situation in which the percentage of ORR's existing net bed capacity in standard programs that is occupied or held for placement by unaccompanied children meets or exceeds 85 percent for a period of seven consecutive days, in contrast with the FSA definition of more than 130 minors eligible for placement in a licensed program. As a practical matter, it has been the case for the last several years (with the exception of the period in 2020 in which unaccompanied children were being expelled at the border) that the daily average of unaccompanied child referrals from DHS substantially exceeds 130.

Comment: One commenter argued that under this proposed definition, ORR would have the authority to operate a temporary unlicensed facility for any number of situations it considers an emergency, including an influx, stating concerns that emergency and influx shelters are large, often in remote areas, and child welfare advocates have long expressed grave concerns with the treatment of children and the general conditions in such facilities. The commenter recommended that emergency or influx facilities only be allowed to shelter children if in alignment with ORR's own stated minimum standards and with standards under international law.

Response: ORR reiterates that emergency or influx facilities must comply with the minimum standards set forth at § 410.1801, which is based on parts of Exhibit 1 of the FSA, as well as other requirements and standards set by ORR under its statutory authorities. ORR notes that EIFs are only authorized under the situations defined as an emergency or influx under § 401.1001. ORR additionally notes that it operates EIFs as emergency care provider facilities in accordance with the standards finalized at 45 CFR 411 in the Interim Final Rule, Standards to Prevent, Detect, and Respond to Sexual Abuse and Sexual Harassment Involving Unaccompanied Children.

Comment: One commenter stated that HHS has omitted data that shows how frequently ORR operates under conditions that would permit ORR to relax standards under this proposal. The commenter stated that there has not been a single month since January 2021 in which ORR or its contractors have not been operating at ''influx'' capacity, as defined by the proposed rule. The commenter therefore requested that HHS make data available to the public regarding how frequently ''emergency'' or ''influx'' conditions are present.

Response: As previously noted, the final rule is substantially raising the threshold for determining that there is an influx. ORR believes that rather than ''relaxing'' standards, this policy would make placements in an EIF less frequent. For data regarding placements in an EIF, ORR refers commenters to publicly available information posted on its website.[310]

Comment: One commenter expressed concern that § 410.1800(c)(2), as proposed in the NPRM, merely stated that during an influx ORR continually develops standard programs that are available to accept emergency or influx placements and does not comport with the FSA requirement to undertake extensive advance contingency planning. The commenter argued that this provision is insufficient to minimize the use of unlicensed congregate influx facilities.

Response: ORR thanks the commenter for their input. ORR is committed to minimizing the use of unlicensed emergency or influx facilities (EIFs) while ensuring that EIFs adhere to minimum standards. ORR notes that it annually reviews its contingency plans based on the actual and anticipated number of unaccompanied children referrals to monitor available resources in light of expected needs. This is consistent with the requirement set forth at Exhibit 3 of the FSA at paragraph 5.[311] ORR believes the requirements related to contingency plans under § 410.1800(c) of this final rule sufficiently comports with the FSA requirement to undertake extensive advance contingency planning.

Comment: One commenter asserted that it is not enough to regularly ''reevaluate'' the number of placements needed as stated in § 410.1800(a) and recommended instead that ORR establish a sizeable list of placements in waiting. The commenter stated that numbers required under the FSA suggest the Government must have a list of beds equal to 62 percent of the capacity threshold constituting an influx and that the FSA also requires the Government to maintain a list and ''. . . update this listing of additional beds on a quarterly basis . . .'' and should therefore revise § 410.1800(c)(2) to require ORR to engage in extensive contingency planning which at a minimum includes a list of licensed placements in waiting equal to at least 62 percent of the capacity threshold at which an influx facility can be utilized. The commenter further stated such a list should include pre-vetted temporary family foster care and small group home options. One commenter suggested a proactive approach by ORR to address potential influx situations, ensuring readiness for accommodating children.

Response: ORR thanks the commenter for their recommendation. ORR notes that it annually reviews its contingency plans based on the actual and anticipated number of unaccompanied children referrals to monitor available resources in light of expected needs. Further, the current scale of the UC Program, which in recent years has experienced around 120,000 referrals of unaccompanied children per year, is significantly greater than the situation in 1997 when the FSA was finalized. Given the dramatically changed circumstances since that time, ORR has repeatedly needed to engage in far more extensive contingency planning than was envisioned in 1997. ORR notes that the commenter's calculation of 62 percent of capacity threshold appears to be a reference to FSA paragraph 12C, which required the former INS to have 80 beds available for placement; 80 beds in no longer a meaningful preparedness number in light of current trends in referrals of unaccompanied children to ORR.

Comment: One commenter requested clarification on the population of children meant by ''placement of such facilities of certain unaccompanied children'' at § 410.1800(c)(1) of the NPRM. The commenter recommended that ORR consider serving children together at specialized facilities catering to those who speak certain languages, who are sibling sets, and/or who are turning 18 in fewer than 30 days.

Response: ORR thanks the commenter for their recommendation. By ''certain unaccompanied children,'' ORR means those children ORR determines could be safely and appropriately placed at an EIF, including as consistent with the standards set forth at § 410.1802(a). ORR further clarifies that providers are required to render services in the child's native or preferred language, thus minimizing the need to consider grouping children in specialized facilities based on certain language. With respect to siblings, ORR stated at § 410.1802(b)(1) that a child cannot be placed in an EIF if the child is part of a sibling group with a sibling(s) age 12 years or younger. As a matter of policy, the interactions and interrelationship of the unaccompanied child with the child's parents, siblings, and any other person who may significantly affect the unaccompanied child's well-being must be considered as a factor in determining the child's best interests.

Comment: A few commenters suggested revisions or clarifications to the provisions at § 410.1800(c)(3) for the list of unaccompanied children affected

by the emergency or influx. One commenter stated that this subpart does not explain how this list would be used or whether only children housed at an emergency or influx facility would be included. The commenter further stated that it also does not appear to include all relevant information needed to ensure that it only includes unaccompanied children who meet the criteria at § 410.1802(a). One commenter stated that this list is a creation of ORR and argued that since the extant privacy protections and policies specify the requirements of contractors and grantees, the proposed rule failed to specify which data protections apply to this information. The commenter suggested that ORR specify how long the information in proposed § 410.1800(c)(3) is retained, and whether this information is part of the case file, included in the case file but separate, or altogether separate from the case file.

Response: ORR first notes that this requirement is consistent with Exhibit 3, paragraph 2 of the FSA. ORR also clarifies that the requirements pertaining to maintenance and confidentiality of records apply to the list described at § 410.1800(c)(3) and the use of this list is limited only to ensuring that ORR is aware of the volume of children are placed in an EIF at any given time and is able to timely transfer and place children.

Comment: A few commenters suggested defined timeframes for emergency declarations, citing concerns such as the presence of cold status sites awaiting activation and the changes in capacity facilitated by the IDIQ vehicle which provides access to multiple ICFs/EIS. One commenter recommended that if unlicensed influx facilities are to be utilized, they should be temporarily open for no more than 60 days.

Response: ORR thanks the commenters for their recommendations. ORR agrees that placements in EIFs should be temporary in nature but cannot commit to closing EIFs when they are still needed due to emergency or influx circumstances.

Comment: Several commenters cited concerns with health and safety risks to unaccompanied children in emergency or influx facilities, with one commenter stating that facilities that are overwhelmed pose heightened risks for exploitation, abuse, and mismanagement. A few commenters expressed concern that influx facilities are already failing to meet minimum standards required under State law thus creating health and safety risks and included examples where unaccompanied children have experienced sexual assault, not enough staff to supervise them, not eating throughout the day, or have tested positive for the coronavirus are not being physically separated from others.

Response: ORR thanks the commenters for their concerns. ORR takes reports of such incidents seriously and will continue to be responsive to any information about failing to meet minimum standards in this section and pursuant to the requirements for monitoring all providers under § 410.1303.

Final Rule Action: After consideration of public comments, ORR is finalizing § 410.1800 as proposed in the NPRM, except that it is clarifying that ORR shall regularly reevaluate the number of standard program placements, and updating § 410.1800(b) to state that ORR shall place each unaccompanied child in a standard program ''as expeditiously as possible,'' not that ORR will ''make all reasonable efforts'' to place each unaccompanied child in a standard program as expeditiously as possible.

Section 410.1801 Minimum Standards for Emergency or Influx Facilities (EIFs)

At § 410.1801(a), ORR notes that in addition to the standards it has for standard programs and restrictive placements, this section provides a set of minimum standards that must be followed for emergency or influx facilities (88 FR 68956 through 68958).

ORR proposed in the NPRM, at § 410.1801(b), a list of minimum services that must be provided to all unaccompanied children in the care of emergency or influx facilities (EIFs), and available at the time of the facility opening. These services, which are consistent with Exhibit 1 of the FSA, would generally apply the same minimum service requirements that apply under the FSA to standard care facilities to emergency or influx facilities. Under § 410.1801(b)(1), these minimum services would require that emergency or influx facilities provide unaccompanied children with proper physical care and maintenance, including suitable living accommodations, food, appropriate clothing, and personal grooming items. ORR proposed in the NPRM, at § 410.1801(b)(2), that emergency and influx facilities provide unaccompanied children with appropriate routine medical and dental care; family planning services, including pregnancy tests; medical services requiring heightened ORR involvement; emergency healthcare services; a complete medical examination (including screenings for infectious diseases) generally within 48 hours of admission; appropriate immunizations as recommended by the Advisory Committee on Immunization Practices' Child and Adolescent Immunization Schedule and approved by HHS's Centers for Disease Control and prevention; administration of prescribed medication and special diets; and appropriate mental health interventions when necessary.

ORR believes that the unique needs and background of each unaccompanied child should be assessed by emergency or influx facilities to ensure that these needs are being addressed and supported by the emergency or influx facility. Therefore, ORR proposed in the NPRM at § 410.1801(b)(3), and consistent with ORR's existing policy and practice, to require that each unaccompanied child at an emergency or influx facility receive an individualized needs assessment that includes: the various initial intake forms, collection of essential data relating to the identification and history of the child and the child's family, identification of the unaccompanied child's special needs including any specific problems which appear to require immediate intervention, an educational assessment and plan, and an assessment of family relationships and interaction with adults, peers and authority figures; a statement of religious preference and practice; an assessment of the unaccompanied child's personal goals, strengths and weaknesses; identifying information regarding immediate family members, other relatives, godparents or friends who may be residing in the United States and may be able to assist in connecting the child with family members.

Access to education services for unaccompanied children in care from qualified professionals is critical to avoid learning loss while in care and ensure unaccompanied children are developing academically. Under § 410.1801(b)(4), ORR would require that emergency or influx facilities provide educational services appropriate to the unaccompanied child's level of development and communication skills in a structured classroom setting Monday through Friday, which concentrates on the development of basic academic competencies, and on English Language Training. ORR proposed in the NPRM that, as part of these minimum services for unaccompanied children in emergency or influx facilities, the educational program shall include instruction and educational and other reading materials in such languages as needed. Basic academic areas may

include such subjects as Science, Social Studies, Math, Reading, Writing and Physical Education. The program must provide unaccompanied children with appropriate reading materials in languages other than English for use during leisure time.

ORR strongly believes that time for recreation is essential to supporting the health and well-being of unaccompanied children. ORR proposed in the NPRM, at § 410.1801(b)(5), to require that emergency or influx facilities provide unaccompanied children with activities according to a recreation and leisure time plan that include daily outdoor activity—weather permitting—with at least one hour per day of large muscle activity and 1 hour per day of structured leisure time activities (that should not include time spent watching television). Activities should be increased to a total of 3 hours on days when school is not in session.

The psychological and emotional well-being of unaccompanied children are an important component of their overall health and well-being, and therefore ORR proposed in the NPRM that these needs must be met by emergency or influx facilities. ORR proposed in the NPRM, at § 410.1801(b)(6), emergency or influx facilities would be required to provide at least one individual counseling session per week conducted by trained social work staff with the specific objective of reviewing the child's progress, establishing new short-term objectives, and addressing both the developmental and crisis-related needs of each child. Group counseling sessions are another way that the psychological and emotional well-being of unaccompanied children can be supported while in ORR care. Therefore, ORR proposed in the NPRM under § 410.1801(b)(7), that unaccompanied children would also receive group counseling sessions at least twice a week. As is the case at standard facilities, these sessions are usually informal and take place with all unaccompanied children present. ORR believes that these group sessions would give new children the opportunity to get acquainted with staff, other children, and the rules of the program, as well as provide them with an open forum where everyone gets a chance to speak. Daily program management is discussed, and decisions are made about recreational and other activities. ORR notes that these group sessions would provide a meaningful opportunity to allow staff and unaccompanied children to discuss whatever is on their minds and to resolve problems.

ORR proposed in the NPRM, at § 410.1801(b)(8), emergency or influx facilities would be required to provide unaccompanied children with acculturation and adaptation services, which include information regarding the development of social and interpersonal skills which contribute to those abilities necessary to live independently and responsibly. ORR believes these services are important to supporting the social development and meeting the cultural needs of unaccompanied children in emergency or influx facilities. ORR proposed in the NPRM, at § 410.1801(b)(9), to require that emergency or influx facilities provide a comprehensive orientation regarding program intent, services, rules (written and verbal), expectations, and the availability of legal assistance. In an effort to support each child's spiritual and religious practices, ORR proposed in the NPRM at § 410.1801(b)(10), that emergency or influx facilities would be required to provide unaccompanied children access to religious services of the child's choice whenever possible. At the same time, with respect to the obligations of care provider facilities, ORR notes that it operates the UC Program in compliance with the requirements of the Religious Freedom Restoration Act and other applicable Federal conscience protections, as well as all other applicable Federal civil rights laws and applicable HHS regulations.[312]

ORR proposed in the NPRM at § 410.1801(b)(11) that emergency or influx facilities would make visitation and contact with family members (regardless of their immigration status) available to unaccompanied children in such a way that is structured to encourage such visitation. ORR notes that the staff must respect the child's privacy while reasonably preventing the unauthorized release of the unaccompanied child. ORR proposed in the NPRM, at § 410.1801(b)(12), unaccompanied children at emergency or influx facilities have a reasonable right to privacy, which includes the right to wear the child's own clothes when available, retain a private space in the residential facility, group or foster home for the storage of personal belongings, talk privately on the phone and visit privately with guests, as permitted by the house rules and regulations, receive and send uncensored mail unless there is a reasonable belief that the mail contains contraband. ORR proposed in the NPRM at § 410.1801(b)(13) that unaccompanied children at emergency or influx facilities would be provided services designed to identify relatives in the United States as well as in foreign countries and assistance in obtaining legal guardianship when necessary for the release of the unaccompanied child. ORR proposed in the NPRM at § 410.1801(b)(14), emergency or influx facilities be required to provide unaccompanied children with legal services information, including the availability of free legal assistance, and that they may be represented by counsel at no expense to the Government the right to a removal hearing before an immigration judge; the ability to apply for asylum with USCIS in the first instance; and the ability to request voluntary departure in lieu of deportation.

ORR proposed in the NPRM at § 410.1801(b)(15) that emergency or influx facilities, whether State-licensed or not, comply, to the greatest extent possible, with State child welfare laws and regulations (such as mandatory reporting of abuse), as well as State and local building, fire, health and safety codes. If there is a potential conflict between ORR's regulations and State law, ORR will review the circumstances to determine how to ensure that it is able to meet its statutory responsibilities. The proposed rule also stated that if a State law or license, registration, certification, or other requirement conflicts with an ORR employee's duties within the scope of their ORR employment, the ORR employee is required to abide by their Federal duties.[313] ORR proposed in the NPRM at § 410.1801(b)(16), emergency or influx facilities deliver services in a manner that is sensitive to the age, culture, native language, and needs of each unaccompanied child. To support this minimum service, emergency or influx facilities would be required to develop an individual service plan for the care of each child. Finally, ORR proposed in the NPRM at § 410.1801(b)(17) that the emergency or influx facility be required to maintain records of case files and make regular reports to ORR. Emergency or influx facilities must have accountability systems in place, which preserve the confidentiality of client information and protect the records from unauthorized use or disclosure.

ORR proposed in the NPRM at § 410.1801(c), that emergency or influx facilities must do the following when providing services to unaccompanied children: (1) Maintain safe and sanitary conditions that are consistent with ORR's concern for the particular vulnerability of minors; (2) Provide access to toilets, showers and sinks, as well as personal hygiene items such as

soap, toothpaste and toothbrushes, floss, towels, feminine care items, and other similar items; (3) Provide drinking water and food; (4) Provide medical assistance if the unaccompanied child is in need of emergency services; (5) Maintain adequate temperature control and ventilation; (6) Provide adequate supervision to protect unaccompanied children; (7) separate from other unaccompanied children those unaccompanied children who are subsequently found to have past criminal or juvenile detention histories or have perpetrated sexual abuse that present a danger to themselves or others; (8) Provide contact with family members who were arrested with the unaccompanied child; and (9) Provide access to legal services at § 410.1309 in this rule. ORR notes that these requirements are based in part on standards described in the FSA at paragraph 12A. Although ORR understands these requirements apply specifically to the conditions in DHS facilities following initial arrest or encounter by immigration officers at DHS, nevertheless, because they set out additional safeguards for unaccompanied children, ORR proposed in the NPRM to adopt them for purposes of emergency or influx facilities under this rule. Additionally, consistent with paragraph 12A of the FSA, ORR would transfer an unaccompanied child to another care provider facility if necessary to provide adequate language services. These language access requirements are intended to protect unaccompanied children's interests and ensure that they understand their legal rights and options available to them, the nature of ORR custody and the general ORR principles regarding their care, and that they have access to adequate and effective legal representation if necessary. Many of these services are provided by case managers, who must have a presence onsite at the emergency or influx facility.

ORR proposed in the NPRM at § 410.1801(d), certain scenarios in which ORR may grant waivers for an emergency or influx facility operator, whether a contractor or grantee, from the standards proposed under § 410.1801(b). Specifically, waivers may be granted for any or all of the services identified under § 410.1801(b) if the facility is activated for a period of six consecutive months or less and ORR determines that such standards are operationally infeasible. For example, an emergency or influx facility operator may be unable to provide services at the site within the timeframe required by ORR. ORR determines whether certain standards are operationally infeasible on a case-by-case basis, taking into consideration the circumstances presented by a specific emergency or influx facility. ORR also would require that such waivers be made publicly available.

Comment: A few commenters agreed with the improvements in the minimum standards for standard programs and emergency or influx facilities outlined in the NPRM. One commenter supported the inclusion of requirements that both types of facility provide an individualized needs assessment and an individualized services plan for each child. The commenter likewise supported the requirement that facilities provide services in a manner that is sensitive to the age, culture, native language and needs of each child. The commenter further agreed with requirements that standard programs implement trauma-informed positive behavior management systems, stating the minimum standards represent important protections for unaccompanied children in ORR's care and custody. Another commenter stated that ORR's proposed rule advances its efforts to plan for emergency and influx contingencies in a way that seeks to minimize the impact on children, requiring a higher standard of care than used in past temporary facilities, in particular the Emergency Intake Sites opened in 2021.

Response: ORR thanks commenters for their comments concerning the minimum standard provisions in this section.

Comment: One commenter stated that proposed § 410.1801 offers important protections for unaccompanied children and, if implemented, would help mitigate some of the harms of unlicensed congregate influx facilities documented in HHS Office of the Inspector General and NGO reports. The commenter stated that the minimum standards and services as outlined in the NPRM appear to address many of the challenges they have identified during previous visits to Emergency Intake Sites at the southern border. One commenter also stated agreement that as described, the group counseling sessions and the acculturation and adaptation services provide an opportunity for meaningful dialogue between staff and children and stated the requirement for an individualized needs assessment helps identify and address a child's particular situation and determine whether the child should not be placed in an emergency or influx facility. The commenter also agreed with ORR's requirement that visitation and contact with family members is structured in a way to encourage such visitation helps maintain communication with family members and serves to enhance a child's feeling of connection and safety in a challenging environment. The commenter further agreed that provision of legal services information is always essential, but particularly in a setting which may not be State-licensed.

Response: ORR thanks commenters for their comments.

Comment: One commenter suggested that to avoid confusion regarding what standards to apply to emergency and influx facilities, as opposed to standard programs, ORR remove a listing of minimum standards for emergency and influx facilities instead require EIFs to meet the minimum standards set forth at § 410.1302.

Response: ORR thanks the commenter for their recommendation. ORR clarifies that having a separate provision for EIF minimum standards is appropriate due to the differing operational context when EIFs may be activated (*e.g.,* during influx, natural disaster, or medical emergency). Codifying separate standards enables ORR to require services consistent with the FSA at Exhibit 1, while preserving operational flexibility that is appropriate in times of emergency or influx.

Comment: One commenter expressed concern that the minimum standards for both standard programs and emergency or influx facilities do not address all of the issues for which the States have developed licensing standards for children's residential facilities, including such examples as minimum staff-to-child ratios, specifications as to the size and maintenance of living quarters, children's independence and access to the community, as appropriate, including access to participation in recreational, cultural, and extra-curricular activities outside the facility. The commenter stated that it is not clear whether other requirements subsequently developed by ORR for unlicensed standard programs would be consistent with or address all issues addressed by the States' standards. The commenter recommended that the minimum standards and any other requirements that ORR develops for standard programs and emergency or influx facilities address the issues for which the States have developed licensing standards, including but not limited to the examples identified above. The commenter suggested that ORR look to the States' licensing standards and requirements for guidance in developing and elaborating its own standards.

Response: ORR thanks the commenter for their concerns. Traditionally, emergency or influx facilities are not State-licensed since placements are made under exceptional circumstances and intended to be temporary in duration. Also, under its terms, the FSA did not contemplate that Exhibit 1 standards would apply to emergency or influx facilities. Nevertheless, in this final rule ORR goes beyond the requirements of the FSA to define minimum standards specific to emergency or influx facilities in this section that are similar to those described at Exhibit 1 and at § 410.1302 of this rule, to strengthen protections for unaccompanied children and ensure that they receive specified services.

Comment: Several commenters disagreed with the inclusion of unlicensed facilities in the operation of influx or emergency intake sites and stated that such facilities should be required to meet the same minimum standards for licensed facilities under this section, or should be required to be State-licensed, or conform to State licensure requirements even in influx or emergency circumstances to the greatest extent possible. One commenter suggested that ORR should revise the proposed rule to clearly require that standard programs and emergency and influx programs meet both ORR requirements and applicable State laws and regulations. One commenter urged ORR to revise § 410.1801 to require that an emergency or influx facility be licensed by an appropriate State agency if State licensure is available. One commenter suggested that Federal preemption language be followed by qualifying language stating: (1) State licensure is required, and (2) if a conflict between ORR's policies or regulations and State law arises, the State-licensed program must still follow State licensure requirements.

Response: ORR thanks the commenters for their recommendations. ORR declines to require EIFs to be state-licensed because it may be essential for emergency or influx facilities to operate in exceptional circumstances in which it is not possible to attain State licensure. ORR further notes that the FSA does not require facilities operated in response to emergency or influx conditions to be state-licensed. However, this final rule goes beyond the requirements of the FSA by establishing a set of minimum standards applicable to EIFs. ORR notes these minimum standards are similar to those described at § 410.1302. Nevertheless, § 410.1302 and § 410.1801 are separate. Section 410.1302 applies to standard programs and secure facilities, and § 410.1801 applies to EIFs. While they bear some similarities, ORR disagrees that all of the minimum standard requirements for the standard programs and secure facilities should apply to emergency or influx sites because the priority for these facilities is to provide essential services to unaccompanied children when time is of the essence. Issues relating to standard programs and secure facilities are addressed at subpart D.

Comment: A few commenters stated that the minimum standards need to provide trauma-based staffing criteria or training of staff at influx facilities, with one commenter specifically stating this should consist of licensed, trained, and trauma-informed child welfare staff who should serve as the initial point of contact for any unaccompanied children at influx facilities. The commenter stated that influx facilities should be prepared to provide culturally and linguistically appropriate trauma informed care and have registered and licensed nursing and other medical and behavioral health professionals onsite. The commenter also emphasized that facilities must be child-centered, trauma-informed, and prioritize children's best interests that expedite their safe release to family. One commenter stated that when opening an emergency or influx facility, it is essential to ensure that staff, many of whom may be newly hired in such a facility, are trained in all aspects of working with and providing services to unaccompanied children.

Response: ORR thanks the commenter for their input. ORR reiterates its belief that a trauma-informed approach to the care and placement of unaccompanied children is essential to ensuring that the interests of children are considered in decisions and actions relating to their care and custody.[314] ORR emphasizes that pursuant to § 410.1801(b)(16) (redesignated as § 410.1801(b)(14) in the final rule), emergency or influx facilities must deliver services in a manner that is sensitive to the age, culture, native language, and complex needs of each unaccompanied child, and must also develop an individual service plan for the care of each child. Furthermore, an individualized needs assessment must be conducted pursuant to § 410.1801(b)(3), which identifies the unaccompanied child's special needs including any specific problems which appear to require immediate intervention. ORR policies prioritize release to an ORR vetted and approved sponsor when release is appropriate as described in subpart C of this rule. ORR believes that, in order to comply with the requirements provided under § 410.1801(b), EIF staff must have the appropriate professional experience and training relevant to working with and providing services to unaccompanied children.

Comment: One commenter expressed concern with the temporary nature of placements in an EIF, stating that any temporary operation inevitably creates confusion and uncertainty for children and staff. The commenter recommended prioritizing the need to appropriately inform children in their preferred language about where they are, who is responsible for them, the reasons for these arrangements, what to expect, and their rights and how to exercise them. The commenter further recommended ensuring services that interface with children and impact their length of stay, such as case management, are in place from the outset, arguing that this is critical to managing children's right to information, their expectations, and planning for release from custody and unification with family. The commenter stated that children should not be placed in a temporary care arrangement that does not have a plan in place to manage their eventual release.

Response: ORR thanks the commenter for their recommendations. ORR agrees that minimizing transfers is in the child's best interest and therefore seeks to place children in emergency intake sites and influx care facilities only when there are exceptional circumstances and only for children that meet the criteria for placement in an EIF described in this section as discussed in previous responses. ORR notes that at § 410.1801(b)(3), EIF sites are required to perform individualized needs assessment, which includes the various initial intake forms, identification of the unaccompanied child's special needs including any specific problems which appear to require immediate intervention, and an educational assessment and plan; and a statement of religious preference and practice; an assessment of the unaccompanied child's personal goals, strengths and weaknesses. ORR agrees with one of the commenter's recommendations that some provisions within § 410.1801(b)(3) that involve planning for release from custody and unification with family should be available at the outset at EIFs and thus be non-waivable. As a result, ORR will move the provision of ''Services designed to identify relatives in the United States as well as in foreign countries and assistance in obtaining legal guardianship when necessary for the release of the unaccompanied child'' out of § 410.1801(b)(3) and place it into the newly designated § 410.1801(c)(10) as a non-waivable provision, while

adding ''Family unification'' before ''Services'' at the beginning of the sentence. Relatedly, ORR will update § 410.1801(b)(3) by removing the provisions of ''collection of essential data relating to the identification and history of the child and the child's family''; ''assessment of family relationships and interaction with adults, peers and authority figures''; and ''identifying information regarding immediate family members, other relatives, godparents or friends who may be residing in the United States and may be able to assist in connecting the child with family members'' from 410.1801(b)(3) and place them into the newly designated 410.1801(c)(11) as a non-waivable provision. ORR also notes that it is updating § 410.1801(b)(3) to include consideration of whether a child is an indigenous language speaker as part of the individualized needs assessment. ORR further agrees with commenter recommendations to ensure that children understand services that they will interface with, as well as understand their right to information and expectations. ORR will therefore move what was previously § 410.1801(b)(9) (''A comprehensive orientation regarding program intent, services, rules (written and verbal), expectations, and the availability of legal assistance.'') to the newly designated § 410.1801(c)(12) as a non-waivable provision and add a clarifying edit that this orientation will include information about U.S. child labor laws to conform with language in § 410.1302(c)(8)(iii). Additionally, § 410.1801(b)(16) (redesignated as § 410.1801(b)(14) in the final rule) requires that EIFs develop an individual service plan for each child. ORR believes these requirements, as well as other requirements under § 410.1801(b), will ensure appropriate interfacing with children to keep them informed of their rights regarding placement and available services.

Comment: One commenter stated that under § 410.1801(b)(1), the nutrition standards should mirror those for standard programs and be consistent with USDA recommendations.

Response: ORR thanks the commenter for their input. ORR believes that while the requirement for nutrition standards consistent with USDA recommendations is established for standard programs under § 410.1302(c), ORR must consider the circumstances requiring placement in an emergency or influx facility and the need to meet more immediate care for needs during periods of influx or emergency such as adequate shelter, health and safety, and provision of other required services for facilities where housing is meant to be temporary. However, ORR agrees with the commenter that further specificity is needed and is therefore updating § 410.1801(b)(1) to clarify that EIFs shall provide sufficient quantity of food that is appropriate for children, as well as drinking water. Although ORR requires the provision of food and drinking water in emergency or influx facilities at § 410.1801(c)(3), this may preclude the availability of food menus and the type of variety and quality ORR would normally require. ORR will continue to monitor these requirements as they are implemented and may consider providing additional specificity through future policymaking.

Comment: One commenter stated the concern that many children in emergency or influx facilities may be proficient in neither English nor Spanish, and therefore recommended provision of alternative language services.

Response: ORR thanks the commenter for their concern. ORR is clarifying that it will always require the provision of services under this subpart in a child's native or preferred language. ORR also notes that it is updating § 410.1801(b)(3) to include consideration of whether a child is an indigenous language speaker as part of the individualized needs assessment. ORR further notes that at § 410.1802(a) criteria for placement in an emergency or influx facility to the extent feasible include that the child speaks English or Spanish as their preferred language. If ORR becomes aware that a child does not meet any of the criteria at any time after placement into an emergency or influx facility, ORR shall transfer the unaccompanied child to the least restrictive setting appropriate for that child's need as expeditiously as possible.

Comment: One commenter stated that the inclusion of educational services is necessary to ensure that children are actively engaged and learning while at an emergency or influx facility. A few commenters stated that education services described in § 410.1801(b)(4) should be focused on English immersion, with one commenter suggesting to concentrates primarily on the integration of the child into a routine of education attendance and on foundational English language learning rather than on development of basic academic competencies.

Response: ORR thanks the commenters for their input. ORR notes that English language acquisition is already stated as a consideration for providing educational services at § 410.1801(b)(4). ORR also believes, however, that instructing children in basic academic areas such as science, social studies, math, reading, writing, and physical education should be a consideration. Instruction is required to be given under this section in such languages as needed so that children do not miss critical instruction appropriate for the child's level of development and communication skills.

Comment: One commenter suggested that group counseling at § 410.1801(b)(7) should be better defined, stating that group counseling should not include everyone at the site but should be much smaller groups based on age and other criteria. Furthermore, the commenter stated that greater attention is needed to clarify and clearly state the purpose and scope of mental health services in ORR programs.

Response: ORR thanks the commenter for their input. In relation to group counseling, ORR notes that since these sessions are required to take place twice per week, children have options as to which session to attend and may establish their own preferences based on age of those in attendance and other criteria. However, ORR believes it is important to allow all unaccompanied children to attend this open forum to speak about decisions that affect them such as daily program management and to get acquainted with staff. Given the limited nature and availability of such sessions and limited capacity of emergency or influx facilities, ORR believes that excluding certain children from some sessions to establish specialized groupings may be unfair or infeasible. ORR notes that it is updating § 410.1801(b)(7) to more closely align with the language at § 410.1302(c)(6), which may provide additional flexibility for EIFs to facilitate group counseling sessions in a way that is appropriate to the unaccompanied children in their care.

Comment: One commenter recommended that ORR focus mental health services on stabilization, acculturation, and psychoeducation to mitigate future risks due to the duration of the vast majority of stays in ORR programs. To support this, the commenter recommended to change the language from ''counseling session'' to ''adjustment support'' with trained mental health staff. The commenter asserted that ''counseling session'' implies a solution-focused service that cannot be reasonably accomplished in such a short time period, while adjustment support implies to provide transitional well-being support and individualized advocacy sounds more feasible.

Response: ORR thanks the commenter for their input. ORR notes that ''counseling session,'' conforms to the language in the FSA and therefore ORR disagrees with the recommended change in terms. ORR further notes that acculturation and adaptation services are described in the next subparagraph at § 410.1801(b)(8) and provides for the development of social and interpersonal skills which contribute to those abilities necessary to live independently and responsibly. The focus of such individual counseling sessions is to establish objectives and review progress, and address both the developmental and crisis-related needs of each child. The provisions in this section do not prescribe certain methods for mitigation of risks, but rather require trained social work professionals to evaluate and address individualized needs on a case-by-case basis.

Comment: One commenter recommended that proposed § 410.1801(b)(15), governing emergency or influx facilities, be revised as follows: ''(15) Emergency or influx facilities, whether State-licensed or not, must comply, to the greatest extent possible, with all applicable State child welfare laws, and regulations (such as mandatory reporting of abuse), and standards, as well as State and local building, fire, health and safety codes, that ORR determines are applicable to non-State licensed facilities.''

Response: ORR thanks the commenter for their recommendation, and notes that it is updating § 410.1801(b)(15) (redesignated as § 410.1801(b)(13) in the final rule) to specify ''all'' State child welfare laws and regulations, and ''all'' State and local building, fire, health and safety codes, as applicable to non-State licensed facilities.

Comment: One commenter sought clarification on accountability systems under § 410.1801(b)(17) (redesignated as § 410.1801(c)(13) in the final rule), stating that it is unclear how this section specific to emergency or influx facilities should be integrated with similar requirements of all care providers described at § 410.1303(g) through (h) as proposed in the NPRM (which includes emergency facilities). The commenter recommended that if ORR intends to use this subsection to emphasize that emergency or influx facilities are subject to the minimum requirements of proposed § 410.1303(g) or the proposed consolidated section on data safeguarding, it should add a cross reference and that if some other meaning is intended, ORR should clarify the text of proposed § 410.1801(b)(17) (redesignated as § 410.1801(c)(13) in the final rule).

Response: ORR thanks the commenter for their recommendation. ORR notes that § 410.1303(h) (proposed in the NPRM as § 410.1303(g)) explicitly applies to all care provider facilities responsible for the care and custody of unaccompanied children, whether the program is a standard program or not. This includes emergency or influx facilities. ORR refers readers to paragraph § 410.1303(h) for requirements and standards for safeguarding a child's case file. ORR notes that § 410.1801(b)(17) (redesignated as § 410.1801(c)(13) in the final rule) only applies to facilities that meet the definition of an EIF under this rule and although it reads similarly in part to § 410.1303(i) for maintaining records of case files and regularly reporting to ORR, an important distinction for non EIFs is the exclusion of language stating ''permit ORR to monitor and enforce the regulations in this part'' since not all regulations in this part apply to emergency or influx facilities.

Comment: One commenter recommended that § 410.1801(b)(17) (redesignated as § 410.1801(c)(13) in the final rule) explicitly outline that children's artistic works should not become a part of the official case file, and there is no requirement to retain them.

Response: ORR thanks the commenter for their recommendation. ORR does not believe an amendment to the final rule is necessary, as no part of the rule or prior guidance states or implies that artistic works be part of the child's official case file.

Comment: One commenter suggested that § 410.1801(c)(4) should provide pediatric medical care to the unaccompanied child instead of limiting this to ''if the unaccompanied child is in need of emergency services,'' stating that as medical care should be provided whenever needed, not just in emergency circumstances. The commenter also recommended adding a requirement to maintain full-time pediatric medical expertise on site.

Response: ORR thanks the commenter for their recommendation. ORR notes that appropriate routine medical and dental care is among the required services at § 410.1801(b)(2) and emergency services are specified at § 410.1801(c)(4) to ensure that children have access to emergency medical services. ORR notes that ensuring full-time pediatric medical expertise is on site is not necessary to ensure routine medical and dental needs are met and would exceed the requirements for both licensed and unlicensed emergency or influx facilities under the FSA. However, ORR will make a clarifying revision to § 410.1801(c)(4) that modified medical examinations are non-waivable at EIFs.

Comment: One commenter stated that § 410.1801(d) does not make clear what factors will be used to determine whether the standards are operationally infeasible and what law is referenced. The commenter suggested that clearer guidelines should be provided, and that a waiver should only be granted in extreme situations. Another commenter expressed concern that the waiver language was too broad and recommended that the provision be amended or withdrawn.

Response: ORR thanks the commenters for their input. ORR notes that, consistent with existing policies, which implement Congressional appropriations requirements,[315] ORR may grant a waiver of one or more standards in this subsection only if the facility has been activated for a period of six consecutive months or less; further, ORR would consider which standards may be operationally infeasible on a case-by-case basis. ORR does not agree that no waivers should be permitted or that a waiver should be granted only in extreme circumstances, because this language is potentially ambiguous and extreme circumstances are likely to exist in many situations giving rise to placement in an emergency or influx facilities. Instead, ORR believes waivers should be limited to situations where one or more standards are in fact operationally infeasible and only for facilities that are activated for a period of 6 consecutive months or less. ORR believes that this will limit the volume and scope of waivers granted under this subsection. However, ORR has revised the language of § 410.1801(d) to clarify that while waivers may be granted during the first six months of EIF activation, these waivers will only be granted to the extent that ORR determines that they are necessary because it would be operationally infeasible to comply with the specified standards. Further, waivers will be granted for no longer than necessary in light of operational feasibility. Finally, ORR is also adding language at § 410.1801(d) to state that, even where a waiver is granted, EIFs shall make all efforts to meet requisite standards under § 410.1801(b) as expeditiously as possible.

Comment: One commenter expressed concern that the rule does not explain how ORR will provide oversight to emergency or influx facilities or ensure that such facilities comply with ORR's standards and with State law. The commenter recommended that ORR

implement a more comprehensive regime for Federal oversight of unlicensed facilities housing unaccompanied children where a State will not be providing oversight, including EIFs. The commenter recommended that ORR adopt additional monitoring and enforcement functions for facilities that are not State-licensed such as requirements for: inspection, screening, and documentation, criminal and child abuse and neglect background checks, frequency of monitoring visits and evaluations receiving, investigating, and responding to complaints; enforcement of standards. The commenter urged ORR to allocate sufficient staffing and other resources to ensure that oversight of any unlicensed facilities is as robust as that which would otherwise have been provided by the State in which the facilities are located.

Response: ORR thanks the commenter for their recommendations. ORR notes that, as stated in § 410.1303, it will monitor all care provider facilities, including unlicensed standard programs and EIFs for compliance with the terms of the regulations in parts 410 and 411 of this title. With respect to the specific recommendations made by the commenters, ORR notes: regarding inspection, screening, and documentation, such requirements are already built into the ORR grant and contracting process through which grantees and contractors are selected to operate care provider facilities, whereby care providers agree to such requirements under ORR policies and as consistent with 45 CFR part 75; regarding background checks for EIF staff, ORR notes that, like standard programs, EIFs are subject to requirements set forth at 45 CFR 411.16; regarding frequency of monitoring visits and evaluations and responding to complaints, ORR notes that it would conduct enhanced monitoring of EIFs; regarding investigating and responding to complaints, ORR notes that the requirements established at § 410.1303(f) apply to EIFs; and regarding establishing a framework for the enforcement of standards at EIFs, ORR notes that § 410.1303 establishes such a framework, which is in addition to other established enforcement mechanisms such as those described at 45 CFR 75.371.

Final Rule Action: After consideration of public comments, ORR is finalizing this section as proposed in the NPRM with the following changes. ORR is making clarifying edits at § 410.1801(b)(1) to specify that proper physical care and maintenance includes providing children with a sufficient quantity of food and drinking water, replacement of ''special needs'' with ''individualized needs'' at § 410.1801(b)(3), addition of whether the child is an indigenous language speaker at § 410.1801(b)(3), removal of ''in the residential facility, group or foster home'' at § 410.1801(b)(11), replacement of ''deportation'' with ''removal'' at § 410.1801(b)(12), addition of the word ''all'' in reference to complying with State child welfare laws and regulations to the greatest extent possible at § 410.1801(b)(15) (redesignated to § 410.1801(b)(13)), and addition of the word ''complex'' at § 410.1801(b)(16) (redesignated to § 410.1801(b)(14)) to more closely align with the language at § 410.1302(d). ORR is also updating § 410.1801(b)(7) to more closely align with the language at § 410.1302(c)(6). As a result of the changes discussed in this final rule action, ORR is redesignating § 410.1801(b)(10) as § 410.1801(b)(9), § 410.1801(b)(11) as § 410.1801(b)(10), § 410.1801(b)(12) as § 410.1801(b)(11), § 410.1801(b)(14) as § 410.1801(b)(12), § 410.1801(b)(15) as § 410.1801(b)(13), and § 410.1801(b)(16) as § 410.1801(b)(14). ORR is further updating § 410.1801(b)(3) by moving the provision of ''Services designed to identify relatives in the United States as well as in foreign countries and assistance in obtaining legal guardianship when necessary for the release of the unaccompanied child'' from § 410.1801(b)(3) and placing it in the newly designated § 410.1801(c)(10) as a non-waivable provision, while also adding ''Family unification'' before ''services'' at the beginning of the sentence. ORR is also updating § 410.1801(b)(3) by removing the provisions of ''collection of essential data relating to the identification and history of the child and the child's family''; ''assessment of family relationships and interaction with adults, peers and authority figures''; and ''identifying information regarding immediate family members, other relatives, godparents or friends who may be residing in the United States and may be able to assist in connecting the child with family members'' from § 410.1801(b)(3) and placing them into the newly designated § 410.1801(c)(11) as a non-waivable provision. ORR is also moving what was previously § 410.1801(b)(9) (''A comprehensive orientation regarding program intent, services, rules (written and verbal), expectations, and the availability of legal assistance.'') to the newly designated § 410.1801(c)(12) and adding a clarifying edit that this orientation will include ''information about U.S. child labor laws'' to conform with language in § 410.1302(c)(8)(iii)). Additionally, ORR is updating § 410.1801(b)(15) (redesignated to § 410.1801(b)(13)) to remove language regarding the obligation of ORR employees to comply with their responsibilities under Federal law where there is a potential conflict between State and Federal law. ORR is moving the provision that was proposed previously at § 410.1801(b)(17) in the NPRM (''The EIF shall maintain records of case files and make regular reports to ORR. EIFs must have accountability systems in place, which preserve the confidentiality of client information and protect the records from unauthorized use or disclosure.'') into the newly designated § 410.1801(c)(13) so that the provision is non-waivable for EIFs. ORR is also replacing ''arrested'' with ''apprehended'' at § 410.1801(c)(7). ORR is updating § 410.1801(c)(9) to correctly refer to § 410.1309(a). Additionally, ORR is making clarifying edits to § 410.1801(d), including the addition of ''waivers are granted in accordance with law,'' as well as clarifying edits to make clear how long waivers may last, to what extent, and to which parts waivers may apply. ORR is also revising § 410.1801(c)(4) to add ''and provide a modified medical examination'' after ''services.'' Finally, ORR is adding language at § 410.1801(d) to state that, even where a waiver is granted, EIFs shall make all efforts to meet requisite standards under § 410.1801(b) as expeditiously as possible.

Section 410.1802 Placement Standards for Emergency or Influx Facilities

ORR proposed in the NPRM at § 410.1802 to codify the criteria and requirements for placement of unaccompanied children at emergency or influx facilities (88 FR 68958). These requirements are consistent with existing ORR policies.[316]

ORR proposed in the NPRM at § 410.1802(a), that, to the extent feasible, unaccompanied children who are placed in an emergency or influx facility meet all of the following criteria: the child (1) is expected to be released to a sponsor within 30 days; (2) is age 13 or older; (3) speaks English or Spanish as their preferred language; (4) does not have a known disability or other mental health or medical issue or dental issue requiring additional evaluation, treatment, or monitoring by a healthcare provider; (5) is not a pregnant or parenting teenager; (6) would not have a diminution of legal services as a result of the transfer to an unlicensed facility; and (7) is not a

danger to themselves or to others (including not having been charged with or convicted of a criminal offense). Additionally, if ORR becomes aware that a child does not meet any of the criteria specified under § 410.1802(a) at any time after placement into an emergency or influx facility, ORR shall transfer the unaccompanied child to the least restrictive setting appropriate for that child's need as expeditiously as possible. ORR believes that these criteria will help to ensure that the unaccompanied child is placed in a setting that is appropriate to accommodate the child's specific needs.

ORR proposed in the NPRM at § 410.1802(b) that it would also consider the following factors for the placement of an unaccompanied child in an EIF: (1) the unaccompanied child should not be part of a sibling group with a sibling(s) age 12 years or younger; (2) the unaccompanied child should not be subject to a pending age determination; (3) the unaccompanied child should not be involved in an active State licensing, child protective services, or law enforcement investigation, or an investigation resulting from a sexual abuse allegation; (4) the unaccompanied child should not have a pending home study; (5) the unaccompanied child should not be turning 18 years old within 30 days of the transfer to an emergency or influx facility; (6) the unaccompanied child should not be scheduled to be discharged in three days or less; (7) the unaccompanied child should not have a current set docket date in immigration court or State/family court (juvenile included), not have a pending adjustment of legal status, and not have an attorney of record or DOJ Accredited Representative; (8) the unaccompanied child should be medically cleared and vaccinated as required by the emergency or influx care facility (for instance, if the influx care facility is on a U.S. Department of Defense site); and (9) the unaccompanied child should have no known mental health, dental, or medical issues, including contagious diseases requiring additional evaluation, treatment, or monitoring by a healthcare provider. ORR believes that these provisions will help support the safe and appropriate placement of unaccompanied children in ORR care. For purposes of this final rule, ORR further clarifies that these categories of children, to include particularly vulnerable children and children likely to have extended lengths of stay, would be prioritized for initial placement in standard programs as opposed to EIFs; they would also be prioritized for transfer to standard programs if currently placed at EIFs.

Comment: One commenter expressed concern that transfers between care provider facilities are a barrier to care for the child, given the delays that can be experienced from transfers. The commenter recommended ORR implement an emergency placement system for children with exceptional needs and that intakes should have 24 hours to place that child with a safe and appropriate program. The commenter further suggested that if a child is placed in an ICF but is then found to not meet ICF placement criteria, the child's placement into an appropriate facility should be considered under the same criteria as a border placement. The commenter suggested that the ORR Intakes team would obtain jurisdiction and assign the child to an appropriate program in a manner similar to how ORR Intakes placed children arriving from the border and that placement responsibility would not fall on the ICF.

Response: ORR notes that at § 410.1802(a), ORR shall transfer the unaccompanied child to the least restrictive setting appropriate for that child's need as expeditiously as possible if the child is found not to have made the specific criteria stated therein for placement at an EIF.

Comment: One commenter stated that under § 410.1802(a)(4) of the NPRM, it was unclear which healthcare professionals determine eligibility for having a known disability or other mental health or medical issue—including pregnancy—or dental issue requiring additional evaluation, treatment, or monitoring by a healthcare provider. The commenter recommended that ORR medical staff be the ones to complete this assessment and it is preferable for ORR staff to be onsite at DHS and aiding in this determination as transfers of unaccompanied children between programs is disruptive for the child and that steps should be taken to minimize the number of transfers of unaccompanied children between ORR facilities. The commenter further expressed concern regarding ORR's ability to accurately make the assessment of all the criteria for over 100,000 children under proposed § 410.1802(a).

Response: ORR thanks the commenter for their concerns, and first clarifies that CBP personnel are not involved in placing unaccompanied children in EIFs. Further, ORR understands that when transferring unaccompanied children CBP relays available information, which may come from a variety of sources (*e.g.,* including officer observations, contracted medical care providers, or existing CBP records). After an unaccompanied child is transferred into ORR custody, pursuant to its authority under the HSA, ORR makes all placement decisions. ORR agrees that it is necessary to have information to make appropriate placement determinations for children, and bases decisions to place an unaccompanied child in an EIF on the criteria described in this section, information in the child's case file, and, if the child is being transferred into an EIF from another ORR care provider facility, recommendations from the child's previous case manager as well as an independent reviewer and ORR Federal field staff. In addition, consistent with existing policies, ORR does not place particularly vulnerable children in EIFs (*e.g.,* children 12 years of age or younger; children who are not proficient in English or Spanish; children who have a known disability or other mental health or medical issue requiring additional evaluation, treatment, or monitoring by a healthcare provider; pregnant or parenting teenagers; children who are at a documented enhanced risk due to their identification as LGBTQI+). If a child is placed into an EIF as an initial placement and as a result lacks records sufficient to indicate particular vulnerability (*i.e.,* immediately upon transfer into ORR custody from another Federal agency), ORR screens such children for the particular vulnerabilities within 5 days of EIS placement and continues to monitor children for particular vulnerabilities thereafter.

Comment: One commenter questioned why children turning 18 within 30 days of the transfer should be excluded from placement at an ICF, stating that an unaccompanied child who is within 30 days of turning 18 and has a potential sponsor who is a parent or legal guardian would be best served at an ICF due to the short length of stay. Another commenter recommended that an unaccompanied child only be placed in an EIF if they are more than 90 days from turning 18 years old, not more than 30 days as contemplated by § 410.1802(b)(5) of the NPRM.

Response: ORR thanks commenters for their input. ORR notes that under § 410.1802(a)(1), the expectation that an unaccompanied child will be released to a sponsor within 30 days is a factor in favor of transfer into an EIF, because in this way, in the event of an emergency or influx, ORR can prioritize placement in standard programs for children potentially may need to stay in ORR custody for a longer period (88 FR 68958). With respect to unaccompanied

children who are expected to be released to a sponsor within 30 days, but who are also within 30 days of turning 18, ORR notes that it would determine placement on a case-by-case basis, consistent with its responsibility to place unaccompanied children in the least restrictive setting that is in the best interest of the child—which requires an individualized determination based on a totality of factors. Because ORR favors placing unaccompanied children in EIFs whom it expects can be released without complications that would typically delay release, ORR does not believe at this time that it is necessary to update its proposed 30-day criteria for unaccompanied children who are close to turning 18.

Comment: One commenter requested clarification regarding whether § 410.1802(b)(8) requires that children be fully vaccinated prior to being placed at an ICF.

Response: ORR clarifies that this paragraph refers to criteria that ORR shall use to determine transfer from an EIF and not requirements to be placed into an EIF. Regarding vaccination, if the specific EIF site requires the child be medically cleared or vaccinated [317] and ORR finds out this condition has not been met, rather than requiring children to conform to the facility, ORR shall transfer the unaccompanied child to another standard program of appropriate non-EIF facility based on the individualized needs of the child as expeditiously as possible.

Final Rule Action: After consideration of public comments, ORR is finalizing this section with the following modification to clarify at § 410.1802(b)(7), so that it now reads, ''The unaccompanied child should not have a current set date in immigration court or State/family court (juvenile included), and not have an attorney of record or DOJ Accredited Representative.'' ORR is otherwise finalizing this section as proposed in the NPRM with the additional clarifications described above.

Subpart J—Availability of Review of Certain ORR Decisions

Section 410.1900 Purpose of This Subpart

Ensuring that placement decisions involving restrictive placements,[318] such as decisions to place unaccompanied children in a restrictive placement, to step-up a child to a more restrictive level of care, to step-down a child from one restrictive placement to another (*e.g.,* from secure to a heightened supervision facility), or to continue to keep a child in a restrictive placement, are subject to review is fundamental to ensuring unaccompanied children are placed in the least restrictive setting that is in their best interest while also considering the safety of others and runaway risk. ORR believes that establishing the availability of regular administrative reviews helps ensure, for the relatively few unaccompanied children that are placed in restrictive placements, that such placement is appropriate and based on clear and convincing evidence, as discussed in subpart B. In the NPRM, ORR noted that its proposals in this subpart are consistent with the preliminary injunction issued on August 30, 2022, in *Lucas R.* v. *Becerra,* as discussed in section III.B.4. of this final rule. ORR proposed in the NPRM at § 410.1900 that the purpose of this subpart is to describe the availability of review of certain ORR decisions regarding the care and placement of unaccompanied children (88 FR 68958 through 68959).

Final Rule Action: No public comments were received on this section. ORR is finalizing its proposal as proposed.

Section 410.1901 Restrictive Placement Case Reviews

ORR is required under the TVPRA to place unaccompanied children in the least restrictive setting that is in their best interests, and in making placements may consider danger to self, danger to the community, and runaway risk.[319] ORR believes that this requirement entails consideration of the safety of individual unaccompanied children whom it places, as well as the other unaccompanied children who have already been placed at the same care provider facility. ORR continually and routinely assesses whether an unaccompanied child's placement in a restrictive placement meets the criteria for such placements as discussed in § 410.1105 Criteria for Placing an Unaccompanied Child in Restrictive Placement. ORR proposed in the NPRM, at § 410.1901(a), in all cases involving restrictive placements, ORR would determine, based on clear and convincing evidence, that sufficient grounds exist for stepping up or continuing to hold an unaccompanied child in a restrictive placement (88 FR 68959). ORR further proposed a requirement that the evidence supporting a restrictive placement decision be recorded in the unaccompanied child's case file.

ORR believes that it is imperative that unaccompanied children placed in restrictive placements understand the reasons for their placement and their rights, including their right to contest such a placement and their right to counsel. Therefore, ORR proposed in the NPRM at § 410.1901(b), to require that a written Notice of Placement (NOP) be provided to unaccompanied children no later than 48 hours after step-up to a restrictive placement, as well as at least every 30 days an unaccompanied child remains in a restrictive placement (88 FR 68959). ORR notes that whenever possible, ORR seeks to provide NOPs in advance of a step-up to a restrictive placement. ORR further proposed requiring that the NOP clearly and thoroughly set forth the reason(s) for placement and a summary of supporting evidence under § 410.1901(b)(1); inform the unaccompanied child of their right to contest the restrictive placement before the Placement Review Panel (PRP) upon receipt of the NOP, the procedures by which the unaccompanied child may do so, and all other available administrative review processes under § 410.1901(b)(2); and include an explanation of the unaccompanied child's right to be represented by counsel in challenging such restrictive placements under § 410.1901(b)(3). Finally, to ensure that the unaccompanied child understands the information provided under this paragraph, ORR proposed in the NPRM that a case manager would be required to explain the NOP to the unaccompanied child, in the child's native or preferred language, depending on the child's preference, and in a way the child understands, under § 410.1901(b)(4). ORR notes that communications with unaccompanied children would be required to meet ORR's language access standards under § 410.1306.

As part of ensuring that unaccompanied children are informed regarding their restrictive placement, it is critical that any legal counsel or other representative or advocate, and a parent or guardian for an unaccompanied child also receive such notification. Therefore, ORR proposed in the NPRM at § 410.1901(c), to require that the care provider facility provide a copy of the NOP to the unaccompanied child's legal counsel of record, legal service provider, child advocate, and to a parent or legal guardian of record, no later than 48 hours after step-up, as well as every 30 days the unaccompanied child remains in a restrictive placement (88 FR 68959 through 68960). ORR notes that this requirement may be subject to specific child welfare-related exceptions.

ORR believes that placements of unaccompanied children in restrictive placements should be routinely assessed

to ensure they meet the criteria at § 410.1105. If an unaccompanied child does not meet such criteria, they should accordingly be stepped down to a placement that is the least restrictive setting that is in their best interest, prioritizing their safety and the safety of others. ORR proposed in the NPRM, at § 410.1901(d), to establish regular administrative reviews for restrictive placements (88 FR 68960). ORR proposed in the NPRM regular intervals for administrative reviews depending on the type of restrictive placement: 30-day, at minimum, for all restrictive placements under § 410.1901(d)(1); and more intensive 45-day reviews by ORR supervisory staff for unaccompanied children in secure facilities, under proposed § 410.1901(d)(2).[320] For unaccompanied children in RTCs, the 30-day review at proposed § 410.1901(d)(1) would be required to involve a psychiatrist or psychologist to determine whether the unaccompanied child should remain in restrictive residential care, under § 410.1901(d)(3). ORR welcomed public comment on these proposals.

Comment: One commenter recommended adding to § 410.1901(b)(2) that the Notice of Placement (NOP) would inform the child of available administrative review processes in their language of preference.

Response: ORR agrees that children should be informed in their native or preferred language consistent with its language access requirements under § 410.1306 and is therefore revising § 410.1901(b) to state that ORR shall provide an unaccompanied child with a Notice of Placement (NOP) ''in the child's native or preferred language.''

Comment: Related to unaccompanied children with disabilities, one commenter recommended that § 410.1901(a) should require clear and convincing evidence that a child cannot be placed in a less restrictive facility with additional accommodations or services.

Response: ORR agrees and is finalizing at § 410.1105(d) that ORR's determination whether to place an unaccompanied child in a restrictive placement shall include consideration of whether there are any reasonable modifications to the policies, practices, or procedures of an available less restrictive placement or any provision of auxiliary aids and services that would allow the child to be placed in that less restrictive facility. ORR agrees that evidence of such consideration should be documented in the child's case file, consistent with section 504. ORR is also finalizing at § 410.1105(d) that ORR's consideration of reasonable modifications and auxiliary aids and services to facilitate less restrictive placements shall also apply to transfer decisions under § 410.1601 and will be incorporated into restrictive placement case reviews under § 410.1901. ORR notes, however, that consistent with its finalized proposal at § 410.1311, it is not required to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity. ORR notes further that the final rule incorporates a clear and convincing requirement at § 410.1901(a), and that it is correcting a technical error to replace ''In all cases involving placement in a restrictive setting'' with ''In all cases involving a restrictive placement'' in order to use the defined term ''restrictive placement.'' Lastly, ORR is clarifying that the burden to determine if sufficient grounds exists rests on ORR by adding the phrase ''have the burden to'' to § 410.1901(a) so that it states ''In all cases involving placement in a restrictive placement, ORR shall have the burden to determine, based on clear and convincing evidence, that sufficient grounds exist for stepping up or continuing to hold an unaccompanied child in a restrictive placement.''

Comment: One commenter expressed concern about the unaccompanied child's and their attorney's access to the evidence related to the restrictive placement decision under § 410.1901(a), noting that it is critical that the child and their counsel have access to any relevant document in advance of a PRP hearing when one is requested.

Response: ORR agrees that an unaccompanied child and their attorney of record must have access to relevant documents in advance of the PRP hearing, and notes that ORR is requiring that a summary of evidence supporting the restrictive placement be provided with the NOP under § 410.1901(b)(1). Under § 410.1902(b), ORR shall permit the unaccompanied child or their counsel to review the evidence in support of step-up or continued restrictive placement before the PRP review is conducted.

Comment: Several commenters recommended that ORR provide NOPs in advance of a step-up to a restrictive placement, stating their belief that this would better align with child welfare principles and external standards, provide unaccompanied children the opportunity to challenge the step-up, and provide unaccompanied children an understanding of what is happening before the step-up occurs and of the justification for the step-up decision. Several commenters who recommended ORR provide NOPs in advance of a step-up to a restrictive setting stated they believe unaccompanied children should have the opportunity to challenge the step-up, and the reasons for it, before a transfer to the restrictive placement occurs. One commenter argued that the lack of notice and opportunity to be heard before being transferred to a restrictive facility does not comply with international law. Another commenter said that ORR could design and implement an independent hearing process that takes place before the transfer to a restrictive placement happens.

A few of the commenters who recommended that ORR provide advanced notice of step-ups into restrictive placements provided alternatives for consideration. One commenter recommended that ORR establish an exception that ORR could transfer an unaccompanied child to a restrictive placement without prior notice only upon a reasonable belief that the child is a present, imminent danger to self or others. Another commenter recommended ORR, at minimum, incorporate the intent expressed in preamble into the final regulation text that ORR would provide NOPs in advance of a step-up to a restrictive placement whenever possible.

Response: ORR's proposal under § 410.1901(b) to provide the NOP no later than 48 hours after a step-up does not preclude ORR from providing the NOP before the step-up to a restrictive placement occurs when it is safe and appropriate to do so. Thus, as ORR emphasized in the NPRM preamble, ORR seeks to provide NOPs in advance of a step-up to a restrictive placement whenever possible, although ORR is not explicitly stating so in the final rule regulation text (88 FR 68959). ORR agrees that unaccompanied children must understand the reasons for their placement and their rights, including their right to contest such a placement and their right to counsel, and for that reason ORR proposed in the NPRM the requirements under § 410.1901(b)(1) to (4). ORR is finalizing a clarification at § 410.1901(b)(3) that unaccompanied children's right to counsel is ''at no cost to the Federal Government'' for consistency with 8 U.S.C. 1232(c)(5). ORR further notes that its proposals under § 410.1901(b)(1) to (4) are consistent with the *Lucas R.* Court's finding on summary judgment that, ''in light of the important Government interests at stake, as well as the safety of the minors, full pre-deprivation notice and hearing are not constitutionally required.'' [321]

Comment: Regarding § 410.1901(c) in the NPRM, one commenter recommended a clarification that both the attorney at the prior facility or the legal service provider at the new, more restrictive placement receive the NOP 48 hours within a step-up.

Response: ORR clarifies that the NOP shall be provided to the unaccompanied child's attorney of record and LSP, regardless of whether the child has a different attorney of record and LSP at the new, more restrictive placement. Related to notice to the child's parent or legal guardian, and as is consistent with the *Lucas R.* preliminary injunction and ORR's role as the Federal custodian responsible for the care and custody of the child, ORR is adding § 410.1901(c)(1) to state that service of the NOP on a parent or legal guardian shall not be required where there are child welfare reasons not to do so, where the parent or legal guardian cannot be reached, or where a unaccompanied child 14 or over states that the unaccompanied child does not wish for the parent or legal guardian to receive the NOP. Additionally, ORR is finalizing a new provision at § 410.1901(c)(2) to describe child welfare rationales, which include but are not limited to, a finding that the automatic provision of the notice could endanger the unaccompanied child; potential abuse or neglect by the parent or legal guardian; a parent or legal guardian who resides in the United States but refuses to act as the unaccompanied child's sponsor; or a scenario where the parent or legal guardian is non-custodial and the unaccompanied child's prior caregiver (such as a caregiver in home country) requests that the non-custodial parent not be notified of the placement. Finally, ORR is adding § 410.1901(c)(3) to state that when an NOP is not automatically provided to a parent or legal guardian, ORR shall document, within the unaccompanied child's case file, the child welfare reason for not providing the NOP to the parent or legal guardian.

Comment: One commenter urged ORR to conduct reviews of children's restrictive placements within 14 days, rather than the 30-day or 45-day marks proposed under § 410.1901(d) of the NPRM to ensure compliance with its legal obligation under the TVPRA to place children in the least restrictive setting in their best interests. Another commenter supported the proposal for periodic administrative reviews and stated that international standards also require that until the one-month mark after the initial review, there should be a review every seven days so that unaccompanied children have multiple opportunities to be assessed for step-down or release from restrictive facilities.

Response: ORR appreciates the commenters' recommendations. ORR continues to believe that requiring review of all restrictive placements at least every 30 days is a reasonable standard and consistent with the TVPRA at 8 U.S.C. 1232(c)(2)(A). ORR does not believe § 410.1901(d) prevents more frequent reviews when needed. Therefore, § 410.1901(d) states that restrictive placements must be reviewed ''at least'' every 30 days, allowing ORR and its care provider facilities the flexibility to assess placements more frequently as determined appropriate in any given case. As such, ORR believes that the frequency of reviews required under § 410.1901(d) will reasonably allow ORR to determine whether a restrictive placement continues to be warranted.

Comment: One commenter requested that ORR clarify what is meant by ''more intensive'' relating to the 45-day review of placements in secure facilities under § 410.1901(d)(2) of the NPRM.

Response: ORR notes that its proposal in the NPRM at § 410.1901(d)(2) of a 45-day ''more intensive'' review was a technical error. In this final rule, ORR is codifying in the final rule at § 410.1901(d)(2) a ''more intensive'' review every 90 days for unaccompanied children in secure facilities to determine whether the placement in a secure facility continues to be appropriate or whether the child's needs could be met in a less restrictive setting. Ninety days is consistent with current ORR policies, and with ORR policies as they existed at the time the NPRM was published. These 90-day ''more intensive'' reviews are conducted by ORR supervisory staff. Typically, those staff review the child's case file, consult with clinical and healthcare professionals who have examined or treated the child, and discuss the case with the assigned ORR field staff.

Comment: A few commenters recommended that ORR, in its periodic reviews of children in restrictive placements, should require consideration of whether reasonable modifications and auxiliary aids and services would permit a less restrictive placement for an unaccompanied child with disabilities to adequately protect the child's rights.

Response: ORR agrees that periodic reviews should take into consideration whether reasonable modifications and auxiliary aids and services would permit a less restrictive placement for an unaccompanied child with disabilities. Therefore, ORR is adding in new § 410.1105(d) which provides in pertinent part that, for an unaccompanied child with one or more disabilities, restrictive placement case reviews under § 410.1901 shall incorporate consideration of reasonable modifications and auxiliary aids and services to facilitate less restrictive placement.

Comment: One commenter recommended that periodic reviews include additional procedural protections, specifically that the 30-day review of a placement in an RTC or OON RTC facility, as described at § 410.1901(d)(3) of the NPRM, include a detailed and specific review prepared by a qualified, licensed psychologist or psychiatrist of the mental health needs of the child. The commenter included a list of elements that should be required, such as medical assessment of diagnoses, prescriptions, and therapeutic interventions, whether the child continues to be a danger to self or others, explanation of the reasons for continued placement in a restrictive setting, and whether there are any reasonable modifications to the policies, practices, or procedures of an available less restrictive placement or any provision of additional support services or auxiliary aids that would allow the child to be placed in a less restrictive facility.

Response: ORR believes that reviews should be conducted in consultation with a qualified licensed psychologist or psychiatrist, and should contain sufficiently detailed documentation and for that reason incorporated the requirement at § 410.1903(d)(3) for review by a psychiatrist or psychologist for children in restrictive placements in residential treatment centers. ORR notes that the list of elements recommended for the review are consistent with ORR's beliefs, but that ORR declines to adopt them into regulation because it prefers to continue to use and update its existing guidance to provide more detailed requirements for care provider facilities. Lastly, ORR refers the commenter to the discussion at § 410.1105(d) where it is finalizing a requirement to incorporate consideration of reasonable modifications and auxiliary aids and services to facilitate less restrictive placement for children with one or more disabilities.

Final Rule Action: After consideration of public comments, ORR is finalizing its proposal as proposed with revisions at § 410.1901(a) to replace ''In all cases involving placement in a restrictive setting, ORR shall determine'' with ''In all cases involving a restrictive

placement, ORR shall have the burden to determine;'' at § 410.1901(b) to state, ''in the child's native or preferred language;'' at § 410.1901(b)(3) to add ''at no cost to the Federal Government;'' at § 410.1901(c) to replace ''legal counsel'' with ''attorney;'' at § 410.1901(d)(2), to correct a technical error in the NPRM by updating ''45 days'' to ''90 days;'' at § 410.1901(d)(3) to write out residential treatment center instead of ''RTC;'' and at § 410.1901(c), to add the following provisions:

(1) Service of the NOP on a parent or legal guardian shall not be required where there are child welfare reasons not to do so, where the parent/legal guardian cannot be reached, or where an unaccompanied child 14 or over states that the unaccompanied child does not wish for the parent or legal guardian to receive the NOP.

(2) Child welfare rationales include but are not limited to: a finding that the automatic provision of the notice could endanger the unaccompanied child; potential abuse or neglect by the parent or legal guardian; a parent or legal guardian who resides in the United States but refuses to act as the unaccompanied child's sponsor; or a scenario where the parent or legal guardian is non-custodial and the unaccompanied child's prior caregiver (such as a caregiver in home country) requests that the non-custodial parent not be notified of the placement.

(3) When an NOP is not automatically provided to a parent or legal guardian, ORR shall document, within the unaccompanied child's case file, the child welfare reason for not providing the NOP to the parent or legal guardian.

Section 410.1902 Placement Review Panel

ORR believes that unaccompanied children who are placed in a restrictive placement should have the ability to request reconsideration of their placement at any time after receiving an NOP. Consistent with existing policy, under paragraph (a), ORR proposed in the NPRM to convene a Placement Review Panel (PRP) when an unaccompanied child requests reconsideration of their placement in a restrictive placement, for the purposes of reviewing the unaccompanied child's reconsideration request (88 FR 68959 through 68960). As stated in the NPRM, under current practice, the PRP is a three-member panel consisting of ORR's senior-level career staff with requisite experience in child welfare, including restorative justice, adverse childhood experiences, special populations, and/or mental health. ORR proposed in the NPRM at § 410.1902(a), that upon request for reconsideration of their placement in a restrictive placement, ORR would afford the unaccompanied child a hearing before the PRP, at which the unaccompanied child may, with the assistance of counsel if preferred, present evidence on their own behalf. An unaccompanied child could present witnesses and cross-examine ORR's witnesses if such witnesses are willing to voluntarily testify. ORR noted that an unaccompanied child and/or their legal counsel of record would be provided with the child's case file information, in accordance with ORR's case file policies. An unaccompanied child that does not wish to request a hearing could also have their placement reconsidered by submitting a request for a reconsideration along with any supporting documents as evidence.

ORR proposed in the NPRM at § 410.1902(b), that the PRP would afford any unaccompanied children in a restrictive placement the opportunity to request a PRP review as soon as the unaccompanied child receives an NOP and anytime thereafter.

ORR proposed in the NPRM at § 410.1902(c), that the ORR would require itself to convene the PRP within a reasonable timeframe, to allow the unaccompanied child to have a hearing without undue delay. ORR proposed in the NPRM to require, at § 410.1902(d), that the PRP would issue a decision within 30 calendar days of the PRP request whenever possible. ORR believes these requirements would help ensure reconsideration requests are decided in a timely manner.

Finally, ORR believes ORR staff members should be recused from participation in a PRP under certain circumstances to help ensure an impartial reconsideration of an unaccompanied child's placement. Thus, ORR proposed in the NPRM at § 410.1902(e) that an ORR staff member who was involved with the decision to step-up an unaccompanied child to a restrictive placement could not serve as a Placement Review Panel member with respect to that unaccompanied child's placement. ORR welcomed public comment on these proposals.

Comment: A few commenters stated that ORR should include a requirement in the final rule for care provider facilities to seek legal assistance for unaccompanied children throughout the PRP process. Another commenter wrote that ORR should ensure each unaccompanied child that requests a PRP has legal representation and a child advocate. One commenter urged ORR to clarify that the child has a right to counsel of their choosing and a right to present witnesses and evidence under § 410.1902.

Response: ORR is revising its proposal under § 410.1902(a) to additionally state that where the child does not have an attorney, ORR shall encourage the care provider facility to seek assistance for the child from a contracted legal service provider or child advocate. ORR believes that unaccompanied children should have the ability to present witnesses and evidence, and for that reason, proposed these requirements under § 410.1902(a). ORR is also clarifying that the assistance of counsel is ''at no cost to the Federal Government'' instead of ''if preferred'' for consistency with 8 U.S.C. 1232(c)(5). Related to § 410.1902(a) and for consistency with 8 U.S.C. 1232(c)(5), ORR is clarifying that a child's request to have their placement reconsidered without a hearing must be written by adding the word ''written'' before request, so that the sentence reads ''An unaccompanied child that does not wish to request a hearing may also have their placement reconsidered by submitting a written request for a reconsideration along with any supporting documents as evidence.'' Finally, ORR is clarifying at § 410.1902(a) to add ''child and ORR'' to describe the witnesses that may be willing to voluntarily testify, so that it reads ''An unaccompanied child may present witnesses and cross-examine ORR's witnesses, if such child and ORR witnesses are willing to voluntarily testify.''

Comment: A few commenters recommended that ORR both inform children of their right to an interpreter and provide a certified interpreter in the child's preferred language at the PRP hearing, noting that this is consistent with most State laws and Federal law and would promote effective communication and a fair hearing.

Response: ORR is adding at § 410.1902(a) a requirement that an unaccompanied child shall be provided access at the PRP hearing to interpretation services in their native or preferred language, depending on the unaccompanied child's preference, and in a way they effectively understand.

Comment: A few commenters noted that § 410.1902(a) does not specify that unaccompanied children and their attorney will have a right to review ORR's evidence before the hearing and will be provided the casefile in a reasonable time. One commenter recommended that ORR disclose the child's case file and all evidence supporting restrictive placement no later than five business days prior to the PRP hearing.

Response: ORR is revising its requirement under § 410.1902(b) to additionally require that ORR shall permit the child or the child's counsel to review the evidence in support of step-up or continued restrictive placement, including any countervailing or otherwise unfavorable evidence, within a reasonable time before the PRP review is conducted. ORR shall also share the unaccompanied child's complete case file apart from any legally required redactions with their counsel within a reasonable timeframe to be established by ORR to assist in the legal representation of the unaccompanied child. ORR recognizes that the complete case file will need to be provided with sufficient time for the unaccompanied child (and their counsel, if any) to review the case file in advance of the PRP review, and for that reason added ''within a reasonable time'' to its revision of § 410.1902(b).

Comment: One commenter expressed concern that in the majority of States, court review of the secure detention of a child is ensured, and that in those States, detention is either time-limited or the child is entitled to a rehearing by the court upon request. The commenter believed that unaccompanied children should similarly have a right to continued placement review through periodic hearings.

Response: As is consistent with ORR's current policy, under this final rule at § 410.1901(d), periodic administrative reviews of restrictive placements are automatically conducted every 30 days. In accordance with current policy and pursuant to language finalized at § 410.1902(a) through (e), unaccompanied children have the opportunity, with the assistance of legal counsel at no cost to the Federal Government, to make a request for reconsideration of their restrictive placement to the PRP, which is comprised of neutral senior-level career staff who have experience in child welfare, restorative justice, adverse childhood experiences, special populations, and mental health and must not have been involved in the initial decision to place the child in a restrictive setting.

Comment: A few commenters recommended that ORR provide additional procedural protections. One commenter stated their belief that this would decrease burden on ORR by eliminating the financial cost and administrative challenges of transferring an accompanied child to a new placement after a successful PRP challenge. One commenter stated that ORR should provide unaccompanied children with NOPs and PRPs, absent a present, imminent danger to self or others, before they are stepped up to a more restrictive placement and that this would protect the unaccompanied children's liberty interests, mental health, and well-being. Another commenter stated that a specific timeframe for scheduling the hearing should be provided, noting that an unaccompanied child should not be transferred to the restrictive placement until the PRP makes a decision regarding placement of the child.

A few commenters recommended that ORR should require an automatic review of all placements in restrictive settings by the PRP. One commenter recommended ORR provide the following timelines for such automatic reviews: 5 business days prior to the step-up and no sooner than 72 hours after receiving notice of the restrictive placement. Another commenter noted their belief that ORR would face minimal burden in scheduling automatic PRP reviews. Another commenter added that ORR should then allow unaccompanied children, if they choose, to opt-out of such hearings. The commenter noted that because many unaccompanied children lack the English proficiency or literacy to request a PRP review, that automatic PRP reviews are consistent with State juvenile proceedings and would ensure the child's private interest in freedom from prolonged detention, due process rights, and well-being.

Response: ORR thanks commenters for their recommendations. Due process does not require that ORR provide a PRP review prior to the step-up to a more restrictive placement or provide automatic PRP reviews. As the *Lucas R.* Court found on summary judgment, ''in light of the important Government interests at stake, as well as the safety of the minors, full pre-deprivation notice and hearing are not constitutionally required.'' [322] The Court also did not require automatic adversarial hearings for each stepped up unaccompanied child, finding that the required 30-day administrative review for all restrictive placements, and the more intensive 90-day reviews of placements in secure facilities, ''already provide automatic procedural safeguards'' for unaccompanied children.[323]

Comment: One commenter expressed concern that the PRP is not a substitute for the FSA's mandatory and automatic juvenile coordinator review and approval of all secure placements, noting that it is an important safeguard because it eliminates the burden on the child to contest the placement in cases where an error could have been identified by the juvenile coordinator. The commenter recommended that ORR include a requirement for juvenile coordinator review in the final rule.

Response: ORR staff (*e.g.,* a Federal Field Specialist (FFS) or FFS Supervisor) perform the function of the juvenile coordinator described in FSA paragraph 23 in order to provide the mandatory reviews and approvals for all placements in secure facilities. Therefore, at § 410.1902(a) ORR is adding that ''All determinations to place an unaccompanied child in a secure facility that is not a residential treatment center will be reviewed and approved by ORR federal field staff.''

Comment: One commenter recommended requiring ORR witnesses to testify because they may be crucial to a placement decision, and a child does not have the same ability to call them to testify as ORR does.

Response: Under § 410.1902(a) of this final rule, an unaccompanied child may present their own witnesses and cross-examine ORR's witnesses, if any are willing to voluntarily testify. ORR may, but is not required to, call and present its own witnesses.

Comment: Several commenters recommended that ORR require that the placement review panel (PRP) issue a decision within 7 days of a hearing and submission of evidence or, if no hearing or review of additional evidence is requested, within 7 days following receipt of a child's written statement. They noted that ORR could extend this deadline as necessary under specified circumstances.

Response: ORR agrees and is revising § 410.1902(c) to require that ORR shall convene the PRP within 7 days of a child's request for a hearing, and that ORR may institute procedures to request clarification or additional evidence if warranted, or to extend the 7-day deadline as necessary under specified circumstances.

Comment: A few commenters also noted that § 410.1902(d) does not require the PRP decision be in writing and recommended that the final rule require a written decision. One commenter stated that ORR should require the PRP to set forth, in writing, detailed, specific, and individualized reasoning for any decision so that the reasoning behind the decision is well-documented and there is access to the evidence used to make the decision.

Response: ORR agrees and is accordingly revising § 410.1902(d) to require the PRP to issue a written decision within 7 days of a hearing and submission of evidence or, if no hearing or review of additional evidence is requested, within 7 days following

receipt of a child's written statement. ORR may institute procedures to request clarification or additional evidence if warranted, or to extend the 7-day deadline as necessary under specified circumstances. It is ORR's existing practice that PRP decisions are detailed, specific, and provide individualized reasons because ORR believes this is beneficial to unaccompanied children and supports transparency.

Comment: A few commenters recommended that ORR require that the PRP decision be issued or translated in a language the unaccompanied child understands, and that the case manager explain the PRP decision to the child in a language the child understands and prefers.

Response: ORR agrees that the PRP decision should be in a language the unaccompanied child understands as this is consistent with § 410.1306 language access requirements for written materials. ORR is accordingly revising § 410.1902(d) to require the PRP be issued in the child's native or preferred language.

Comment: A few commenters recommended that ORR state that PRP proceedings are separate and apart from the unaccompanied child's immigration A-File and not relied upon in any deportation or removal hearing or any USCIS adjudication because the potential for a negative impact on their immigration case may discourage children from exercising their right to the PRP review. One commenter suggested ORR clarify that the PRP is conducted exclusively within the scope of ORR's duty under the HSA as the custodian of unaccompanied children.

Response: ORR notes that § 410.1902(a) explicitly provides that PRP reviews are conducted for the purpose of determining the appropriateness of an unaccompanied child's placement. Placement is a defined term in this final rule, and assumes the unaccompanied child is in ORR custody. ORR further clarifies, consistent with other parts of this preamble, that ORR is not an immigration enforcement authority. ORR notes that the A-file is the immigration file which belongs to DHS, and not to ORR.

Comment: One commenter expressed concern that no timeline is specified for step-down when the PRP decides the unaccompanied child should be moved to a less restrictive setting, and stated if that is not possible, ORR should provide a plan for an expeditious step-down to the child and their counsel, along with documentation of all efforts to find a placement.

Response: ORR agrees that when the PRP decides an unaccompanied child is ready for step-down to a less restrictive setting, the child should be stepped down as expeditiously as is possible, consistent with § 410.1101(f) in this final rule which would require that all facilities accept children absent limited specific reasons (*e.g.,* licensing requirements).

Comment: One commenter requested clarification regarding the members of the PRP, including where the PRP would be located organizationally within ORR, and whether care provider staff would be members of the panel. The commenter recommended the PRP contain both administrative as well as field staff to encourage decisions accounting for a diversity of experience. Another commenter recommended that § 410.1902(e) require that all PRP members be neutral and detached because they believe this would be consistent with State child welfare laws and court decisions.

Response: The PRP is a three-member panel of ORR senior-level career staff, and as such is not organizationally located within any certain unit of ORR. ORR's policy currently requires PRP panel members have experience in child welfare, including restorative justice, adverse childhood experiences, special populations, and/or mental health. ORR is finalizing under § 410.1902(e) that panel members shall not have been involved with the decision to step-up an unaccompanied child to a restrictive placement and believes this requirement is sufficient to ensure an impartial reconsideration of such placements.

Final Rule Action: After consideration of public comments, ORR is finalizing its proposal as proposed, with the following revisions and additions: At § 410.1902(a) ORR is adding that ''All determinations to place an unaccompanied child in a secure facility that is not a residential treatment center will be reviewed and approved by ORR federal field staff.'' ORR is also adding at § 410.1902(a) that ''Where the minor does not have an attorney, ORR shall encourage the care provider facility to seek assistance for the minor from a contracted legal service provider or child advocate'', and that ''An unaccompanied child shall be provided access at the PRP hearing to interpretation services in their native or preferred language, depending on the unaccompanied child's preference, and in a way they effectively understand.'' At 410.1902(a), ORR is stating ''at no cost to the Federal Government'' instead of ''if preferred.'' At § 410.1902(a) ORR is adding the word ''written'' before request so that the sentence reads ''An unaccompanied child that does not wish to request a hearing may also have their placement reconsidered by submitting a written request for a reconsideration along with any supporting documents as evidence.'' At § 410.1902(a) ORR is adding ''child and ORR'' so that the sentence reads ''An unaccompanied child may present witnesses and cross-examine ORR's witnesses, if such child and ORR witnesses are willing to voluntarily testify.'' At § 410.1902(b), ORR is adding that ''ORR shall permit the minor or the minor's counsel to review the evidence in support of step-up or continued restrictive placement, and any countervailing or otherwise unfavorable evidence, within a reasonable time before the PRP review is conducted. ORR shall also share the unaccompanied child's complete case file apart from any legally required redactions with their counsel within a reasonable timeframe to be established by ORR to assist in the legal representation of the unaccompanied child.'' At § 410.1902(c), ORR is revising the text to state that ''ORR shall convene the PRP within 7 days of a child's request for a hearing. ORR may institute procedures to request clarification or additional evidence if warranted, or to extend the 7-day deadline as necessary under specified circumstances.'' At § 410.1902(d), ORR is revising the text to state that ''The PRP shall issue a written decision in the child's native or preferred language within 7 days of a hearing and submission of evidence or, if no hearing or review of additional evidence is requested, within 7 days following receipt of a child's written statement. ORR may institute procedures to request clarification or additional evidence if warranted, or to extend the 7-day deadline as necessary under specified circumstances.'' Finally, ORR is revising language at § 410.1902(e) to replace ''must'' with ''shall.''

Section 410.1903 Risk Determination Hearings

The decision in *Flores* v. *Sessions,* 862 F.3d 863 (9th Cir. 2017), held that notwithstanding the passage of the HSA and the TVPRA, pursuant to the FSA unaccompanied children in ORR custody continue to have the ability to seek a bond hearing before an immigration judge in every case, unless waived by the unaccompanied child.[324] The regulations under this section are intended to afford the same type of hearing for unaccompanied children, while recognizing that the HSA, enacted after the FSA went into effect, transferred the responsibility of care and

custody of unaccompanied children from the former INS to ORR.[325]

ORR proposed in the NPRM at § 410.1903, to establish a hearing process that provides the same substantive protections as immigration court bond hearings under the FSA, but through an independent and neutral HHS hearing officer (88 FR 68960 through 68962). Further, these hearings would take place at HHS rather than the Department of Justice (DOJ). ORR explained in the NPRM that this arrangement would parallel the arrangement under the FSA because when the FSA was enacted, the former INS, which then was responsible for the care and custody of unaccompanied children, and the immigration courts were located in the same department, DOJ. Similarly, ORR proposed in the NPRM the availability of risk determination hearings before hearing officers who are within the same department, HHS, but independent of ORR. In the NPRM, ORR explained that it believes that utilizing an independent hearing officer within HHS would help prevent undue delay for a hearing while the unaccompanied child is in ORR care because generally HHS hearing officer schedules have greater availability in the short term, particularly as compared to immigration courts. ORR noted in the NPRM that it codified a similar provision in the 2019 Final Rule which the Ninth Circuit held was consistent with the FSA, except to the extent the 2019 Final Rule did not automatically place unaccompanied children in restrictive placements in bond hearings.[326] ORR proposed in the NPRM to implement a process substantially the same as the one in the 2019 Final Rule but updated to conform with the Ninth Circuit's ruling.

Unlike typical ''bond redetermination hearings'' in the immigration court context, which refer to an immigration judge's review of a custody decision, including any bond set, by DHS,[327] ORR does not require payment of money in relation to any aspect of its care and placement of unaccompanied children. Instead, the function of risk determination hearings in the ORR context is to determine whether an unaccompanied child would be a danger to the community or a runaway risk if released. With respect to these functions, ORR notes, first, that consistent with its discretion as described at 8 U.S.C. 1232(c)(2)(A), it does not consider runaway risk when making release decisions regarding unaccompanied children in its care. As a result, unlike when the FSA was implemented in 1997, runaway risk is no longer a relevant issue in risk determination hearings for unaccompanied children.[328] Therefore, the relevant issue for risk determination hearings for unaccompanied children is whether they would present a danger if released from ORR custody. With respect to this function, ORR notes that for the great majority of unaccompanied children in ORR custody, it has determined they are not a danger and therefore has placed them in non-restrictive placements such as shelters and group homes. These unaccompanied children remain in ORR care only because a suitable sponsor has not yet been found and approved. ORR also notes that if an unaccompanied child is found not to be a danger to self or others through a hearing described in this section, such a finding may be relevant to questions of placement and release, but any change of placement or potential release must be implemented consistent with the other requirements of this part (*e.g.,* subparts B, C, and G). Therefore, in hearings described in this section, an ALJ is unable to order the release or change in placement of an unaccompanied child. The ALJ rules only on the question of danger to self or the community.

ORR proposed in the NPRM at § 410.1903(a), to codify that all unaccompanied children in restrictive placements would be afforded a risk determination hearing before an independent HHS hearing officer to determine, through a written decision, whether the unaccompanied child would present a risk of danger to the community if released, unless the unaccompanied child indicates in writing that they refuse such a hearing (88 FR 68960). For all other unaccompanied children in ORR custody, ORR proposed in the NPRM that they may request such a hearing.

ORR proposed in the NPRM a process for providing notifications and receiving requests related to risk determination hearings (88 FR 68960). ORR proposed in the NPRM at § 410.1903(a)(1), to require that requests under this section be made in writing by the unaccompanied child, their attorney of record, or their parent or legal guardian by submitting a form provided by ORR to the care provider facility or by making a separate written request that contains the information requested in ORR's form. ORR proposed in the NPRM at § 410.1903(a)(2), that unaccompanied children in restrictive placements based on a finding of dangerousness would automatically be provided a risk determination hearing, unless they refuse in writing. They would also receive a notice of the procedures under this section and would be able to use a form provided to them to decline a hearing under this section. ORR proposed in the NPRM that unaccompanied children in restrictive placements may decline the hearing at any time, including after consultation with counsel. ORR would require that such choice be communicated to ORR in writing.

ORR proposed in the NPRM procedures related to risk determination hearings so that the roles of each party are clear (88 FR 68960 through 68961). ORR proposed in the NPRM at § 410.1903(b), that it would bear an initial burden of production, providing relevant arguments and documents to support its determination that an unaccompanied child would pose a danger if discharged from ORR care and custody. ORR proposed in the NPRM that the unaccompanied child would have a burden of persuasion to show that they would not be a danger to the community if released, under a preponderance of the evidence standard. ORR notes that it has established a subregulatory process to ensure access to case files and documents for unaccompanied children and their legal counsel in a timely manner for these purposes. ORR proposed in the NPRM at § 410.1903(c), the unaccompanied child would have the ability to be represented by a person of the unaccompanied child's choosing, would be permitted to present oral and written evidence to the hearing officer, and would be permitted to appear by video or teleconference. Finally, ORR proposed in the NPRM that ORR may also choose to present evidence at the hearing, whether in writing, or by appearing in person or by video or teleconference.

ORR also proposed regulations related to hearing officers' decisions in risk determination hearings (88 FR 68961). First, ORR proposed in the NPRM at § 410.1903(d), a decision that an unaccompanied child would not be a danger to the community if released would be binding upon ORR unless appealed. ORR believes that unaccompanied children must also have the opportunity to appeal decisions finding that they are a danger to the community if released. However, HHS does not have a two-tier administrative appellate system that closely mirrors that of the EOIR within the DOJ, where immigration court decisions may be appealed to the Board of Immigration Appeals. To provide similar protections without such a two-tier system, under § 410.1903(e) of the NPRM, ORR proposed that decisions under this section may be appealed to the Assistant Secretary of ACF, or the Assistant

Secretary's designee. ORR proposed in the NPRM that appeal requests be in writing and be received by the Assistant Secretary or their designee within 30 days of the hearing officer's decision under § 410.1903(e)(1). Under § 410.1903(e)(2), ORR is proposing that the Assistant Secretary, or their designee, will reverse a hearing officer decision only if there is a clear error of fact, or if the decision includes an error of law. Further, ORR proposed in the NPRM at § 410.1903(e)(3), that if the hearing officer finds that the unaccompanied child would not pose a danger to the community if released, and such decision would result in ORR releasing the unaccompanied child from its custody (*e.g.,* because ORR had otherwise completed its assessment for the release of the unaccompanied child to a sponsor, and the only factor preventing release was its determination that the unaccompanied child posed a danger to the community), an appeal to the Assistant Secretary would not effect a stay of the hearing officer's decision, unless the Assistant Secretary or their designee issues a decision in writing within five business days of such hearing officer decision that release of the unaccompanied child would likely result in a danger to the community. ORR proposed in the NPRM to require that such a stay decision must include a description of behaviors of the unaccompanied child while in ORR custody and/or documented criminal or juvenile behavior records from the unaccompanied child demonstrating that the unaccompanied child would present a danger to community, if released.

Alternatively, ORR considered an appeal structure under which a politically accountable official (*e.g.,* the Assistant Secretary of ACF), or their designee would have discretion to conduct de novo review of hearing officer determinations. As under the proposed approach, the official conducting de novo review would be able to reverse hearing officer determinations. But the official would not be constrained to reversing hearing officer determinations based only on clear error of fact, or error of law. Instead, the official would step into the position of the hearing officer and re-decide the issues. ORR requested comments as to whether it should adopt this alternative scheme.

ORR reiterates that in the context of risk determination hearings, although a finding of non-dangerousness may ultimately result in an unaccompanied child's release, neither the hearing officer nor the Assistant Secretary, on appeal, may order the release or change of placement of an unaccompanied child, because release or change of placement implicate additional requirements described in this part (*e.g.,* sponsor suitability assessment, in the case of release; or available bed space at a suitable care provider facility, in the case of a change of placement). Placement and release decision-making authority is vested in the Director of ORR under the HSA and TVPRA.[329] The fundamental question at issue in an ORR risk determination hearing is whether an unaccompanied child would pose a danger to the community if released. Having said that, to the extent the hearing officer or Assistant Secretary, or designee, makes other findings with respect to the unaccompanied children, ORR will consider those in making placement and release decisions. For example, if a hearing officer finds that the child is not a flight risk, ORR will consider that finding when assessing the child's placement and conditions of placement—though the decision does not affect release because ORR does not determine flight risk for purposes of deciding whether a child will be released.

ORR proposed in the NPRM at § 410.1903(f) that decisions under this section would be final and binding on the Department, meaning, for example, that when deciding whether to release an unaccompanied child (in accordance with the ordinary procedures on release for unaccompanied children as discussed in subpart C of this rule), the ORR Director would not be able to disregard a determination that an unaccompanied child is not a danger (88 FR 68961). Further, in the case of an unaccompanied child who was determined to pose a danger to the community if released, the child would be permitted to seek another hearing under this section only if they can demonstrate a material change in circumstances. Similarly, because ORR may not have located a suitable sponsor at the time a hearing officer issues a decision, it may find that circumstances have changed by the time a sponsor is found such that the original hearing officer decision should no longer apply. Therefore, ORR proposed that it may request the hearing officer to make a new determination under this section if at least one month has passed since the original decision, and/or ORR can show that a material change in circumstances means the unaccompanied child should no longer be released due to presenting a danger to the community. Based on experience under current policies, ORR stated that one month is a reasonable length of time for a material change in circumstances to have occurred and best balances operational constraints with the safety concerns of all children under ORR care. It also ensures that children who have newly exhibited dangerous behaviors are accurately adjudicated. ORR notes that it previously proposed and finalized this same length of time (one month) in the 2019 Final Rule. ORR notes that because it always seeks to release an unaccompanied child to a sponsor whenever appropriate, ORR can make determinations to release a child previously determined to be a danger to the community without a new risk determination hearing because the purpose of a risk determination hearing is to ensure a child who is not a danger to the community is not kept in ORR custody.

ORR proposed in the NPRM at § 410.1903(g) that this section cannot be used to determine whether an unaccompanied child has a suitable sponsor, and neither the hearing officer nor the Assistant Secretary, or the Assistant Secretary's designee, would be authorized to order the unaccompanied child released (88 FR 68961 through 68962). This means that an unaccompanied child that has been determined by a hearing officer to not present a danger would only be released in accordance with the ordinary procedures on release for unaccompanied children as discussed in subpart C of this rule.

Finally, ORR proposed in the NPRM at § 410.1903(h) that this section may not be invoked to determine an unaccompanied child's placement while in ORR custody or to determine level of custody for the unaccompanied child (88 FR 68962). Under this section, the purpose of a risk determination hearing is only to determine whether an unaccompanied child presents a danger to the community if released, not to determine placement or level of custody. ORR would determine placement and level of custody as part of its ordinary procedures for the placement of unaccompanied children as discussed in subpart B of this final rule. That said, ORR would be able to take into consideration the hearing officer's decision on an unaccompanied child's level of danger (and runaway risk) for those purposes.

For purposes of this final rule, as further explained below at Final Rule Action, ORR notes that it is amending this section to reorganize certain provisions proposed in the NPRM, including consolidation of certain provisions; and to make changes regarding the burden of proof. ORR is revising § 410.1903(a) to encompass the

requirements of former §§ 410.1903(a) and (a)(1) in the NPRM so that it states ''All unaccompanied children in restrictive placements based on a finding of dangerousness shall be afforded a hearing before an independent HHS hearing officer, to determine, through a written decision, whether the unaccompanied child would present a risk of danger to self or to the community if released, unless the unaccompanied child indicates in writing that they refuse such a hearing. Unaccompanied children placed in restrictive placements shall receive a written notice of the procedures under this section and may use a form provided to them to decline a hearing under this section. Unaccompanied children in restrictive placements may decline the hearing at any time, including after consultation with counsel.''

ORR is revising new § 410.1903(b) to incorporate the requirements of former § 410.1903(a)(2) in the NPRM so that it states ''All other unaccompanied children in ORR custody may request a hearing under this section to determine, through a written decision, whether the unaccompanied child would present a risk of danger to self or to the community if released. Requests under this section must be made in writing by the unaccompanied child, their attorney of record, or their parent or legal guardian by submitting a form provided by ORR to the care provider facility or by making a separate written request that contains the information requested in ORR's form.''

For clarity, ORR is also revising new § 410.1903(i) (formerly § 410.1903(g) in the NPRM) to remove the phrase ''and neither the hearing officer nor the Assistant Secretary may order the unaccompanied child released'' and new § 410.1903(j) (formerly § 410.1903(h) to remove ''This section may not be invoked to determine the unaccompanied child's placement while in ORR custody. Nor may this section be invoked to determine the level of custody for the unaccompanied child'' and replace it with ''Determinations under this section will not compel an unaccompanied child's release; nor will determinations under this section compel transfer of an unaccompanied child to a different placement. Regardless of the outcome of a risk determination hearing or appeal, an unaccompanied child may not be released unless ORR identifies a safe and appropriate placement pursuant to subpart C; and regardless of the outcome of a risk determination hearing or appeal, an unaccompanied child may only be transferred to another placement by ORR pursuant to requirements set forth at subparts B and G.''

Comment: One commenter requested clarity regarding where independent hearing officers within HHS would be located organizationally and emphasized the importance of hearing officers having the proper knowledge and qualifications to preside over risk determination hearings. Another commenter was concerned that a hearing before a hearing officer within HHS would eliminate the right of an unaccompanied child to have a hearing before an immigration judge, and that there would be an inherent conflict of interest between ORR's role as custodian and decision-maker relating to release.

Response: The independent HHS hearing officers described in this final rule will be administrative law judges (ALJs) that are situated within HHS's Departmental Appeals Board (DAB). DAB ALJs are appointed by the Secretary of HHS, and as such, are independent of ORR. Further, they have the appropriate experience and credentials to preside over risk determination hearings.

ORR also notes that the Ninth Circuit found that ORR's similar requirement in the 2019 Final Rule was not a material departure from the FSA, and that ''shifting bond redetermination hearings for unaccompanied minors from immigration judges, adjudicators employed by the Justice Department, to independent adjudicators employed by HHS is a permissible interpretation of the Agreement, so long as the shift does not diminish the due process rights the Agreement guarantees.'' [330] Consistent with the Ninth Circuit's holding, ORR does not agree with the commenters that there is a conflict of interest in providing risk determination hearings before HHS independent hearing officers, who are ALJs. ORR anticipates that the independent hearing officers will accrue specialized expertise allowing them to make adjudications more quickly and effectively than immigration judges who remain largely unfamiliar with ORR policies and practices.

Comment: One commenter noted that risk determination hearings are proposed to be available to unaccompanied children determined by ORR to pose a danger to the community, but that the proposed rule did not specify the availability of such hearings for a child determined by ORR to pose a danger to self. The commenter believes that the child must have the ability to challenge such a determination under this section.

Response: ORR clarifies its intent that risk determination hearings are available to unaccompanied children determined by ORR to pose a danger to self. To make that more explicit, in the final rule at § 410.1903(a) ORR will specify that an unaccompanied child whom ORR determines is a ''danger to self or to the community if released'' will have the opportunity to challenge such a determination in a risk determination hearing.

Comment: One commenter believes that ORR should guarantee the appointment of counsel to represent unaccompanied children in risk determination hearings, as the outcome directly impacts their liberty.

Response: ORR will make legal services available for unaccompanied children, subject to budget appropriations, consistent with 8 U.S.C. 1232(c)(5) and as finalized under § 410.1309 of this part. ORR is not able to guarantee the appointment of counsel to represent unaccompanied children in risk determination hearings due to budgetary fluctuations year to year.

Comment: One commenter expressed concern that some unaccompanied children who are not placed in a restrictive placement may still be determined as dangerous and subject to restrictive measures even though they are not placed in a restrictive placement, and should nevertheless receive an automatic risk determination hearing, like unaccompanied children who are placed in a restrictive placement.

Response: ORR will provide automatic risk determination hearings to unaccompanied children in restrictive placements due to a determination of dangerousness. A restrictive placement may deprive an unaccompanied child of certain liberties due to stricter security measures in those facilities. ORR does not believe that unaccompanied children in non-restrictive facilities need automatic hearings because such settings do not restrict children's liberty to the same degree. Yet even so, under this final rule, all unaccompanied children in non-restrictive placements may request a risk determination hearing. ORR expects, however, that in cases involving unaccompanied children in non-restrictive placements, it typically would not consider the children to be a danger to self or others, and so it would send notice to the ALJ of that point. Subject to the relevant procedures established by the DAB, such notice may obviate the need for a hearing. ORR informs all unaccompanied children of their ability to request a risk determination hearing during their orientation and makes

request forms available to them at all times.

Comment: One commenter requested clarification of what constitutes a finding of dangerousness under § 410.1903(a)(2).

Response: ORR refers the commenter to the factors it considers for placing unaccompanied children under § 410.1103(b), including whether an unaccompanied child presents a danger to self or others, consistent with the factors the Secretary of HHS may consider under the TVPRA at 8 U.S.C. 1232(c)(2)(A) in making placement determinations for unaccompanied children (88 FR 68921).

Comment: One commenter stated that ORR should inform children of their right to contest the hearing officer's findings following a risk determination hearing.

Response: As stated in proposed § 410.1903(e), an administrative law judge's decision under this section may be appealed by either the unaccompanied child or ORR to the Assistant Secretary of ACF, or the Assistant Secretary's designee (88 FR 68961). ORR will ensure the child is aware of the right to appeal in a written notice provided consistent with § 410.1903(a).

Comment: A few commenters recommended that ORR unambiguously state in the regulations that a child has a right to review ORR's evidence within a reasonable time in advance of a risk determination hearing or, alternatively, specify that ORR's evidence at the risk determination hearing will be limited to the evidence provided to the child as part of the NOP in a restrictive placement.

A few commenters also stated the proposed regulations should further clarify that ORR bears the burden of proof, with one commenter recommending a beyond a reasonable doubt standard and others suggesting a clear and convincing standard. Another commenter recommended that ORR should bear the burden of proving the legitimacy of placement determinations, which commenter asserted is supported by Federal case law.

Response: In response to the commenters' suggestions about the burden of proof in a risk determination hearing, ORR has revised § 410.1903(c) to state that ORR will bear the burden of proof by clear and convincing evidence that the unaccompanied child would pose a danger to self or others if released from ORR's custody. This revision is consistent with the burden applied in PRP reviews, as discussed in § 410.1902.

In order to enable an unaccompanied child and their counsel to prepare for a risk determination hearing, ORR has clarified at § 410.1903(e) that within a reasonable time prior to a hearing, ORR will provide to the unaccompanied child and their counsel the evidence and information supporting ORR's determination, including the evidentiary record.

Comment: One commenter recommends that ORR use clearer language to describe unaccompanied children's right to counsel, a right to present evidence, and a right to present and cross-examine witnesses.

Response: Section 410.1903 of the final rule includes additional procedural protections for unaccompanied children. First, new § 410.1903(d) (previously § 410.1903(c) in the NPRM) states that the unaccompanied child may be represented by a person of their choosing, which may include counsel, and may present oral and written evidence to the hearing officer and may appear by video or teleconference. Also, new § 410.1903(e) requires ORR to provide the unaccompanied child and their counsel the evidence and information supporting ORR's dangerousness determination, including the evidentiary record, within a reasonable time prior to the hearing.

Comment: A few commenters stated that only allowing an unaccompanied child to seek another hearing under this section if they can demonstrate a material change in circumstances is in violation of the FSA's stated policy favoring release. The commenters expressed concern that ORR may request reconsideration every month while barring the child from requesting reconsideration absent a material change and recommended that ORR either establish a policy permitting recurring risk determination hearings for children detained long-term or permit an unaccompanied child to request a new hearing under the same bases as ORR.

Response: As an initial matter, the FSA did not include a right to recurring bond hearings, which, among other things, would create an enormous administrative burden on the Agency without offering any additional procedural protections to an unaccompanied child. The final rule permits the unaccompanied child to request a new hearing if they can demonstrate a ''material change in circumstances.'' Without such a material change in circumstances, the hearing officer would have no new evidence to review and consider, rendering a new hearing superfluous. ORR is revising new § 410.1903(h) (previously § 410.1903(f) in the NPRM), however, to state that ORR may only seek a new hearing if ORR can show a material change in circumstances as well, which is consistent with the unaccompanied child's standard for reconsideration.

Final Rule Action: After consideration of public comments, ORR is finalizing § 410.1903 as follows: ORR is updating throughout § 410.1903 to replace ''danger to the community'' with ''danger to self or to the community;'' ORR is revising § 410.1903(a) to encompass the requirements of former §§ 410.1903(a) and (a)(1) in the NPRM so that it states, ''All unaccompanied children in restrictive placements based on a finding of dangerousness shall be afforded a hearing before an independent HHS hearing officer, to determine, through a written decision, whether the unaccompanied child would present a risk of danger to self or to the community if released, unless the unaccompanied child indicates in writing that they refuse such a hearing. Unaccompanied children placed in restrictive placements shall receive a written notice of the procedures under this section and may use a form provided to them to decline a hearing under this section. Unaccompanied children in restrictive placements may decline the hearing at any time, including after consultation with counsel.''

ORR is revising new § 410.1903(b) to incorporate the requirements of former § 410.1903(a)(2) in the NPRM so that it states ''All other unaccompanied children in ORR custody may request a hearing under this section to determine, through a written decision, whether the unaccompanied child would present a risk of danger to self or to the community if released. Requests under this section must be made in writing by the unaccompanied child, their attorney of record, or their parent or legal guardian by submitting a form provided by ORR to the care provider facility or by making a separate written request that contains the information requested in ORR's form;'' at new § 410.1903(c) (formerly § 410.1903(b) in the NPRM) to use the term ''proof'' instead of ''production'' and ''persuasion'', at new § 410.1903(h) (formerly § 410.1903(f) in the NPRM) to remove the phrase ''if at least one month has passed since the original decision, and'' and replace it with ''only if;'' at new § 410.1903(i) (formerly § 410.1903(g) in the NPRM) to remove the phrase ''and neither the hearing officer nor the Assistant Secretary may order the unaccompanied child released;'' and new § 410.1903(j)

(formerly § 410.1903(h) in the NPRM) to remove ''This section may not be invoked to determine the unaccompanied child's placement while in ORR custody. Nor may this section be invoked to determine the level of custody for the unaccompanied child'' and replace it with ''Determinations under this section will not compel an unaccompanied child's release; nor will determinations under this section compel transfer of an unaccompanied child to a different placement. Regardless of the outcome of a risk determination hearing or appeal, an unaccompanied child may not be released unless ORR identifies a safe and appropriate placement pursuant to subpart C; and regardless of the outcome of a risk determination hearing or appeal, an unaccompanied child may only be transferred to another placement by ORR pursuant to requirements set forth at subparts B and G.''

Subpart K—UC Office of the Ombuds

Subpart K of this final rule is issued by the Secretary of HHS pursuant to his retained authority under the TVPRA, rather than by ORR. This is to ensure the new office's independence from ORR.

The NPRM proposed to establish an independent ombuds office that would promote important protections for all children in ORR care (88 FR 68962). An ombuds office to address unaccompanied children's issues does not currently exist, and HHS believes that the creation of an ombuds office would advance its duty to ''ensur[e] that the interests of the child are considered in decisions and actions relating to the care and custody of an unaccompanied alien child.'' [331] An ombuds for the UC Program would be an independent, impartial, and confidential public official with authority and responsibility to receive, investigate and informally address complaints about Government actions, make findings and recommendations and publicize them when appropriate, and publish reports on its activities. Although an ombud's office would not have authority to compel HHS or ORR to take certain actions, HHS believes an Office of the Ombuds would provide a mechanism by which unaccompanied children, sponsors, and other stakeholders, including federal staff and care provider facility staff, could confidentially raise concerns with an independent, impartial entity that could conduct investigations and make recommendations regarding program operations and decision-making, and refer concerns to other Federal agencies (*e.g.,* HHS Office of the Inspector General, Department of Justice, etc.) or entities. HHS believes that an Office of the Ombudsman is a sound solution to serve a similar function as the oversight currently provided by the *Flores* monitor. While this section would not create an oversight mechanism with authorities that equate with court oversight under a consent decree, HHS notes that it is important to maintain an independent mechanism to identify and report concerns regarding the care of unaccompanied children; it further believes that this independent mechanism should have the ability to investigate such claims, to work collaboratively with HHS and ORR to potentially resolve such issues and publish reports on its activities. HHS therefore proposed to add new subpart K to part 410 to establish the UC Office of the Ombuds.

Key Principles of an Office of the Ombuds

HHS reviewed literature published by several national organizations—including the Administrative Conference of the United States (ACUS), American Bar Association (ABA), International Ombudsman Association (IOA), the United States Ombudsman Association (USOA), and the Coalition of Federal Ombudsman (COFO)—pertaining to standards of practice and establishment of ombuds offices.[332] The literature identifies independence, confidentiality, and impartiality as core standards of any Federal ombuds office. The literature also identifies common definitional characteristics among Federal ombuds offices, such as informality (*i.e.,* ombuds offices do not make decisions binding on the agency or provide formal rights-based processes for redress) and a commitment to credible practices and procedures. In addition, most ombuds offices adhere to the concepts of providing credible review of the issues that come to the office, a commitment to fairness, and assistance in the resolution of issues without making binding agency decisions.[333] These attributes align with HHS's goals for the creation of an office that can provide an independent and impartial body that can receive reports and grievances regarding the care, placement, services, and release of unaccompanied children. The NPRM therefore included a proposal for the creation of an Office of the Ombuds that incorporates lessons and recommendations identified in the 2016 ACUS report, follows the model of other established Federal ombuds offices, and takes into consideration feedback from interested parties (88 FR 68962).

Comment: A few commenters recommended the Office of the Ombuds finalize minimum standards for a credible review process based upon the United States Ombudsman Association (USOA) Governmental Ombudsman Standards.

Response: HHS thanks commenters and may take into consideration whether to adopt standards for a credible review process for the new Office of the Ombuds consistent with those from the USOA Governmental Ombudsman Standards and from other nationally recognized ombuds organizations. However, HHS notes that such standards would be promulgated through a future regulatory or subregulatory process to more efficiently reflect standards as they evolve. Further, HHS anticipates this future process would be undertaken by ACF or the Office of the Ombuds, consistent with its independence from ORR.

Section 410.2000 Establishment of the UC Office of the Ombuds

§ 410.2000 of the NPRM described the establishment of a UC Office of the Ombuds (88 FR 68962). As the literature identified independence of the office as one of the key standards of an ombuds, HHS proposed in the NPRM at § 410.2000(a) that the ombuds will report directly to the ACF Assistant Secretary and will be managed as a distinct entity separate from the UC Program. HHS requested input on options relating to placement and reporting structure of this office within ORR or in another part of ACF.

HHS proposed in the NPRM at § 410.2000(b), that the UC Office of the Ombuds would be an independent, impartial office with authority to receive and investigate complaints and concerns related to unaccompanied children's experiences in ORR care confidentially and informally. This paragraph captured two additional key standards of an ombuds identified by literature: impartiality and confidentiality. In the NPRM, HHS noted the UC Office of the Ombuds would not serve as a legal advocate for any person or issue binding decisions; rather, it would work as a neutral third party that can investigate concerns and attempt to resolve issues which are brought to the office. HHS stated that it intends for the UC Office of the Ombuds to be an additional resource for the UC Program and ORR, unaccompanied children, their sponsors and advocates, and other interested parties. Further, the UC Office of the Ombuds would not supplant other roles and responsibilities of other entities such as the HHS Office

of Inspector General, ORR's monitoring activities of its grants and contracts, or services included in this rule, such as child advocate services (discussed in § 410.1308 of the NPRM) or legal services (discussed in § 410.1309 of the NPRM). Rather, as proposed in the NPRM, the UC Office of the Ombuds would be responsible for acting as a neutral third party to receive, investigate, or address complaints about Government actions.

Comment: Several commenters supported the proposal to establish the Office of the Ombuds.

Response: ORR thanks commenters for their support.

Comment: A few commenters did not support the establishment of the Office of the Ombuds, due to concern about the authority to establish the office, the ability of other Government agencies to fulfill the proposed role, and the cost to establish the office.

Response: HHS notes that the TVPRA requires it, among other agencies, to ''establish policies and programs'' to ensure that unaccompanied children in the United States are protected from traffickers and other persons seeking to victimize or otherwise engage such children in criminal, harmful, or exploitative activity.[334] HHS and ORR have identified the need for this office in order to ensure the effective implementation of HHS's and ORR's statutory responsibilities. An ombuds office, within HHS or ACF, to address unaccompanied children's issues does not currently exist. As a result, HHS proposed to create an independent ombuds office to specifically promote protections for all children in ORR care. HHS further refers the commenters to the discussion of costs to establish the Ombuds Office at Section VI.

Comment: One commenter requested clarification about the role of the Office of the Ombuds given that ORR has an internal Prevention of Child Abuse and Neglect (PCAN) unit.

Response: The Office of the Ombuds and the PCAN Team perform two key, but distinct, functions. The PCAN Team is situated within ORR and oversees compliance with policies and procedures related to allegations of staff-perpetrated child abuse and neglect arising at care provider facilities.

In contrast, the Ombuds for the UC Program will be situated outside of ORR, within ACF. As discussed above, and as codified in this final rule at § 410.2000, it will be an independent, impartial, and confidential public official with authority and responsibility to receive, investigate and informally address complaints about Government actions, make findings and recommendations and publicize them when appropriate, and publish reports on its activities. Additionally, the Ombuds will publish annual findings from its activities, will report to the ACF Assistant Secretary, and will be managed as an entity distinct from ORR.

Comment: Several commenters supported the establishment of the Office of the Ombuds but expressed concern about its independence and authority as the Office is not required to report to Congress. Commenters also recommended the office report to the HHS Secretary.

Response: The agency's literature review pertaining to standards of practice and establishment of ombuds offices identified independence, confidentiality, and impartiality as core standards of any Federal Ombuds office. These attributes will be present in the Office of the Ombuds as it exists within ACF. The ability of the Office of the Ombuds to refer concerns to the HHS Office of the Inspector General as well as other Federal agencies such as DOJ, and to Congress, are examples of the Office's ability to act independently while situated within ACF.

Comment: Several commenters supported the Office of the Ombuds and recommended ensuring the Office's ability to access system data to identify trends as part of its oversight and enforcement authority. Several commenters also recommended an annual review process to evaluate the Office of the Ombuds' effectiveness.

Response: HHS notes that ACF may take into consideration the recommendations regarding access to system data in future policymaking. ACF may consider adopting an annual review process to evaluate the Office of the Ombuds' effectiveness as ACF develops practices, policies, and procedures for the Office of the Ombuds consistent with practices, policies, and procedures from nationally recognized ombuds organizations.

Final Rule Action: After consideration of public comments, this section is finalized as proposed.

Section 410.2001 UC Office of the Ombuds Policies and Procedures; Contact Information

HHS proposed in the NPRM at § 410.2001(a) and (b), that the UC Office of the Ombuds shall develop and make publicly available the office's standards, practices, and policies and procedures giving consideration to the recommendations by nationally recognized ombuds organizations (88 FR 68963). HHS requested comments identifying potential standards, practices, and policies and procedures for ombuds consideration. For example, HHS requested comments regarding whether the UC Office the Ombuds should adopt standards, practices, and policies and procedures that are consistent with the ABA, IOA, USOA, COFO, or another nationally recognized ombuds organization that should be considered.

HHS further proposed at § 410.2001(c) of the NPRM that the UC Office of the Ombuds ensure that information about the office, including how to contact the office, is publicly available and that the office provide notice to unaccompanied children, sponsors, and others of its scope and responsibilities, in both English and other languages spoken and understood by unaccompanied children in ORR care. Per the NPRM, notice shall be provided in an accessible manner, including through the provision of auxiliary aids and services and in clear, easily understood language, using concise and concrete sentences and/or visual aids. HHS's review of other ombuds office outreach activities found multiple approaches to raising awareness about an ombuds office, such as flyers, information posted at care provider facilities, a website and onsite visits to facilities or constituents.[335] HHS proposed in the NPRM providing the UC Office of the Ombuds with the discretion to determine the best approaches to providing outreach and awareness of the office's ability to act as a neutral third party, including visiting ORR facilities and publishing aggregated information annually about the number and types of concerns the UC Office of the Ombuds receives.

Comment: A few commenters supported the Office of the Ombuds making information about the office available and understandable by unaccompanied children, paying special attention to the needs of Indigenous children, and recommended using verbal and written means to share the information with unaccompanied children, include anti-retaliation messages in the information.

Response: HHS notes that ACF will take into consideration in future policymaking the recommendation to share information about the Office of the Ombuds with unaccompanied children verbally and in writing. ACF will share information about the office in a child appropriate way including information about anti-retaliation messaging.

Comment: Several commenters supported the Office of the Ombuds and recommended that the Office of the Ombuds follow accepted best practices for ombuds including confidentiality, transparency, impartiality, accessibility,

and a code of ethics, and take a child-rights centered approach.

Response: The value of the Office of the Ombuds is predicated on appropriate professional standards of practice and definitional characteristics.[336] The office will adhere to core standards associated with federal ombuds—independence, confidentiality and impartiality—and common characteristics that include a commitment to fairness.[337] HHS expects an Office of the Ombuds created to address issues pertaining to unaccompanied children would adhere to the professional attributes associated with ombuds while also specifically protecting and advancing the interests and the rights of children in the care and custody of ORR.

Comment: One commenter requested clarification on the interaction of the Office of the Ombuds and the ORR Policy Guide relating to investigative authority.

Response: The Office of the Ombuds will sit outside of ORR, within ACF, will be independent of ORR, and have authority and responsibility to receive, investigate and informally address complaints about Government actions, make findings and recommendations and publicize them when appropriate. The ORR Policy Guide is a guide for the actions of ORR and its care providers.

Comment: Several commenters recommended that HHS provide more details about communicating with the Office of the Ombuds, including establishing a timeframe to enable public contact with the office, the widespread publication of a toll-free hotline, contact information for Office of the Ombuds on the agency website, and a process to annually review the contact method effectiveness.

Response: HHS notes that ACF will provide further information about methods made available to the public to communicate with the Office of the Ombuds through subregulatory guidance, as such information may change over time.

Final Rule Action: After consideration of public comments, this section is finalized as proposed.

Section 410.2002 UC Office of the Ombuds Scope and Responsibilities

The 2016 ACUS Report described different kinds of ombuds offices which perform different functions based on their mandates. They may identify new issues and patterns of concerns that are not well known or are being ignored; support procedural changes; contribute to significant cost savings by dealing with identified issues, often at the earliest or pre-complaint stages, thereby reducing litigation and settling serious disputes; prevent problems through training and briefings; and serve as an important liaison between colleagues, units, or agencies.[338] HHS intends to establish an ombuds office as an independent, impartial office with authority to receive and investigate issues and concerns related to unaccompanied children's experience in ORR care.

HHS proposed in the NPRM at § 410.2002(a), that the scope of the activities of the UC Office of the Ombuds may include: reviewing ORR compliance with Federal law and meeting with interested parties to hear input on ORR's implementation of and adherence to Federal law; visiting ORR facilities where unaccompanied children are or will be housed; investigating issues or concerns related to unaccompanied children's access to services while in ORR care; reviewing the implementation and execution of ORR policy and procedures; reviewing individual circumstances that raise concerns such as issues with access to services, communications with advocates or sponsors, transfers, or discharge from ORR care; and providing general education and information about ORR and the legal and regulatory landscape relevant to unaccompanied children (88 FR 68963). HHS proposed in the NPRM that the UC Office of the Ombuds may request information and documents from ORR and ORR care provider facilities and shall be provided with such information and documents to the fullest extent possible. HHS further proposed that the UC Office of the Ombuds may recommend new or revised UC Program policies and procedures, or other process improvements. HHS included these anticipated areas of activity at § 410.2002(a) of the NPRM.

HHS anticipates that the UC Office of the Ombuds may have the opportunity to not only field individual concerns from unaccompanied children, their representatives, and program and facility staff, but may also identify patterns of concerns and may be well positioned to offer recommendations to improve ORR program processes and procedures. HHS proposed in the NPRM that, as an independent office reporting to the ACF Assistant Secretary, the UC Office of the Ombuds may determine its caseload and agenda and expects that such caseload may vary due to a variety of circumstances.

HHS proposed in the NPRM at § 410.2002(b), that, because the UC Office of the Ombuds is not an enforcement entity, it should have the discretion to refer matters to other offices or entities, such as State or local law enforcement or the HHS Office of Inspector General (OIG), as appropriate (88 FR 68963).

Finally, to assist the UC Office of the Ombuds in accomplishing its responsibilities, HHS proposed in the NPRM at § 410.2002(c) that the Ombuds must be able to meet with unaccompanied children in ORR care upon receiving a complaint or based on relevant findings while investigating issues or concerns, have access to ORR facilities, premises, and case file information; and have access to care provider and Federal staff responsible for the children's care (88 FR 68963).

Comment: Many commenters supported the proposed scope and responsibilities.

Response: HHS thanks the commenters for their support.

Comment: A few commenters expressed support for the scope of the Office of Ombuds, but also expressed concern the office would not be able to refer matters to State licensing agencies for investigation and enforcement.

Response: HHS believes the Office of the Ombuds would provide a mechanism for independent review of care provider facilities. HHS believes that § 410.2002(b) broadly provides the Ombuds office with making referrals to ''offices with jurisdiction over a particular matter'' which could include State licensing entities.

Comment: A few commenters requested clarification if the reference to § 410.2100 in the regulation text at proposed § 410.2002(a) was in error as the regulatory text does not include § 410.2100.

Response: HHS thanks commenters for identifying the error. The correct reference is to § 410.2001 and will be updated in the final rule regulatory text at § 410.2002(a).

Comment: A few commenters supported the Office of the Ombuds and recommended the Office of the Ombuds scope and responsibilities include protections from retaliation against those reporting concerns for the care of unaccompanied children to the office.

Response: HHS notes that ACF may consider measures in future policymaking that would clarify the protections against retaliation available for individuals that would report concerns about the care of unaccompanied children in ORR care to the Office of the Ombuds. In this rule, the Office of the Ombuds is being created by the Secretary and not ORR. In the future, the Secretary can advance requirements through policymaking that would be mandatory for the Office to implement, including protections from

retaliation by HHS against those who make reports to the Office.

Comment: A few commenters recommended removing the term ''non-binding'' from the description of the office's recommendations to ORR in § 410.2002(a)(10), adding a timeframe for ORR written responses to the recommendations, and reporting recommendations and responses to Congress.

Response: HHS believes the fact that Office of the Ombuds recommendations will not constitute a binding decision on the agency is aligned with common characteristics among Federal ombuds offices and will not impede the ability of the Office of the Ombuds to conduct investigations and make recommendations and to refer concerns to other Federal agencies. HHS notes that ACF will provide further details regarding timeframes for ORR written responses and the process for reporting recommendations and responses to Congress through subregulatory guidance.

Comment: Several commenters support the Office of the Ombuds proposed scope and responsibilities and recommend the Ombuds publish an annual report describing activities conducted in the prior year, summarize child welfare trends and challenges experienced by ORR, and submit the annual reports to Congress.

Response: HHS may take this into consideration for future policymaking.

Comment: Many commenters recommended expanding the Office of the Ombuds' scope and responsibilities, including authority for comprehensive oversight of facilities located in states where State licensure is unavailable because the facility is housing unaccompanied children, and specifying ORR responsibilities in response to Office of the Ombuds reports and recommendations such as providing written responses and corrective actions ORR agrees to take. One commenter recommended a new proposal to provide the Ombuds unobstructed access to any facility to meet confidentially with facility staff, ORR employees and contractors and any unaccompanied children, and to ensure unobstructed access by the Ombuds to information pertinent to the care and custody of an unaccompanied child. One commenter recommended a new subsection to give the Ombuds investigation and enforcement authority for section 504 violations. One commenter recommended a requirement that the Ombuds seek input from the unaccompanied children and former unaccompanied children concerning what affects unaccompanied children while in ORR care. A few commenters recommended making the proposed activities in § 410.2002(a) mandatory.

Response: HHS may take these recommendations into consideration for future policymaking. As provided at § 410.2001(a), the Office of the Ombuds shall develop appropriate standards, practices, and policies and procedures, giving consideration to the recommendations by nationally recognized Ombudsperson organizations. The scope and responsibilities of the Office shall be consistent with the standards, practices, and policies and procedures to be developed, and ACF may consider these recommendations in that context as well.

Comment: A few commenters expressed support for the Office of the Ombuds scope and responsibilities and recommended expanding the scope by revising § 410.2002(a)(3) to include access to documents and information from out-of-network provider facilities and emergency placements as the office deems the information relevant. Other commenters recommended specifying the annual reports proposed in § 410.2002(a)(4) will be made to the Director of ORR, the Assistant Secretary for Children and Families and the Secretary of HHS and will be publicly available. Several commenters recommended expanding and strengthening the Office of the Ombuds investigatory authority, including revising § 410.2002(a)(5) to remove the phrase '' as necessary'' to expand and strengthen the Ombuds' authority and recommend specifying what an investigation shall entail, creating a new subsection to grant the Office of the Ombuds subpoena authority, expanding § 410.2002(a)(6) to require frequent visits and monitoring out-of-network facilities and unlicensed facilities including Influx Care Facilities (ICFs) and Emergency Intake Sites (EISs).

Response: HHS may take these recommendations into consideration for future policymaking.

Comment: One commenter recommended revising § 410.2002(a)(12) so that the responsibility to advise and update the Director of ORR, Assistant Secretary, and the Secretary on the status of ORR's implementation and adherence to Federal law or ORR policy is not discretionary.

Response: HHS may take this recommendation into consideration for future policymaking.

Comment: One commenter recommended revising § 410.2002(a)(8) so the Ombuds resolves complaints or concerns raised by interested parties as it relates to ORR's implementation or adherence to Federal law or ORR regulations and policy and HHS policy.

Response: HHS may take this recommendation into consideration for future policymaking.

Comment: One commenter recommended that § 410.2002(a) include a new subsection stating the Office of the Ombuds shall create processes for conducting coaching, mediation, and dispute resolution for reports it receives and the processes invite participation by all interested parties.

Response: HHS may take these recommendations into consideration for future policymaking.

Final Rule Action: After consideration of public comments, the reference at § 410.2002(a) is being updated to correctly refer to § 410.2001 and the section is otherwise finalized as proposed.

Section 410.2003 Organization of the UC Office of the Ombuds

The 2016 ACUS Report recommends that agencies should support the credibility of offices of the ombuds by selecting an ombuds with sufficient professional stature and requisite knowledge, skills, and abilities to effectively execute the duties of the office.[339] This should include, at a minimum, knowledge of informal dispute resolution practices as well as, depending on the office mandate, familiarity with process design, training, data analysis, and facilitation and group work with diverse populations.[340] To align with the recommendations, HHS proposed in the NPRM at § 410.2003(a) that the UC Ombuds should be hired as a career civil servant. HHS believes that requiring the UC Ombuds position be hired as a career civil servant, rather than a political appointee, will support the important goal of impartiality (88 FR 68963). HHS proposed in the NPRM at § 410.2003(b), that the UC Ombuds have the requisite knowledge and experience to effectively fulfill the work and role, including membership in good standing in a nationally recognized organization, State bar association, or association of ombudsmen. Expertise should include but is not limited to informal dispute resolution practices, services and matters related to unaccompanied children and in child welfare, familiarity and experience with oversight and regulatory matters, and knowledge of ORR policy and regulations. In addition, HHS proposed in the NPRM at § 410.2003(c) that the Ombuds may engage additional staff as it deems necessary and practicable to support the functions and responsibilities of the Office; and, at

§ 410.2003(d), HHS proposed in the NPRM that the UC Ombuds shall establish procedures for training, certification, and continuing education for staff and other representatives of the Office.

Comment: One commenter supported the proposed § 410.2003.

Response: HHS thanks the commenter for its support.

Comment: Several commenters supported the proposal and recommended strengthening the requirements in § 410.2003(b) for the Ombuds position, including possessing a career's worth of demonstrated leadership in the field of public child welfare administration ideally with experience in the plight of unaccompanied children; must be inclusive of LGBTQI+ affirming best practices; possess familiarity with HHS functions, policies and procedures; experience in establishment and assessment of Quality Assurance/Improvement practices; and membership in good standing of a nationally recognized association of ombudsmen or State bar association throughout the course of employment as the Ombuds.

Response: HHS agrees that the Ombuds should possess demonstrated leadership in public child welfare administration ideally experienced with the experiences of unaccompanied children, inclusive of LGBTQI+ affirming best practices, content, and knowledge, experienced in quality assurance and improvement practices, has familiarity with HHS functions, policies and procedures and recognized as a member in good standing of a State bar association or association of ombudsmen. HHS notes that ACF will provide further details regarding the professional experiences and credentials considered for the Ombuds position through subregulatory guidance.

Comment: Several commenters supported the proposal for the Ombuds to hire additional staff but expressed concern about the lack of guidance on structure, framework or staffing criteria. Commenters also recommended that Ombuds staff include individuals with lived experience as an unaccompanied child and there are sufficient staff for timely responses to reports received from across the nation.

Response: HHS notes that ACF may provide further details regarding the Office of the Ombuds' structure, framework or staffing criteria through future policymaking or subregulatory guidance. HHS believes that Ombuds staff should include individuals with appropriate professional and personal experiences that are relevant to the functions of the office, which may include lived experience as an unaccompanied child. HHS agrees that it is important that the Office of the Ombuds be sufficiently staffed to ensure timely responses to reports.

Comment: A few commenters supported the proposal the Ombuds establish procedures for training, certification, and continuing education for staff, and recommend consulting the ACUS framework for training standards that link the Ombuds to professional ombuds organizations and establish minimum standards for training and certification that include but are not limited to mandatory reporting laws and ombuds standards and practices offered by ombuds professional associations or training programs.

Response: HHS may take these recommendations into consideration for future policymaking.

Comment: One commenter did not support the proposal that the Ombuds shall be a career civil servant, and recommended the Ombuds be appointed by, and report directly to, the HHS Secretary to ensure appropriate level of authority and impact.

Response: As discussed in the Background section, the Secretary of HHS delegated the authority under the TVPRA to the Assistant Secretary for Children and Families. The Office of the Ombuds will be managed as an entity distinct from ORR. HHS believes the unaccompanied children Ombuds should be a career civil servant, rather than a political appointee, to support the goal of impartiality. Additionally, HHS believes the Office of the Ombuds should report to the ACF Assistant Secretary to be well positioned to offer recommendations to improve ORR program processes and procedures.

Final Rule Action: After consideration of public comments, this section is being finalized as proposed.

Section 410.2004 Confidentiality

HHS proposed in the NPRM at § 410.2004(a), basic requirements that the Ombuds ensure that records and proceedings should be kept in a confidential manner, except to address an imminent risk of serious harm or in response to judicial action (88 FR 68964). Additionally, the Ombuds is prohibited from using or sharing information for any immigration enforcement related purpose. This provision is in line with the 2016 ACUS Report identification of confidentiality of ombuds communications and proceedings as being of paramount importance to encourage reporting of concerns, thereby affording the ombuds the opportunity to assist the constituent and the agency in resolving the concern.[341] HHS also proposed at § 410.2004(b) that the UC Office of the Ombuds may accept reports from anonymous reporters.

To align to these goals and to help in the development of the UC Office of the Ombuds, HHS requested public comment on best practices for preserving the confidentiality of parties that may submit a complaint, as well as building trust in the confidentiality of the office so that individuals feel comfortable and safe, without the fear of retaliation, to report concerns.

Comment: A few commenters supported the proposal at § 410.2004(a), noting that confidentiality will help to establish trust with the unaccompanied child.

Response: HHS thanks the commenters for their support.

Comment: One commenter supported the proposal at § 410.2004(a) that the Ombuds shall manage files and records in a manner that preserves confidentiality and recommended adding a statement that an exception may apply dependent on circumstances.

Response: HHS may consider this recommendation in future policymaking.

Comment: A few commenters expressed concern that the proposal does not explicitly indicate whether the Ombuds and associated staff are considered mandated reporters and recommended establishing the expectation that the Ombuds and associated staff are mandated reporters and required to adhere to mandated reporting laws in States where they are acting in their professional capacity.

Response: HHS may take this recommendation into consideration in future policymaking.

Comment: One commenter recommended revising the proposal at § 410.2004(b) so the Office of the Ombuds shall accept reports of concerns from anonymous reporters.

Response: Under § 410.2004(b) as proposed, the Office of the Ombuds may accept reports of concern from anonymous reporters. HHS believes this language sufficiently provides the Office of the Ombuds the discretion necessary to review reports of concern from anonymous reporters on a case-by-case basis.

Final Rule Action: After consideration of public comments, this section is being finalized as proposed.

Request for Information

As stated in the NPRM, HHS believes the UC Office of the Ombuds should be intentionally designed and requests any other comments and input on how the

Ombuds should handle concerns relating to ORR practices (88 FR 68964). HHS therefore included in the NPRM a request for information for additional public input on the proposed UC Office of the Ombuds. HHS sought public comment on whether the Office should provide services relating to oversight in other areas, including more generalized concerns about ORR conduct and services. HHS also sought comment on potential intersections between the Ombuds and other avenues for mitigation or redress of grievances (*e.g.,* the ORR Placement Review Panel). Additionally, HHS sought comment on additional independent and impartial mechanisms to address grievances or complaints related to children's experiences in ORR care.

Finally, HHS welcomed comments on other organizational and structural matters relevant to the proposed UC Office of the Ombuds.

Comment: A few commenters recommended that the Office of the Ombuds establish relationships with State and local law enforcement, CPS agencies and other actors, enter into memoranda of understanding with DHS, Office of the Immigration Detention Ombudsman (OIDO), and Office for Civil Rights and Civil Liberties (CRCL) to address oversight of unaccompanied children in Federal custody, and requiring the Office of the Ombuds to collaborate with State and local ombuds as appropriate.

Response: HHS may consider these recommendations in future policymaking.

Comment: A few commenters recommended a new provision requiring ongoing engagement by the Ombuds and community stakeholders, FSA class counsel, and the FSA court-appointed monitor to ensure the Ombuds is aware of stakeholder concerns and priorities, and that the Ombuds should invite collaboration with oversight entities and nonprofit and international organizations with expertise in monitoring and protecting children's rights.

Response: HHS may take into consideration these recommendations in future policymaking.

Comment: A few commenters recommended clarification on the connection between the ORR NCC and the Office of the Ombuds to streamline reporting concerns and reduce confusion.

Response: The Office of the Ombuds is an entity situated outside of ORR, within ACF, and with authority and responsibility to receive, investigate and informally address complaints about Government actions. The ORR NCC is funded directly by ORR. Given their distinct roles, concerns reported to the ORR NCC would not be forwarded to the Office of the Ombuds.

Comment: A few commenters recommended increasing the office size to promote accessibility to unaccompanied children throughout the United States.

Response: HHS may take this recommendation into consideration in future policymaking.

Comment: One commenter recommended extending the scope of the Office of the Ombuds to unaccompanied children within 6 months post-release and to youth who are trafficking victims to age 18.

Response: The focus of the Ombuds office will be related to the care, treatment, and access to services for children in ORR custody.

Comment: One commenter recommended the Office of the Ombuds prioritize investigating and publishing a comprehensive report reviewing systematic gaps in care of Indigenous unaccompanied children and consult Indigenous experts in the report's development.

Response: The Office of the Ombuds will investigate and report on all unaccompanied children in ORR custody pursuant to requirements under § 410.2002(a).

Final Rule Action: ACF welcomed the additional input on the organizational and structural matters of the Office of the Ombuds and may take these recommendations into consideration in future policymaking.

V. Collection of Information Requirements

Under the Paperwork Reduction Act of 1995 (PRA), HHS is required to provide 60-day notice in the **Federal Register** and solicit public comment before a collection of information requirement is submitted to the Office of Management and Budget (OMB) for review and approval. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a control number assigned by OMB. This final rule does not require information collections for which HHS plans to seek OMB approval.

Under § 410.1902, as discussed in section IV. of this final rule, ORR is finalizing its proposal to establish processes for unaccompanied children to appeal the denial of release and for certain prospective sponsors to appeal sponsorship denials. While this appeals process may require unaccompanied children or prospective sponsors to submit information to ORR, information collections imposed subsequent to an administrative action are not subject to the PRA under 5 CFR 1320.4(a)(2). Therefore, ORR is not estimating any information collection burden associated with this process.

Under § 410.1903, as discussed in section IV. of this final rule, ORR is finalizing its proposal to establish processes for risk determination hearings. As part of these processes, five forms will be made available to unaccompanied children placed in ORR custody by their case manager or by individuals associated with the HHS Departmental Appeals Board, which is responsible for the actual day-to-day logistical operations of these hearings. These forms will be provided to all unaccompanied children placed in a restrictive setting (*i.e.,* secure facilities (including residential treatment facilities) and heightened supervision facilities), and to unaccompanied children placed in other types of facilities upon request. The five forms include the Request for Risk Determination Hearing (Form RDH–1), the Risk Determination Hearing Opt-Out (Form RDH–2), the Appointment of Representation for Risk Determination Hearing (Form RDH–3), the Risk Determination Hearing Transcript Request (Form RDH–4), and the Request for Appeal of Risk Determination Hearing (Form RDH–5). ORR estimates each form will require 10 minutes (0.167 hours) to complete. Prospective respondents include ORR grantee and contractor staff, unaccompanied children, parents/legal guardians of unaccompanied children, attorneys of record, and legal service providers. ORR is unable to estimate how many of each type of respondent will complete each form, therefore ORR uses a range to estimate the cost associated with completing these forms. For this range, ORR assumes unaccompanied children and parents of unaccompanied children as a minimum and lawyers as a maximum.

ORR believes that the cost for unaccompanied children and parents of unaccompanied children undertaking administrative and other tasks on their own time is a post-tax wage of $24.04/hour. The Valuing Time in U.S. Department of Health and Human Services Regulatory Impact Analyses: Conceptual Framework and Best Practices identifies the approach for valuing time when individuals undertake activities on their own time.[342] To derive these costs, a measurement of the usual weekly earnings of wage and salary workers of $1,145, divided by 40 hours to calculate an hourly pre-tax wage rate of $28.63/

hour.[343] This rate is adjusted downwards by an estimate of the effective tax rate for median income households of about 14 percent calculated by comparing pre- and post-tax income,[344] resulting in the post-tax hourly wage rate of $24.62/hour. Unlike State and private sector wage adjustments, ORR is not adjusting these wages for fringe benefits and other indirect costs since the individuals' activities, if any, would occur outside the scope of their employment. For lawyers, ORR utilizes the median hourly wage rate of $65.26 in accordance with the Bureau of Labor Statistics (BLS).[345] ORR calculates the cost of overhead, including fringe benefits, at 100 percent of the median hourly wage. This is necessarily a rough adjustment, both because fringe benefits and overhead costs vary significantly by employer and methods of estimating these costs vary widely in the literature. Nonetheless, ORR believes that doubling the hourly wage rate ($65.26 × 2 = $130.52) to estimate total cost is a reasonably accurate estimation method. ORR provides burden estimates for forms RDH–1 through RDH–5 in Table 1 below.

TABLE 1—BURDEN ESTIMATES ASSOCIATED WITH RISK DETERMINATION HEARING FORMS

Form	# Annual respondents	Responses per respondent	Burden hours per response	Annual total burden hours	Minimum cost ($24.62/hr)	Maximum cost ($130.52/hr)
Request for Risk Determination Hearing (Form RDH–1)	435	1	0.167	72.5	$1,785	$9,463
Risk Determination Hearing Opt-Out (Form RDH–2)	435	1	0.167	72.5	1,785	9,463
Appointment of Representative for Risk Determination Hearing (Form RDH–3)	1740	1	0.167	290	7,140	37,851
Risk Determination Hearing Transcript Request (Form RDH–4)	16	1	0.167	2.67	66	348
Request for Appeal of Risk Determination Hearing (Form RDH–5)	3	1	0.167	0.5	12	65
Total	2,614	1	0.167	438	10,788	57,190

As shown in Table 1, ORR estimates an annual total burden of 438 hours at a cost ranging from $10,788 to $57,190 to complete and submit forms associated with risk determination hearings. ORR will submit these information collection estimates to OMB for approval as part of a new information collection request.

Once the new risk determination hearing forms are in effect, ORR will prepare a non-substantive change request to the OMB to discontinue the use of three instruments currently approved under OMB control number 0970–0565 (expiration date November 30, 2024). The forms to be replaced by the Risk Determination Hearing forms described above include the following: Request for a Flores Bond Hearing (Form LRG–7), Motion Requesting a Bond Hearing—Secure or Staff Secure (Form LRG–8A), Motion Requesting a Bond Hearing—Non-Secure (Form LRG–8B). ORR assumes these forms will be completed by a Child, Family, or School Social Worker at a wage rate of $42.94 per hour.[346] The currently approved annual burden hours associated with these three forms is 14 hours at a cost of $601 (14 hours × $42.94). In aggregate, we estimate a total net burden of 424 hours (438 hours − 14 hours) at a cost ranging from $10,187 ($10,788 − $601) to $56,589 ($57,190 − $601).

ORR has reviewed the requirements being codified in subparts A and B and determined that the regulatory burden associated with reporting and recordkeeping requirements is accounted for under OMB control number 0970–0554 (*Placement and Transfer of Unaccompanied Children into ORR Care Provider Facilities*) and OMB control number 0970–0547 (*Administration and Oversight of the Unaccompanied Children Program*). ORR did not propose any new requirements which result in a change in burden.

ORR has reviewed the requirements being codified in subpart C and determined that the regulatory burden associated with reporting and recordkeeping requirements is accounted for under OMB control number 0970–0278 (*Family Reunification Packet for Sponsors of Unaccompanied Children*), OMB control number 0970–0552 (*Release of Unaccompanied Children from ORR Custody*) and OMB control number 0970–0553 (*Services Provided to Unaccompanied Children*). ORR did not propose any new requirements which result in a change in burden.

ORR has reviewed the requirements being codified in subpart D and determined that, with the exception of the regulatory burden associated with risk determination hearing forms discussed previously, the regulatory burden associated with reporting and recordkeeping requirements is otherwise accounted for under OMB control number 0970–0547 (*Administration and Oversight of the Unaccompanied Children Program*), OMB control number 0970–0564 (*Monitoring and Compliance for Office of Refugee Resettlement (ORR) Care Provider Facilities*), and OMB control number 0970–0565 (*Legal Services for Unaccompanied Children*).

ORR has reviewed the requirements being codified in subparts E through I and determined that the regulatory burden associated with reporting and recordkeeping requirements is accounted for under OMB control number 0970–0554 (*Placement and Transfer of Unaccompanied Children into ORR Care Provider Facilities*). ORR did not propose any new requirements which result in a change in burden.

ORR has reviewed the requirements being codified in subpart J and determined that the regulatory burden associated with reporting and recordkeeping requirements is accounted for under OMB control number 0970–0565 (*Legal Services for Unaccompanied Children*). ORR did not propose any new requirements which result in a change in burden.

VI. Regulatory Impact Analysis

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). Section 3(f) of Executive Order 12866, as amended by Executive Order 14094, defines a ''significant regulatory action'' as an action that is likely to result in a rule: (1) having an annual effect on the economy of $200 million or more (adjusted every 3 years for changes in gross domestic product), or adversely affecting in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, territorial, or tribal Governments or communities; (2) creating a serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impact of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising legal or policy issues for which centralized review would meaningfully further the President's priorities or the principles set forth in the Executive order. Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. While there is uncertainty about the magnitude of effects associated with these regulations, it cannot be ruled out that they exceed the threshold for significance set forth in section 3(f)(1) of Executive Order 12866. Therefore, the regulation is section 3(f)(1) significant and has been reviewed by OMB.

A. Economic Analysis

1. Baseline of Current Costs

In order to properly evaluate the benefits and costs of regulations, agencies must evaluate the costs and benefits against a baseline. OMB Circular A–4 defines the ''no-action'' baseline as ''an analytically reasonable forecast of the way the world would look absent the regulatory action being assessed, including any expected changes to current conditions over time.'' ORR considers its current operations and procedures for implementing the terms of the FSA, the HSA, and the TVPRA to be an informative baseline for this analysis, from which it estimates the costs and benefits that would result from implementing this rule. The section below discusses some examples of the current cost for ORR's operations and procedures under this baseline. The costs described below are already being incurred as part of ORR's implementation of the terms of FSA, the HSA, and the TVPRA. However, the future in the absence of the rule is unclear, including because the end of temporary legal structures could change the UC Program's operations. Relative to some future trajectories—that is, other analytic baselines—there could be additional new costs (and new effects more generally) associated with the policies being promulgated in this final rule.

Referrals of unaccompanied children to the UC Program vary considerably from one year to the next, even from month to month, and are largely unpredictable. Funding for the UC Program's services are dependent on annual appropriations, which rely in part on fluctuating migration numbers. For example, in fiscal year (FY) 2019, the UC Program served 69,488 unaccompanied children and received $1.3 billion in appropriations.[347] In contrast, in FY 2022, ORR served 128,904 unaccompanied children and received $5.5 billion in appropriations.[348] Appropriations account for uncertainty inherent in migration numbers by providing additional resources in any month when the UC Program receives referrals over a certain threshold. For example, in FY 2023, a contingency fund provided $27 million for each increment of 500 referrals (or pro rata share) above a threshold of 13,000 unaccompanied children referrals in a month.[349]

The UC Program funds private non-profit and for-profit agencies to provide shelter, counseling, medical care, legal services, and other support services to children in custody. In addition, some funding is provided for limited post-release services to certain unaccompanied children. Care provider facilities receive grants or contracts to provide shelter, including therapeutic care, foster care, shelter with increased staff supervision, and secure detention care. The majority of program costs (approximately 82 percent) are for care in ORR shelters. Other services for unaccompanied children, such as medical care, background checks, and family unification services, make up approximately 16 percent of the budget. Administrative expenses to carry out the program total approximately 2 percent of the budget.

2. Estimated Costs

This rule codifies current ORR and HHS requirements for compliance with the HSA, the TVPRA, the FSA, court orders, and other requirements described under existing ORR policies and cooperative agreements. Because the majority of requirements being codified in this final rule are already enforced by ORR, ORR does not expect this rule to impose any additional costs aside from those costs incurred by the Federal Government to establish the risk determination hearing process described in § 410.1903 and the UC Office of the Ombuds described in subpart K. Existing staff are currently responsible for conducting both Internal Compliance Reviews and Placement Review Panels as described in §§ 410.1901 and 410.1902, respectively, therefore no additional cost will be incurred.

In § 410.1309, ORR is finalizing the proposal that to the greatest extent practicable and consistent with section 292 of the INA (8 U.S.C. 1362), that all unaccompanied children who are or have been in ORR care would have access to legal advice and representation in immigration legal proceedings or other matters, consistent with current policy. ORR is finalizing the proposal that to the extent that appropriations are available, and insofar as it is not practicable to secure pro bono counsel for unaccompanied children as specified at 8 U.S.C. 1232(c)(5), ORR would have discretion to fund legal service providers to provide direct immigration legal representation. Similarly, ORR is finalizing under § 410.1210 that ORR may offer PRS, which is voluntary for the unaccompanied child and sponsor, for all released children based on their needs and the extent to which appropriations are available. As discussed in Section VI, funding for UC Program services is dependent on annual appropriations from Congress. While ORR is unable to estimate the extent of the need for PRS and legal services and the associated costs, the regulations specifically mention that funding for PRS and legal service providers are limited to the extent appropriations are available. ACF's Justification of Estimates for Appropriation Committees provides additional information regarding the impact of its requested budget.[350]

At § 410.1903, ORR is finalizing the proposal to establish a hearing process that provides the same substantive protections as immigration court bond hearings under the FSA, but through an independent and neutral HHS adjudicator. This rule shifts responsibility for these hearings from DOJ to HHS. ORR estimates that some resources will be required to implement this shift. ORR believes that this burden will fall on DOJ and HHS staff and estimates that it will require approximately 2,000 to 4,000 hours to implement. This estimate reflects 6 to 12 staff working full-time for 2 months

to create the new system. After this shift in responsibility has been implemented, ORR estimates that the rule will lead to no change in net resources required for risk determination hearings, and therefore estimate no incremental costs or savings. ORR sought public comment on these estimates but did not receive any comments.

In subpart K, ORR discusses the establishment of an Office of the Ombuds for the UC Program. Although the scope of the Office of the Ombuds may be varied, ORR anticipates that it would provide a mechanism by which unaccompanied children, sponsors, and other relevant parties could raise concerns, be empowered to independently investigate claims, issue findings, and make recommendations to ORR, and refer findings to other Federal agencies or Congress as appropriate. The Ombuds role will be filled by a career civil servant who has expertise in dispute resolution, familiarity with oversight and regulatory matters, experience working with unaccompanied children or in child welfare, and knowledge of ORR policy and regulations. In addition to the Ombuds position itself, ORR anticipates the need for support staff as well. In order to estimate the costs associated with the Office of the Ombuds and its potential staffing requirements, ORR conferred with budgetary experts and analyzed the needs anticipated to accommodate the likely case load. ORR assumes the Ombuds would be a GS–15 ($176,458 per year) while support staff would consist of one GS–14 ($150,016 per year), four GS–13s ($126,949 per year), and four GS–12s ($106,759 per staff per year). For estimating purposes, ORR assumes each position will be a Step 5 and include a factor 36.25 percent for overhead, per OMB.[351] In total, ORR estimates the cost of establishing this office would be $1,718,529 per year [($176,458 + 150,016 + ($126,949 × 4) + ($106,759 × 4) × 136.25 percent]. ORR welcomed comments on the proposed staffing and structure for the Office of the Ombuds but did not receive any comments other than those previously included in subpart K.

ORR notes that all care provider facilities discussed in this final rule are ORR grantees and the costs of maintaining compliance with these requirements are allowable costs to grant awards under the Basic Considerations for cost provisions at 45 CFR 75.403 through 75.405, in that the costs are reasonable, necessary, ordinary, treated consistently, and are allocable to the award. Additional costs associated with the policies discussed in this final rule that were not budgeted, and cannot be absorbed within existing budgets, would be allowable for the grant recipient to submit a request for supplemental funds to cover the costs.

ORR also notes that EIFs discussed in this final rule are operated by contractors who provide facility management and wraparound services to safely house and care for unaccompanied children during a time of and in response to emergency or influx. Because ORR is finalizing subpart I to codify existing requirements and are not finalizing any additional requirements which we believe will result in changes to current operational practices which impact either facility or staffing costs to operate EIFs, ORR does not estimate any additional costs.

ORR sought public comment on any additional costs associated with the proposals in the NPRM which have not been otherwise addressed (88 FR 68975).

ORR did not receive any comments on additional costs which were not otherwise addressed in the discussion of the proposals in this final rule. As a result, ORR is making no changes or additions to the costs previously discussed in the NPRM. In addition, ORR is making no changes or additions to costs resulting from changes and amendments to regulatory text.

3. Benefits

The primary benefit of the rule is to ensure that applicable regulations reflect ORR's custody and treatment of unaccompanied children in accordance with the relevant and substantive terms of the FSA, the HSA, and the TVPRA. Additionally, the proposed codification of minimum standards for licensed facilities and the release process ensures a measure of consistency across the programs network of standard facilities. ORR also anticipates that many of the previously discussed costs will be partially offset by a reduction in legal costs and staff time associated with the FSA and associated motions to enforce that require significant usage of staff time—often at extremely short notice—and require ORR to pay attorneys' fees.

As required by OMB Circular A–4 (available on the Office of Management and Budget website at: *https://www.whitehouse.gov/wp-content/uploads/2023/11/CircularA-4.pdf*), ORR has prepared an accounting statement to illustrate the impacts of the finalized policies in this final rule in Table 3.

TABLE 2—ACCOUNTING STATEMENT: ESTIMATED ANNUAL COSTS AND BENEFITS

Category	Estimate
Benefits:	
Annualized Monetized Benefits	$0.
Annualized quantified, but non-monetized, benefits	None.
Unquantified Benefits	(1) Applicable regulations reflect ORR's custody and treatment of unaccompanied children in accordance with the relevant and substantive terms of the FSA, the HSA, and the TVPRA. (2) Codification of minimum standards for licensed facilities and the release process ensures a measure of consistency across the programs network of standard facilities. (3) Reduction in legal costs and staff time associated with the FSA and associated motions to enforce.
Costs:	
Annualized monetized costs	$1,718,529.
Annualized quantified, but non-monetized, costs	2,000–4,000 hours.
Unquantified Costs.	
Transfers	$0.
Net Benefits	$0.

B. Regulatory Flexibility Analysis

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term ''small entities'' comprises small business, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. Individuals are not considered by the RFA to be a small entity.

The purpose of this action is to promulgate regulations that implement the relevant and substantive terms of the FSA and provisions of the HSA and TVPRA where they necessarily intersect with the FSA's provisions. Publication of final regulations would result in termination of the FSA, as provided for in FSA paragraph 40. The FSA provides standards for the detention, treatment, and transfer of minors and unaccompanied children. Section 462 of the HSA and section 235 of the TVPRA prescribe substantive requirements and procedural safeguards to be implemented by ORR with respect to unaccompanied children. Additionally, court decisions have dictated how the FSA is to be implemented.[352]

Section 462 of the HSA also transferred to the ORR Director ''functions under the immigration laws of the United States with respect to the care of unaccompanied children that were vested by statute in, or performed by, the Commissioner of Immigration and Naturalization.'' [353] The ORR Director may, for purposes of performing a function transferred by this section, ''exercise all authorities under any other provision of law that were available with respect to the performance of that function to the official responsible for the performance of the function'' immediately before the transfer of the program.[354]

Consistent with provisions in the HSA, the TVPRA places the responsibility for the care and custody of unaccompanied children with the Secretary of Health and Human Services.[355] Prior to the enactment of the HSA, the Commissioner of Immigration and Naturalization, through a delegation from the Attorney General, had authority ''to establish such regulations . . . as he deems necessary for carrying out his authority under the provisions of this Act.'' [356] In accordance with the relevant savings and transfer provisions of the HSA,[357] the ORR Director now possesses the authority to promulgate regulations concerning ORR's administration of its responsibilities under the HSA and TVPRA.

This rule would directly regulate ORR. ORR funds grantees and contractors to provide shelter, counseling, medical care, legal services, and other support services to unaccompanied children in custody. Because the requirements being finalized in this rule are already largely enforced by ORR, ORR does not expect this final rule to impose any additional costs to any of their grantees or contractors related to the provision of these services. It is possible that some grantees or contractors may experience costs to remedy any unmet requirements, however ORR is unable to make any specific assumptions due to the unique nature of each grantee and contractor. Additional costs associated with remedial actions necessary to meet requirements promulgated in this final rule that were not budgeted, and cannot be absorbed within existing budgets, would be allowable for the grant recipient to submit a request for supplemental funds to cover the costs.

Per the most recent SBA size standards effective March 17, 2023, the SBA size standard for NAICS 561210 Facilities Support Services is $47.0 million. The SBA size standards for NAICS 561612 Security Guards and Patrol Services is $29.0 million. Currently, ORR funds 52 grantees to provide services to unaccompanied children. ORR finds that all 52 current grantees are non-profits that do not appear to be dominant in their field. Consequently, ORR believes all 52 grantees are likely to be small entities for the purposes of the RFA. The provisions in this final rule make changes to ORR regulations and would not directly financially impact any small entities. ORR reiterates that additional costs associated with remedial actions necessary to meet requirements promulgated in this final rule that were not budgeted, and cannot be absorbed within existing budgets, would be allowable for the small entity grantee to submit a request for supplemental funds to cover the costs.

ORR requested information and data from the public that would assist in better understanding the direct effects of this final rule on small entities (88 FR 68976). Members of the public were invited to submit a comment, as described in the NPRM under Public Participation, if they think that their business, organization, or governmental jurisdiction qualifies as a small entity and that the policies proposed in the NPRM would have a significant economic impact on it. ORR requested that commenters provide as much information as possible as to why the policies proposed in the NPRM would create an impact on small businesses.

ORR is unaware of any relevant Federal rule that may duplicate, overlap, or conflict with the final rule and is not aware of any alternatives to the final rule which accomplish the stated objectives that would minimize economic impact of the proposed rule on small entities. ORR requested comment and also sought alternatives from the public that will accomplish the same objectives and minimize the proposed rule's economic impact on small entities (88 FR 68976). ORR did not receive any comments on the impacts of these policies on small entities.

Based on this analysis, the Secretary certifies that the rule, if finalized, will not have a significant economic impact on a substantial number of small entities.

C. Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act of 1995 requires that agencies assess anticipated costs and benefits before issuing any rule whose mandates require spending in any 1 year of $100 million in 1995 dollars, updated annually for inflation. The current threshold after adjustment for inflation is $183 million, using the most current (2023) Implicit Price Deflator for the Gross Domestic Product. This final rule would not mandate any requirements that meet or exceed the threshold for State, local, or tribal Governments, or the private sector.

Though this rule would not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble. Additionally, UMRA excludes from its definitions of ''Federal intergovernmental mandate,'' and ''Federal private sector mandate'' those regulations imposing an enforceable duty on other levels of Government or the private sector which are a ''condition of Federal assistance'' 2 U.S.C. 658(5)(A)(i)(I), (7)(A)(i). The FSA provides ORR with no direct authority to mandate binding standards on facilities of State and local Governments or on operations of private sector entities. Instead, these requirements would impact such Governments or entities only to the extent that they make voluntary decisions to contract with ORR. Compliance with any standards that are not already otherwise in place resulting from this rule would be a condition of ongoing Federal assistance through such arrangements. Therefore, this rulemaking contains neither a Federal intergovernmental mandate nor a private sector mandate.

D. Paperwork Reduction Act

All Departments are required to submit to OMB for review and approval, any reporting or recordkeeping requirements inherent in a rule under the Paperwork Reduction Act of 1995, Public Law 104–13, 109 Stat. 163 (1995) (codified at 44 U.S.C. 3501 *et seq.*).

As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), ORR submitted a copy of this section to the Office of Management and Budget (OMB) for its review. This final rule complies with settlement agreements, court orders, and statutory requirements, most of whose terms have been in place for over 20 years. This final rule would not require additional information collection requirements beyond those requirements. The reporting requirements associated with those practices have been approved under the requirements of the Paperwork Reduction Act and in accordance with 5 CFR part 1320. ORR received approval from OMB for use of its forms under OMB control number 0970–0278, with an expiration date of August 31, 2025. Separately, ORR received approval from OMB for its placement and service forms under OMB control number 0970–0498, with an expiration date of August 31, 2023. A form associated with the specific consent process is currently pending approval with OMB (OMB Control Number 0970–0385). We will be submitting forms associated with risk determination hearings to OMB for approval as part of a new information collection request as well as submitting associated revisions for approval under OMB control number 0970–0565.

E. Executive Order 13132: Federalism

This final rule would 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. This final rule would implement ORR statutory responsibilities and the FSA by codifying ORR practices that comply with the terms of the FSA and relevant law for the care and custody of unaccompanied children. In finalizing its proposal to codify these practices, ORR was mindful of its obligations to meet the requirements of Federal statutes and the FSA while also minimizing conflicts between State law and Federal interests. At the same time, ORR is also mindful that its fundamental obligations are to ensure that it implements its statutory responsibilities and the agreement that the Federal Government entered into through the FSA.

Typically, ORR enters into cooperative agreements or contracts with non-profit and private organizations to provide shelter and care for unaccompanied children in a facility licensed by the appropriate State or local licensing authority if the State licensing agency provides for licensing of facilities that provide services to unaccompanied children. Where ORR enters into a cooperative agreement or contract with a facility, ORR requires that the organization administering the facility abide by all applicable State or local licensing regulations and laws. ORR designed agency policies and proposed regulations, as well as the terms of ORR cooperative agreements and contracts with the agency's grantees/contractors, to complement applicable State and licensing rules, not to supplant or replace the requirements.

Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this final rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

Notwithstanding the determination that the formal consultation process described in Executive Order 13132 is not required for this rule, ORR welcomed any comments from representatives of State and local juvenile or family residential facilities—among other individuals and groups—during the course of this rulemaking. ORR did not receive any comments regarding the effects of these policies on the States or on the distribution of power and responsibilities among the various levels of Government.

F. Executive Order 12988: Civil Justice Reform

This final rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

VII. Assessment of Federal Regulation and Policies on Families

Section 654 of the Treasury and General Government Appropriations Act of 1999 requires Federal agencies to determine whether a proposed policy or regulation may affect family well-being. If the agency's determination is affirmative, then the agency must prepare an impact assessment addressing criteria specified in the law. This regulation will not have an impact on family well-being as defined in this legislation, which asks agencies to assess policies with respect to whether the policy: strengthens or erodes family stability and the authority and rights of parents in the education, nurture, and supervision of their children; helps the family perform its functions; and increases or decreases disposable income.

Comment: One commenter disagreed that the rule did not erode family stability, stating a belief that facilitating access to abortion has a negative impact on families.

Response: While ORR acknowledges the opinion and concern of the commenter, ORR concluded that the rule does not have an impact on family-being within the meaning of Section 654 of the Treasury and General Government Appropriations Act of 1999.

Final Rule Action: ORR is making no changes to its assessment of the impact of the regulation on families in this final rule.

VIII. Alternatives Considered

ORR considered several alternatives to the proposed regulations prior to finalizing this rule. First, ORR could have chosen not to promulgate this rule proposing to codify requirements that would protect unaccompanied children in ORR care. However, as discussed at Section III.B.3, pursuant to a stipulation in *California* v. *Mayorkas,* HHS agreed to pursue a new rulemaking to replace and supersede the 2019 Final Rule, which had been enjoined. This rulemaking represents that broader rulemaking effort. Had HHS violated its stipulated agreement and moved to lift the injunction of the 2019 Final Rule, it is likely the *California* v. *Mayorkas* litigation would have resumed. In any case, ORR believes that this rule is warranted at this time in order to codify a uniform set of standards and procedures open to public inspection and feedback that will help to ensure the safety and well-being of unaccompanied children in ORR care, implement the substantive terms of the FSA, and enhance public transparency as to the policies governing the operation of the UC Program.

Once ORR decided to pursue a framework of regulatory requirements through a rule, it considered the scope of a rule and whether to propose additional regulations addressing further areas of authority under the TVPRA. ORR rejected this alternative in order to solely focus this rule on requirements that relate specifically to the care and placement of unaccompanied children in ORR custody, pursuant to 6 U.S.C. 279 and 8 U.S.C. 1232, and that would implement the terms of the FSA. ORR

notes that its decision to finalize more targeted regulations in this final rule does not preclude ORR or other agencies from subsequently issuing regulations to address other issues within ORR's statutory authorities in the future.

After considering these alternatives, ORR is finalizing standards that are consistent with its statutory authorities, implement the terms of the FSA that create responsibilities for ORR, and reflect and are consistent with current ORR practices and requirements, including enhanced standards, procedures, and oversight mechanisms to help ensure the safety and well-being of unaccompanied children in ORR care where appropriate, consistent with ORR's statutory authorities and the FSA. In this way, it would be possible to finalize a codified set of standards and requirements that are uniform across care provider facilities and in a way that accords with the way the UC Program functions.

The FSA contemplates the publication of regulations implementing the agreement. In a 2001 Stipulation, the parties agreed to a termination of the FSA ''45 days following the defendants' publication of final regulations implementing this Agreement.'' In 2020, the U.S. Court of Appeals for the Ninth Circuit ruled that if the Government wishes to terminate those portions of the FSA covered by valid portions of HHS regulations, it may do so.[358] In this final rule, ORR is therefore finalizing regulations implementing the agreement by codifying terms of the FSA that prescribe ORR responsibilities for unaccompanied children in order to ensure that unaccompanied children continue to be treated in accordance with the FSA, the HSA, and the TVPRA.

Jeff Hild, Acting Assistant Secretary of the Administration for Children and Families, approved this document on April 14, 2024.

List of Subjects in 45 CFR Part 410

Administrative practice and procedure, Aliens, Child welfare, Immigration, Reporting and recordkeeping requirements, Unaccompanied children.

■ For the reasons set forth in the preamble, we revise 45 CFR part 410 to read as follows:

PART 410—CARE AND PLACEMENT OF UNACCOMPANIED CHILDREN

Subpart A—Care and Placement of Unaccompanied Children

Sec.

Subpart B—Determining the Placement of an Unaccompanied Child at a Care Provider Facility

Subpart C—Releasing an Unaccompanied Child From ORR Custody

Subpart D—Minimum Standards and Required Services

Subpart E—Transportation of an Unaccompanied Child

Subpart F—Data and Reporting Requirements

Subpart G—Transfers

Subpart H—Age Determinations

Subpart I—Emergency and Influx Operations

Subpart J—Availability of Review of Certain ORR Decisions

Subpart K—Unaccompanied Children Office of the Ombuds (UC Office of the Ombuds)

Authority: 6 U.S.C. 279, 8 U.S.C. 1232.

Subpart A—Care and Placement of Unaccompanied Children

§ 410.1000 Scope of this part.

(a) This part governs those aspects of the placement, care, and services provided to unaccompanied children in Federal custody by reason of their immigration status and referred to the Unaccompanied Children Program (UC Program) as authorized by section 462 of the Homeland Security Act of 2002, Public Law 107–296, 6 U.S.C. 279, and section 235 of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), Public Law 110–457, 8 U.S.C. 1232. This part includes provisions

implementing the settlement agreement reached in *Jenny Lisette Flores* v. *Janet Reno, Attorney General of the United States,* Case No. CV 85–4544–RJK (C.D. Cal. 1996).

(b) The provisions of this part are separate and severable from one another. If any provision is stayed or determined to be invalid, the remaining provisions shall continue in effect.

(c) ORR does not fund or operate facilities other than standard programs, restrictive placements (which includes secure facilities, including residential treatment centers, and heightened supervision facilities), or emergency or influx facilities, absent a specific waiver as described under § 410.1801(d) or such additional waivers as are permitted by law.

§ 410.1001 Definitions.

For the purposes of this part, the following definitions apply.

ACF means the Administration for Children and Families, Department of Health and Human Services.

Attorney of record means an attorney who represents an unaccompanied child in legal proceedings or matters subject to the consent of the unaccompanied child. In order to be recognized as an unaccompanied child's attorney of record by the Office of Refugee Resettlement (ORR), for matters within ORR's authority, the individual must provide proof of representation of the child to ORR. ORR notes that attorneys of record may engage with ORR in the course of this representation in order to obtain custody-related document and to engage in other communications necessary to facilitate the representation.

Best interest is a standard ORR applies in determining the types of decisions and actions it makes in relation to the care of an unaccompanied child. When evaluating what is in a child's best interests, ORR considers, as appropriate, the following non-exhaustive list of factors: the unaccompanied child's expressed interests, in accordance with the unaccompanied child's age and maturity; the unaccompanied child's mental and physical health; the wishes of the unaccompanied child's parents or legal guardians; the intimacy of relationship(s) between the unaccompanied child and the child's family, including the interactions and interrelationship of the unaccompanied child with the child's parents, siblings, and any other person who may significantly affect the unaccompanied child's well-being; the unaccompanied child's adjustment to the community; the unaccompanied child's cultural background and primary language; length or lack of time the unaccompanied child has lived in a stable environment; individualized needs, including any needs related to the unaccompanied child's disability; and the unaccompanied child's development and identity.

Care provider facility means any physical site, including an individual family home, that houses one or more unaccompanied children in ORR custody and is operated by an ORR-funded program that provides residential services for unaccompanied children. Out of network (OON) placements are not included within this definition.

Case file means the physical and electronic records for each unaccompanied child that are pertinent to the care and placement of the child. Case file materials include but are not limited to biographical information on each unaccompanied child; copies of birth and marriage certificates; various ORR forms and supporting documents (and attachments, *e.g.,* photographs); incident reports; medical and dental records; mental health evaluations; case notes and records, including educational records, clinical notes and records; immigration forms and notifications; legal papers; home studies and/or post-release service records on a sponsor of an unaccompanied child; family unification information including the sponsor's individual and financial data; case disposition; correspondence regarding the child's case; and Social Security number (SSN); juvenile/criminal history records; and other relevant records. The records of unaccompanied children are the property of ORR, whether in the possession of ORR or a grantee or contractor, and grantees and contractors may not release these records without prior approval from ORR, except for program administration purposes.

Case manager means the individual that coordinates, in whole or in part, assessments of unaccompanied children, individual service plans, and efforts to release unaccompanied children from ORR custody. Case managers also ensure services for unaccompanied children are documented within the case files for each unaccompanied child.

Chemical restraints include, but are not limited to, drugs administered to children to chemically restrain them, and external chemicals such as pepper spray or other forms of inflammatory and/or aerosol agents.

Child advocates means third parties, appointed by ORR consistent with its authority under TVPRA at 8 U.S.C. 1232(c)(6), who make independent recommendations regarding the best interests of an unaccompanied child.

Clear and convincing evidence means a standard of evidence requiring that a factfinder be convinced that a contention is highly probable—*i.e.,* substantially more likely to be true than untrue.

Close relative means a brother, sister, grandparent, aunt, uncle, first cousin, or other immediate biological relative, or immediate relative through legal marriage or adoption, and half-sibling.

Corrective action means steps taken to correct any care provider facility noncompliance identified by ORR.

Department of Justice Accredited Representative, or *DOJ Accredited Representative,* means a representative of a qualified nonprofit religious, charitable, social service, or other similar organization established in the United States and recognized by the Department of Justice in accordance with 8 CFR part 1292. A DOJ Accredited Representative who is representing a child in ORR custody may file a notice of such representation in order to receive updates on the unaccompanied child.

DHS means the U.S. Department of Homeland Security.

Director means the Deputy Assistant Secretary for Humanitarian Services and Director of the Office of Refugee Resettlement (ORR), Administration for Children and Families, Department of Health and Human Services.

Disability means, with respect to an individual, the definition provided by section 3 of the Americans with Disabilities Act of 1990, 42 U.S.C. 12102, which is adopted by reference in section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794(a), and its implementing regulations, 45 CFR 84.3 (programs receiving Department of Health and Human Services (HHS) financial assistance) and 45 CFR 85.3 (programs conducted by HHS), as well as in the TVPRA at 8 U.S.C. 1232(c)(3)(B).

Discharge means an unaccompanied child that exits ORR custody, or the act of an unaccompanied child exiting ORR custody.

Emergency means an act or event (including, but not limited to, a natural disaster, facility fire, civil disturbance, or medical or public health concerns at one or more facilities) that prevents timely transport or placement of unaccompanied children, or impacts other conditions provided by this part.

Emergency incidents means urgent situations in which there is an immediate and severe threat to a child's safety and well-being that requires

immediate action, and also includes unauthorized absences of unaccompanied children from a care provider facility. Emergency incidents include, but are not limited to:

(1) Abuse or neglect in ORR care where there is an immediate and severe threat to the child's safety and well-being, such as physical assault resulting in serious injury, sexual abuse, or suicide attempt;

(2) Death of an unaccompanied child in ORR custody, including out-of-network facilities;

(3) Medical emergencies;

(4) Mental health emergencies requiring hospitalization; and

(5) Unauthorized absences of unaccompanied children in ORR custody.

Emergency or influx facility (EIF) means a type of care provider facility that opens temporarily to provide shelter and services for unaccompanied children during an influx or emergency. An EIF is not defined as a standard program, shelter, or secure facility under this part. Because of the emergency nature of EIFs, they may be unlicensed or may be exempted from licensing requirements by State and/or local licensing agencies. EIFs may also be operated on federally-owned or leased property, in which case, the facility may not be subject to State or local licensing standards.

Emergency safety situation means a situation in which a child presents a risk of imminent physical harm to themselves, or others, as demonstrated by overt acts or expressed threats.

Family planning services include, but are not limited to, Food and Drug Administration (FDA)-approved contraceptive products (including emergency contraception), pregnancy testing and non-directive options counseling, sexually transmitted infection (STI) services, and referrals to appropriate specialists. ORR notes that the term ''family planning services'' does not include abortions. Instead, abortion is included in the definition of *medical services requiring heightened ORR involvement,* and is further discussed in § 410.1307.

Family Reunification Packet means an application and supporting documentation which must be completed by a potential sponsor who wishes to have an unaccompanied child released from ORR to their care. ORR uses the application and supporting documentation, as well as other procedures, to determine the sponsor's ability to provide for the unaccompanied child's physical and mental well-being.

Heightened supervision facility means a facility that is operated by a program, agency or organization licensed by an appropriate State agency, or that meets the requirements of State licensing that would otherwise be applicable if it is in a State that does not allow state licensing of programs providing care and services to unaccompanied children, and that meets the standards for standard programs set forth in § 410.1302, and that is designed for an unaccompanied child who requires close supervision but does not need placement in a secure facility, including a residential treatment center (RTC). It provides 24-hour supervision, custody, care, and treatment. It maintains stricter security measures than a shelter, such as intensive staff supervision, in order to provide supports, manage problem behavior, and prevent children from running away. A heightened supervision facility may have a secure perimeter but shall not be equipped internally with major restraining construction or procedures typically associated with juvenile detention centers or correctional facilities.

HHS means the U.S. Department of Health and Human Services.

Home study means an in-depth investigation of the potential sponsor's ability to ensure the child's safety and well-being, initiated by ORR as part of the sponsor suitability assessment. A home study includes an investigation of the living conditions in which the unaccompanied child would be placed if released to a particular potential sponsor, the standard of care that the unaccompanied child would receive, and interviews with the potential sponsor and other household members. A home study is conducted for any case where it is required by the TVPRA, this part, and for other cases at ORR's discretion, including for those in which the safety and well-being of the unaccompanied child is in question.

Influx means, for purposes of HHS operations, a situation in which the net bed capacity of ORR's standard programs that is occupied or held for placement by unaccompanied children meets or exceeds 85 percent for a period of seven consecutive days.

Legal guardian means an individual who has been lawfully vested with the power, and charged with the duty of caring for, including managing the property, rights, and affairs of, a child or incapacitated adult by a court of competent jurisdiction, whether foreign or domestic.

Legal service provider means an organization or individual attorney who provides legal services to unaccompanied children, either on a pro bono basis or through ORR funding for unaccompanied children's legal services. Legal service providers provide Know Your Rights presentations and screenings for legal relief to unaccompanied children, and/or direct legal representation to unaccompanied children.

LGBTQI+ includes lesbian, gay, bisexual, transgender, queer or questioning, and intersex.

Mechanical restraint means any device attached or adjacent to the child's body that the child cannot easily remove that restricts freedom of movement or normal access to the child's body. For purposes of the Unaccompanied Children Program, mechanical restraints are prohibited across all care provider types except in secure facilities, where they are permitted only as consistent with State licensure requirements.

Medical services requiring heightened ORR involvement means:

(1) Significant surgical or medical procedures;

(2) Abortions; and

(3) Medical services necessary to address threats to the life of or serious jeopardy to the health of an unaccompanied child.

Notification of Concern (NOC) means an instrument used by home study and post-release services providers, ORR care providers, and the ORR National Call Center staff to document and notify ORR of certain concerns that arise after a child is released from ORR care and custody.

Notice of Placement (NOP) means a written notice provided to unaccompanied children placed in restrictive placements, explaining the reasons for placement in the restrictive placement and kept as part of the child's case file. The care provider facility where the unaccompanied child is placed must provide the NOP to the child within 48 hours after an unaccompanied child's arrival at a restrictive placement, as well as at minimum every 30 days the child remains in a restrictive placement.

ORR means the Office of Refugee Resettlement, Administration for Children and Families, U.S. Department of Health and Human Services.

ORR long-term home care means an ORR-funded family or group home placement in a community-based setting. An unaccompanied child may be placed in long-term home care if ORR is unable to identify an appropriate sponsor with whom to place the unaccompanied child during the pendency of their immigration legal proceedings. ''Long-term home care'' has the same meaning as ''long-term

foster care,'' as that term is used in the definition of *traditional foster care* provided at 45 CFR 411.5.

ORR transitional home care means an ORR-funded short-term placement in a family or group home. ''Transitional home care'' has the same meaning as ''transitional foster care,'' as that term is used in the definition of *traditional foster care* provided at 45 CFR 411.5.

Out of network (OON) placement means a facility that is licensed by an appropriate State agency and that provides physical care and services for individual unaccompanied children as requested by ORR on a case-by-case basis, that operates under a single case agreement for care of a specific child between ORR and the OON provider. OON may include hospitals, restrictive settings, or other settings outside of the ORR network of care. An OON placement is not defined as a standard program under this part.

Peer restraints mean asking or permitting other children to physically restrain another child.

Personal restraint means the application of physical force without the use of any device, for the purpose of restraining the free movement of a child's body. This does not include briefly holding a child without undue force in order to calm or comfort them.

Placement means delivering the unaccompanied child to the physical custody and care of either a care provider facility or an alternative to such a facility. An unaccompanied child who is placed pursuant to this part is in the legal custody of ORR and may only be transferred or released by ORR. An unaccompanied child remains in the custody of a referring agency until the child is physically transferred to a care provider facility or an alternative to such a facility.

Placement Review Panel means a three-member panel consisting of ORR's senior-level career staff with requisite experience in child welfare that is convened for the purposes of reviewing requests for reconsideration of restrictive placements. An ORR staff member who was involved with the decision to step-up an unaccompanied child to a restrictive placement may not serve as a Placement Review Panel member with respect to that unaccompanied child's placement.

Post-release services (PRS) mean follow-up services as that term is used in the TVPRA at 8 U.S.C. 1232(c)(3)(B). PRS are ORR-approved services which may, and when required by statute must, be provided to an unaccompanied child and the child's sponsor, subject to available resources as determined by ORR, after the child's release from ORR custody. Assistance may include linking families to educational and community resources, home visits, case management, in-home counseling, and other social welfare services, as needed. When follow-up services are required by statute, the nature and extent of those services would be subject to available resources.

Program-level events mean situations that affect the entire care provider facility and/or unaccompanied children and its staff within and require immediate action and include, but are not limited to:

(1) Death of a staff member, other adult, or a child who is not an unaccompanied child but is in the care provider facility's care under non-ORR funding;

(2) Major disturbances such as a shooting, attack, riot, protest, or similar occurrence;

(3) Natural disasters such as an earthquake, flood, tornado, wildfire, hurricane, or similar occurrence;

(4) Any event that affects normal operations for the care provider facility such as, for instance, a long-term power outage, gas leaks, inoperable fire alarm system, infectious disease outbreak, or similar occurrence.

Prone physical restraint means a restraint restricting a child's breathing, restricting a child's joints or hyperextending a child's joints, or requiring a child to take an uncomfortable position.

PRS provider means an organization funded by ORR to connect the sponsor and unaccompanied child to community resources for the child and for other child welfare services, as needed, following the release of the unaccompanied child from ORR custody.

Psychotropic medication(s) means medication(s) that are prescribed for the treatment of symptoms of psychosis or another mental, emotional, or behavioral disorder and that are used to exercise an effect on the central nervous system to influence and modify behavior, cognition, or affective state. The term includes the following categories:

(1) Psychomotor stimulants;

(2) Antidepressants;

(3) Antipsychotics or neuroleptics;

(4) Agents for control of mania or depression;

(5) Antianxiety agents; and

(6) Sedatives, hypnotics, or other sleep-promoting medications.

Qualified interpreter means:

(1) For an individual with a disability, an interpreter who, via a video remote interpreting service (VRI) or an on-site appearance, is able to interpret effectively, accurately, and impartially, both receptively and expressively, using any necessary specialized vocabulary. Qualified interpreters include, for example, sign language interpreters, oral transliterators, and cued-language transliterators.

(2) For a limited English proficient individual, an interpreter who via a remote interpreting service or an on-site appearance:

(i) Has demonstrated proficiency in speaking and understanding both spoken English and at least one other spoken language;

(ii) Is able to interpret effectively, accurately, and impartially to and from such language(s) and English, using any necessary specialized vocabulary or terms without changes, omissions, or additions and while preserving the tone, sentiment, and emotional level of the original oral statement; and

(3) Adheres to generally accepted interpreter ethics principles, including client confidentiality.

Qualified translator means a translator who:

(1) Has demonstrated proficiency in writing and understanding both written English and at least one other written non-English language;

(2) Is able to translate effectively, accurately, and impartially to and from such language(s) and English, using any necessary specialized vocabulary or terms without changes, omissions, or additions and while preserving the tone, sentiment, and emotional level of the original written statement; and

(3) Adheres to generally accepted translator ethics principles, including client confidentiality.

Release means discharge of an unaccompanied child to an ORR-vetted and approved sponsor. After release, ORR does not have legal custody of the unaccompanied child, and the sponsor becomes responsible for providing for the unaccompanied child's physical and mental well-being.

Residential treatment center (RTC) means a sub-acute, time limited, interdisciplinary, psycho-educational, and therapeutic 24-hour-a-day structured program with community linkages, provided through non-coercive, coordinated, individualized care, specialized services, and interventions. RTCs provide highly customized care and services to individuals following either a community-based placement or more intensive intervention, with the aim of moving individuals toward a stable, less intensive level of care or independence. RTCs are a type of secure facility and are not a standard program under this part.

Restrictive placement means a secure facility, including RTCs, or a heightened supervision facility.

Runaway risk means it is highly probable or reasonably certain that an unaccompanied child will attempt to abscond from ORR care. Such determinations must be made in view of a totality of the circumstances and should not be based solely on a past attempt to run away.

Seclusion means the involuntary confinement of a child alone in a room or area from which the child is instructed not to leave or is physically prevented from leaving.

Secure facility means a facility with an ORR contract or cooperative agreement having separate accommodations for minors, in a physically secure structure with staff able to control violent behavior. ORR uses a secure facility as the most restrictive placement option for an unaccompanied child who poses a danger to self or others or has been charged with having committed a criminal offense. A secure facility is not defined as a standard program or shelter under this part.

Shelter means a kind of standard program in which all of the programmatic components are administered on-site, consistent with the standards set forth in § 410.1302.

Significant incidents mean non-emergency situations that may immediately affect the safety and well-being of a child. Significant incidents include, but are not limited to:

(1) Abuse or neglect in ORR care;

(2) Sexual harassment or inappropriate sexual behavior;

(3) Staff Code of Conduct violations;

(4) Contact or threats to an unaccompanied child while in ORR care from trafficking or smuggling syndicates, organized crime, or other criminal actors;

(5) Incidents involving law enforcement on site;

(6) Potential fraud schemes perpetrated by outside actors on unaccompanied children's sponsors;

(7) Separation from a parent or legal guardian upon apprehension by a Federal agency;

(8) Mental health concerns; and

(9) Use of safety measures, such as restraints.

Sponsor means an individual (or entity) to whom ORR releases an unaccompanied child out of ORR custody, in accordance with ORR's sponsor suitability assessment process and release procedures.

Staff Code of Conduct means the set of personnel requirements established by ORR in order to promote a safe environment for unaccompanied children in its care, including protecting unaccompanied children from sexual abuse and sexual harassment.

Standard program means any program, agency, or organization that is licensed by an appropriate State agency to provide residential, group, or transitional or long-term home care services for dependent children, including a program operating family or group homes, or facilities for unaccompanied children with specific individualized needs; or that meets the requirements of State licensing that would otherwise be applicable if it is in a State that does not allow state licensing of programs providing care and services to unaccompanied children. A standard program must meet the standards set forth in § 410.1302. All homes and facilities operated by a standard program, including facilities for unaccompanied children with specific individualized needs, shall be non-secure as required under State law. However, a facility for unaccompanied children with specific individualized needs may maintain that level of security permitted under State law which is necessary for the protection of an unaccompanied child or others in appropriate circumstances.

Tender age means twelve years of age or younger.

Transfer means the movement of an unaccompanied child from one ORR care provider facility to another ORR care provider facility, such that the receiving care provider facility takes over physical custody of the child. ORR sometimes uses the terms ''step-up'' and ''step-down'' to describe transfers of unaccompanied children to or from restrictive placements. For example, if ORR transfers an unaccompanied child from a shelter facility to a heightened supervision facility, that transfer would be a ''step-up,'' and a transfer from a heightened supervision facility to a shelter facility would be a ''step-down.'' But a transfer from a shelter to a community-based care facility, or vice versa, would be neither a step-up nor a step-down, because both placement types are not considered restrictive.

Trauma bond means when a trafficker uses rewards and punishments within cycles of abuse to foster a powerful emotional connection with the victim.

Trauma-informed means a system, standard, process, or practice that realizes the widespread impact of trauma and understands potential paths for recovery; recognizes the signs and symptoms of trauma in unaccompanied children, families, staff, and others involved with the system; and responds by fully integrating knowledge about trauma into policies, procedures, and practices, and seeks to actively resist re-traumatization.

Unaccompanied child/children means a child who:

(1) Has no lawful immigration status in the United States;

(2) Has not attained 18 years of age; and

(3) With respect to whom:

(i) There is no parent or legal guardian in the United States; or

(ii) No parent or legal guardian in the United States is available to provide care and physical custody.

Unaccompanied Refugee Minors (URM) Program means the child welfare services program available pursuant to 8 U.S.C. 1522(d).

§ 410.1002 ORR care and placement of unaccompanied children.

ORR coordinates and implements the care and placement of unaccompanied children who are in ORR custody by reason of their immigration status.

§ 410.1003 General principles that apply to the care and placement of unaccompanied children.

(a) Within all placements, unaccompanied children shall be treated with dignity, respect, and special concern for their particular vulnerability.

(b) ORR shall hold unaccompanied children in facilities that are safe and sanitary and that are consistent with ORR's concern for the particular vulnerability of unaccompanied children.

(c) ORR plans and provides care and services based on the individual needs of and focusing on the strengths of the unaccompanied child.

(d) ORR encourages unaccompanied children, as developmentally appropriate and in their best interests, to be active participants in ORR's decision-making process relating to their care and placement.

(e) ORR strives to provide quality care tailored to the individualized needs of each unaccompanied child in its custody, ensuring the interests of the child are considered, and that unaccompanied children are protected from traffickers and other persons seeking to victimize or otherwise engage them in criminal, harmful, or exploitative activity, both while in ORR custody and upon release from the UC Program.

(f) In making placement determinations, ORR shall place each unaccompanied child in the least restrictive setting that is in the best interests of the child, giving consideration to the child's danger to self, danger to others, and runaway risk.

(g) When requesting information or consent from unaccompanied children ORR consults with parents, legal guardians, child advocates, and attorneys of record or DOJ Accredited Representatives as needed.

§ 410.1004 ORR custody of unaccompanied children.

All unaccompanied children placed by ORR in care provider facilities remain in the legal custody of ORR and may be transferred or released only with ORR approval; provided, however, that in the event of an emergency, a care provider facility may transfer temporary physical custody of an unaccompanied child prior to securing approval from ORR but shall notify ORR of the transfer as soon as is practicable thereafter, and in all cases within 8 hours.

Subpart B—Determining the Placement of an Unaccompanied Child at a Care Provider Facility

§ 410.1100 Purpose of this subpart.

This subpart sets forth the process by which ORR receives referrals of unaccompanied children from other Federal agencies and the factors ORR considers when placing an unaccompanied child in a particular care provider facility. As used in this subpart, ''placement determinations'' or ''placements'' refers to placements in ORR-approved care provider facilities during the time an unaccompanied child is in ORR care, and not to the location of an unaccompanied child once the unaccompanied child is released in accordance with subpart C of this part.

§ 410.1101 Process for placement of an unaccompanied child after referral from another Federal agency.

(a) ORR shall accept referrals of unaccompanied children, from any department or agency of the Federal Government at any time of day, every day of the year.

(b) Upon notification from any department or agency of the Federal Government that a child in its custody is an unaccompanied child and therefore must be transferred to ORR custody, ORR shall identify a standard program placement for the unaccompanied child, unless one of the listed exceptions in § 410.1104 applies, and notify the referring Federal agency within 24 hours of receiving the referring agency's notification whenever possible, and no later than within 48 hours of receiving notification, barring exceptional circumstances. ORR may seek clarification about the information provided by the referring agency as needed. In such instances, ORR shall notify the referring agency and work with the referring agency, including by requesting additional information, in accordance with statutory time frames.

(c) ORR shall work with the referring Federal Government department or agency to accept transfer of custody of the unaccompanied child, consistent with the statutory requirements at 8 U.S.C. 1232(b)(3).

(d) For purposes of paragraphs (b) and (c) of this section, ORR may be unable to timely identify a placement for and timely accept transfer of custody of an unaccompanied child due to exceptional circumstances, including:

(1) Any court decree or court-approved settlement that requires otherwise;

(2) An influx, as defined at § 410.1001;

(3) An emergency, including a natural disaster such as an earthquake or hurricane, a facility fire, or a civil disturbance;

(4) A medical emergency, such as a viral epidemic or pandemic among a group of unaccompanied children;

(5) The apprehension of an unaccompanied child in a remote location;

(6) The apprehension of an unaccompanied child whom the referring Federal agency indicates:

(i) Poses a danger to self or others; or

(ii) Has been charged with or has been convicted of a crime, or is the subject of delinquency proceedings, delinquency charge, or has been adjudicated delinquent, and additional information is essential in order to determine an appropriate ORR placement.

(e) ORR shall take legal custody of an unaccompanied child when it assumes physical custody from the referring agency.

§ 410.1102 Care provider facility types.

ORR may place unaccompanied children in care provider facilities as defined at § 410.1001, including but not limited to shelters, group homes, individual family homes, heightened supervision facilities, or secure facilities, including RTCs. ORR may place unaccompanied children in out-of-network (OON) placements, subject to § 410.1103, if ORR determines that a child has a specific need that cannot be met within the ORR network of facilities, if no in-network care provider facility equipped to meet the child's needs has the capacity to accept a new placement, or if transfer to a less restrictive facility is warranted and ORR is unable to place the child in a less restrictive in-network facility. Unaccompanied children shall be separated from delinquent offenders in OON placements (except those unaccompanied children who meet the requirements for a secure placement pursuant to § 410.1105). In times of influx or emergency, as further discussed in subpart I of this part, ORR may place unaccompanied children in care provider facilities that may not meet the standards of a standard program, but rather meet the standards in subpart I.

§ 410.1103 Considerations generally applicable to the placement of an unaccompanied child.

(a) ORR shall place each unaccompanied child in the least restrictive setting that is in the best interest of the child and appropriate to the unaccompanied child's age and individualized needs, provided that such setting is consistent with the interest in ensuring the unaccompanied child's timely appearance before DHS and the immigration courts and in protecting the unaccompanied child's well-being and that of others.

(b) ORR shall consider the following factors to the extent they are relevant to the unaccompanied child's placement, including:

(1) Danger to self;

(2) Danger to the community/others;

(3) Runaway risk;

(4) Trafficking in persons or other safety concerns;

(5) Age;

(6) Gender;

(7) LGBTQI+ status or identity;

(8) Disability;

(9) Any specialized services or treatment required or requested by the unaccompanied child;

(10) Criminal background;

(11) Location of potential sponsor and safe and timely release options;

(12) Behavior;

(13) Siblings in ORR custody;

(14) Language access;

(15) Whether the unaccompanied child is pregnant or parenting;

(16) Location of the unaccompanied child's apprehension; and

(17) Length of stay in ORR custody.

(c) ORR may utilize information provided by the referring Federal agency, child assessment tools, interviews, and pertinent documentation to determine the placement of all unaccompanied children. ORR may obtain any records from local, State, and Federal agencies regarding an unaccompanied child to inform placement decisions.

(d) ORR shall review, at least every 30 days, the placement of an unaccompanied child in a restrictive placement to determine whether a new level of care is appropriate.

(e) ORR shall make reasonable efforts to provide licensed placements in those geographical areas where DHS encounters the majority of unaccompanied children.

(f) A care provider facility must accept the placement of unaccompanied children as determined by ORR, and may deny placement only for the following reasons:

(1) Lack of available bed space;

(2) Placement of the unaccompanied child would conflict with the care provider facility's State or local licensing rules;

(3) Initial placement involves an unaccompanied child with a significant physical or mental illness for which the referring Federal agency does not provide a medical clearance; or

(4) In the case of the placement of an unaccompanied child with a disability, the care provider facility concludes it is unable to meet the child's disability-related needs, without fundamentally altering the nature of its program, even by providing reasonable modifications and even with additional support from ORR.

(g) Care provider facilities must submit a written request to ORR for authorization to deny placement of unaccompanied children, providing the individualized reasons for the denial. Any such request must be approved by ORR before the care provider facility may deny a placement. ORR may follow up with a care provider facility about a placement denial to find a solution to the reason for the denial.

§ 410.1104 Placement of an unaccompanied child in a standard program that is not restrictive.

ORR shall place all unaccompanied children in standard programs that are not restrictive placements, except in the following circumstances:

(a) An unaccompanied child meets the criteria for placement in a restrictive placement set forth in § 410.1105; or

(b) In the event of an emergency or influx of unaccompanied children into the United States, in which case ORR shall place the unaccompanied child as expeditiously as possible in accordance with subpart I of this part.

§ 410.1105 Criteria for placing an unaccompanied child in a restrictive placement.

(a) *Criteria for placing an unaccompanied child in a secure facility that is not a residential treatment center (RTC).* (1) ORR may place an unaccompanied child in a secure facility (that is not an RTC) either at initial placement or through a transfer to another care provider facility from the initial placement. This determination must be made based on clear and convincing evidence documented in the unaccompanied child's case file. All determinations to place an unaccompanied child in a secure facility (that is not an RTC) will be reviewed and approved by ORR Federal field staff. A finding that a child poses a danger to self shall not be the sole basis for a child's placement in a secure facility (that is not an RTC).

(2) ORR shall not place an unaccompanied child in a secure facility (that is not an RTC) if less restrictive alternatives in the best interests of the unaccompanied child are available and appropriate under the circumstances. ORR shall place an unaccompanied child in a heightened supervision facility or other non-secure care provider facility as an alternative, provided that the unaccompanied child does not currently pose a danger to others and does not need placement in an RTC pursuant to the standard set forth at 410.1105(c).

(3) ORR may place an unaccompanied child in a secure facility (that is not an RTC) only if the unaccompanied child:

(i) Has been charged with or has been convicted of a crime, or is the subject of delinquency proceedings, delinquency charge, or has been adjudicated delinquent, and where ORR deems that those circumstances demonstrate that the unaccompanied child poses a danger to others, not including:

(A) An isolated offense that was not within a pattern or practice of criminal activity and did not involve violence against a person or the use or carrying of a weapon; or

(B) A petty offense, which is not considered grounds for stricter means of detention in any case;

(ii) While in DHS or ORR's custody, or while in the presence of an immigration officer or ORR official or ORR contracted staff, has committed, or has made credible threats to commit, a violent or malicious act directed at others; or

(iii) Has engaged, while in a restrictive placement, in conduct that has proven to be unacceptably disruptive of the normal functioning of the care provider facility, and removal is necessary to ensure the welfare of others, as determined by the staff of the care provider facility (*e.g.,* stealing, fighting, intimidation of others, or sexually predatory behavior), and ORR determines the unaccompanied child poses a danger to others based on such conduct.

(b) *Criteria for placing an unaccompanied child in a heightened supervision facility.* (1) ORR may place an unaccompanied child in a heightened supervision facility either at initial placement or through a transfer to another facility from the initial placement. This determination must be made based on clear and convincing evidence documented in the unaccompanied child's case file.

(2) In determining whether to place an unaccompanied child in a heightened supervision facility, ORR considers if the unaccompanied child:

(i) Has been unacceptably disruptive to the normal functioning of a shelter such that transfer is necessary to ensure the welfare of the unaccompanied child or others;

(ii) Is a runaway risk;

(iii) Has displayed a pattern of severity of behavior, either prior to entering ORR custody or while in ORR care, that requires an increase in supervision by trained staff;

(iv) Has a non-violent criminal or delinquent history not warranting placement in a secure facility, such as isolated or petty offenses as described in paragraph (b)(2)(iii) of this section; or

(v) Is assessed as ready for step-down from a secure facility, including an RTC.

(c) *Criteria for placing an unaccompanied child in an RTC.* (1) An unaccompanied child with serious mental health or behavioral health issues may be placed in an RTC only if the unaccompanied child is evaluated and determined to be a danger to self or others by a licensed psychologist or psychiatrist consulted by ORR or a care provider facility, which includes a determination by clear and convincing evidence documented in the unaccompanied child's case file, including documentation by a licensed psychologist or psychiatrist that placement in an RTC is appropriate.

(2) ORR may place an unaccompanied child in an out of network (OON) RTC when a licensed clinical psychologist or psychiatrist consulted by ORR or a care provider facility has determined that the unaccompanied child requires a level of care only found in an OON RTC either because the unaccompanied child has identified needs that cannot be met within the ORR network of RTCs or no placements are available within ORR's network of RTCs, or that an OON RTC would best meet the unaccompanied child's identified needs.

(3) The criteria for placement in or transfer to an RTC also apply to transfers to or placements in OON RTCs. Care provider facilities may request ORR to transfer an unaccompanied child to an RTC in accordance with § 410.1601(d).

(d) For an unaccompanied child with one or more disabilities, consistent with

section 504 of the Rehabilitation Act, 29 U.S.C. 794(a), ORR's determination under § 410.1105 whether to place the unaccompanied child in a restrictive placement shall include consideration whether there are any reasonable modifications to the policies, practices, or procedures of an available less restrictive placement or any provision of auxiliary aids and services that would allow the unaccompanied child to be placed in that less restrictive facility. ORR's consideration of reasonable modifications and auxiliary aids and services to facilitate less restrictive placement shall also apply to transfer decisions under § 410.1601 and will be incorporated into restrictive placement case reviews under § 410.1901. However, ORR is not required to take any action that it can demonstrate would fundamentally alter the nature of a program or activity.

§ 410.1106 Unaccompanied children who need particular services and treatment.

ORR shall assess each unaccompanied child in its care to determine whether the unaccompanied child requires particular services and treatment by staff to address their individualized needs while in the care and custody of the UC Program. An unaccompanied child's assessed needs may require particular services, equipment, and treatment by staff for various reasons, including, but not limited to disability, alcohol or substance use, a history of serious neglect or abuse, tender age, pregnancy, or parenting. If ORR determines that an unaccompanied child's individualized needs require particular services and treatment by staff or particular equipment, ORR shall place the unaccompanied child, whenever possible, in a standard program in which the unaccompanied child with individualized needs can interact with children without those individualized needs to the fullest extent possible, but which provides services and treatment or equipment for such individualized needs.

§ 410.1107 Considerations when determining whether an unaccompanied child is a runaway risk for purposes of placement decisions.

When determining whether an unaccompanied child is a runaway risk for purposes of placement decisions, ORR shall consider, among other factors, whether:

(a) The unaccompanied child is currently under a final order of removal.

(b) The unaccompanied child has previously absconded or attempted to abscond from State or Federal custody.

(c) The unaccompanied child has displayed behaviors indicative of flight or has expressed intent to run away.

(d) Evidence that the unaccompanied child is experiencing a strong trauma bond to or is threatened by a trafficker in persons or drugs.

§ 410.1108 Placement and services for children of unaccompanied children.

(a) *Placement.* ORR shall accept referrals for placement of parenting unaccompanied children who arrive with children of their own to the same extent that it receives referrals of other unaccompanied children and shall prioritize placing and keeping the parent and child together in the interest of family unity.

(b) *Services.* (1) ORR shall provide the same care and services to the children of unaccompanied children as it provides to unaccompanied children, as appropriate, regardless of the children's immigration or citizenship status.

(2) U.S. citizen children of unaccompanied children are eligible for public benefits and services to the same extent as other U.S. citizens. Application(s) for public benefits and services shall be submitted on behalf of the U.S. citizen children of unaccompanied children by care provider facilities. Utilization of those benefits and services shall be exhausted to the greatest extent practicable before ORR-funded services are utilized.

§ 410.1109 Required notice of legal rights.

(a) ORR shall promptly provide each unaccompanied child in its custody, in a language and manner the unaccompanied child understands, with:

(1) A State-by-State list of free legal service providers compiled and annually updated by ORR and that is provided to unaccompanied children as part of a Legal Resource Guide for unaccompanied children;

(2) The following explanation of the right of potential review: ''ORR usually houses persons under the age of 18 in the least restrictive setting that is in an unaccompanied child's best interest, and generally not in restrictive placements (which means secure facilities, heightened supervision facilities, or residential treatment centers). If you believe that you have not been properly placed or that you have been treated improperly, you may call a lawyer to seek assistance and get advice about your rights to challenge this action. If you cannot afford a lawyer, you may call one from the list of free legal services given to you with this form;'' and

(3) A presentation regarding their legal rights, as provided under § 410.1309(a)(2).

Subpart C—Releasing an Unaccompanied Child From ORR Custody

§ 410.1200 Purpose of this subpart.

This subpart covers the policies and procedures used to release, without unnecessary delay, an unaccompanied child from ORR custody to a vetted and approved sponsor.

§ 410.1201 Sponsors to whom ORR releases an unaccompanied child.

(a) Subject to an assessment of sponsor suitability, when ORR determines that the detention of the unaccompanied child is not required either to secure the child's timely appearance before DHS or the immigration court, or to ensure the child's safety or that of others, ORR shall release a child from its custody without unnecessary delay, in the following order of preference, to:

(1) A parent;

(2) A legal guardian;

(3) An adult relative;

(4) An adult individual or entity designated by the parent or legal guardian as capable and willing to care for the unaccompanied child's well-being in:

(i) A declaration signed under penalty of perjury before an immigration or consular officer; or

(ii) Such other document that establishes to the satisfaction of ORR, in its discretion, the affiant's parental relationship or guardianship;

(5) A licensed program willing to accept legal custody; or

(6) An adult individual or entity seeking custody, in the discretion of ORR, when it appears that there is no other likely alternative to long term custody, and family unification does not appear to be a reasonable possibility.

(b) ORR shall not disqualify potential sponsors based solely on their immigration status and shall not collect information on immigration status of potential sponsors for law enforcement or immigration enforcement related purposes. ORR shall not share any immigration status information relating to potential sponsors with any law enforcement or immigration enforcement related entity at any time.

(c) In making determinations regarding the release of unaccompanied children to potential sponsors, ORR shall not release unaccompanied children on their own recognizance.

§ 410.1202 Sponsor suitability.

(a) Potential sponsors shall complete an application package to be considered as a sponsor for an unaccompanied child. The application package may be obtained from either the care provider facility or ORR directly.

(b) Prior to releasing an unaccompanied child, ORR shall conduct a suitability assessment to determine whether the potential sponsor is capable of providing for the unaccompanied child's physical and mental well-being. At minimum, such assessment shall consist of review of the potential sponsor's application package, including verification of the potential sponsor's identity, physical environment of the sponsor's home, and relationship to the unaccompanied child, if any, and an independent finding that the individual has not engaged in any activity that would indicate a potential risk to the unaccompanied child. ORR may consult with the issuing agency (*e.g.,* consulate or embassy) of the sponsor's identity documentation to verify the validity of the sponsor identity document presented.

(c) ORR's suitability assessment shall include taking all needed steps to determine that the potential sponsor is capable of providing for the unaccompanied child's physical and mental well-being. As part of its suitability assessment, ORR may require such components as an investigation of the living conditions in which the unaccompanied child would be placed and the standard of care the unaccompanied child would receive, verification of the employment, income, or other information provided by the potential sponsor as evidence of the ability to support the child, interviews with members of the household, a home visit or home study as discussed at § 410.1204. In all cases, ORR shall require background and criminal records checks, which at minimum includes an investigation of public records sex offender registry conducted through the U.S. Department of Justice National Sex Offender public website for all sponsors and adult residents of the potential sponsor's household, and may include a public records background check or an FBI National Criminal history check based on fingerprints for some potential sponsors and adult residents of the potential sponsor's household. Any such assessment shall also take into consideration the wishes and concerns of the unaccompanied child.

(d) ORR shall assess the nature and extent of the potential sponsor's previous and current relationship with the unaccompanied child, and the unaccompanied child's family, if applicable. Lack of a pre-existing relationship with the child does not categorically disqualify a potential sponsor, but the lack of such relationship will be a factor in ORR's overall suitability assessment.

(e) ORR shall consider the potential sponsor's motivation for sponsorship; the unaccompanied child's preferences and perspective regarding release to the potential sponsor; and the unaccompanied child's parent's or legal guardian's preferences and perspective on release to the potential sponsor, as applicable.

(f) ORR shall evaluate the unaccompanied child's current functioning and strengths in conjunction with any risks or concerns such as:

(1) Victim of sex or labor trafficking or other crime, or is considered to be at risk for such trafficking due, for example, to observed or expressed current needs, *e.g.,* expressed need to work or earn money;

(2) History of criminal or juvenile justice system involvement (including evaluation of the nature of the involvement, for example, whether the child was adjudicated and represented by counsel, and the type of offense) or gang involvement;

(3) History of behavioral issues;

(4) History of violence;

(5) Any individualized needs, including those related to disabilities or other medical or behavioral/mental health issues;

(6) History of substance use; or

(7) Parenting or pregnant unaccompanied child.

(g) For individual sponsors, ORR shall consider the potential sponsor's strengths and resources in conjunction with any risks or concerns that could affect their ability to function as a sponsor including:

(1) Criminal background;

(2) Substance use or history of abuse or neglect;

(3) The physical environment of the home; and/or

(4) Other child welfare concerns.

(h) ORR shall assess the potential sponsor's:

(1) Understanding of the unaccompanied child's needs;

(2) Plan to provide adequate care, supervision, and housing to meet the unaccompanied child's needs;

(3) Understanding and awareness of responsibilities related to compliance with the unaccompanied child's immigration court proceedings, school attendance, and U.S. child labor laws; and

(4) Awareness of and ability to access community resources.

(i) ORR shall develop a release plan that will enable a safe release to a potential sponsor through the provision of post-release services if needed.

§ 410.1203 Release approval process.

(a) ORR or the care provider providing care for the unaccompanied child shall make and record the prompt and continuous efforts on its part towards family unification and the release of the unaccompanied child pursuant to the provisions of this section. These efforts include intakes and admissions assessments and the provision of ongoing case management services to identify potential sponsors.

(b) If a potential sponsor is identified, ORR shall explain to both the unaccompanied child and the potential sponsor the requirements and procedures for release.

(c) Pursuant to the requirements of § 410.1202, the potential sponsor shall complete an application for release of the unaccompanied child, which includes supporting information and documentation regarding the sponsor's identity; the sponsor's relationship to the child; background information on the potential sponsor and the potential sponsor's household members; the sponsor's ability to provide care for the unaccompanied child; and the sponsor's commitment to fulfill the sponsor's obligations in the Sponsor Care Agreement, which requires the sponsor to:

(1) Provide for the unaccompanied child's physical and mental well-being;

(2) Ensure the unaccompanied child's compliance with DHS and immigration courts' requirements;

(3) Adhere to existing Federal and applicable state child labor and truancy laws;

(4) Notify DHS, the Executive Office for Immigration Review (EOIR) at the Department of Justice, and other relevant parties of changes of address;

(5) Provide notice of initiation of any dependency proceedings or any risk to the unaccompanied child as described in the Sponsor Care Agreement; and

(6) In the case of sponsors other than parents or legal guardians, notify ORR of a child moving to another location with another individual or change of address. Also, in the event of an emergency (*e.g.,* serious illness or destruction of the home), a sponsor may transfer temporary physical custody of the unaccompanied child to another person who will comply with the Sponsor Care Agreement, but the sponsor must notify ORR as soon as possible and no later than 72 hours after the transfer.

(d) ORR shall conduct a sponsor suitability assessment consistent with the requirements of § 410.1202.

(e) ORR shall not be required to release an unaccompanied child to any person or agency it has reason to believe may harm or neglect the unaccompanied child or fail to present the unaccompanied child before DHS or the immigration courts when requested to do so.

(f) During the release approval process, ORR shall educate the sponsor about the needs of the unaccompanied child and develop an appropriate plan to care for the unaccompanied child.

§ 410.1204 Home studies.

(a) As part of assessing the suitability of a potential sponsor, ORR may require a home study. A home study includes an investigation of the living conditions in which the unaccompanied child would be placed and takes place prior to the child's physical release, the standard of care the child would receive, and interviews with the potential sponsor and others in the sponsor's household.

(b) ORR shall require home studies under the following circumstances:

(1) Under the conditions identified in TVPRA at 8 U.S.C. 1232(c)(3)(B), which requires home studies for the following:

(i) A child who is a victim of a severe form of trafficking in persons;

(ii) A child with a disability (as defined in 42 U.S.C. 12102) who requires particularized services or treatment;

(iii) A child who has been a victim of physical or sexual abuse under circumstances that indicate that the child's health or welfare has been significantly harmed or threatened; or

(iv) A child whose potential sponsor clearly presents a risk of abuse, maltreatment, exploitation, or trafficking to the child based on all available objective evidence.

(2) Before releasing any child to a non-relative sponsor who is seeking to sponsor multiple children, or who has previously sponsored or sought to sponsor a child and is seeking to sponsor additional children.

(3) Before releasing any child who is 12 years old or younger to a non-relative sponsor.

(c) ORR may, in its discretion, initiate home studies if it determines that a home study is likely to provide additional information which could assist in determining that the potential sponsor is able to care for the health, safety, and well-being of the unaccompanied child.

(d) The care provider must inform the potential sponsor whenever a home study is conducted, explaining the scope and purpose of the study and answering the potential sponsor's questions about the process.

(e) An unaccompanied child for whom a home study is conducted shall receive an offer of post-release services as described at § 410.1210.

§ 410.1205 Release decisions; denial of release to a sponsor.

(a) A potential sponsorship shall be denied, if as part of the sponsor assessment process described at § 410.1202 or the release process described at § 410.1203, ORR determines that the potential sponsor is not capable of providing for the physical and mental well-being of the unaccompanied child or that the placement would result in danger to the unaccompanied child or the community.

(b) ORR shall adjudicate the completed sponsor application of a parent or legal guardian; brother, sister, or grandparent; or other close relative who has been the child's primary caregiver within 10 calendar days of receipt of the completed sponsor application, absent an unexpected delay (such as a case that requires completion of a home study). ORR shall adjudicate the completed sponsor application of other close relatives who were not the child's primary caregiver within 14 calendar days of receipt of the completed sponsor application, absent an unexpected delay (such as a case that requires completion of a home study).

(c) If ORR denies release of an unaccompanied child to a potential sponsor who is a parent or legal guardian or close relative, the ORR Director or their designee who is a neutral and detached decision maker shall promptly notify the potential sponsor of the denial in writing via a Notification of Denial letter. The Notification of Denial letter shall include:

(1) An explanation of the reason(s) for the denial;

(2) The evidence and information supporting ORR's denial decision and shall advise the potential sponsor that they have the opportunity to examine the evidence upon request, unless ORR determines that providing the evidence and information, or part thereof, to the potential sponsor would compromise the safety and well-being of the unaccompanied child or is not permitted by law;

(3) Notice that the proposed sponsor may request an appeal of the denial to the Assistant Secretary for Children and Families, or a designee who is a neutral and detached decision maker and instructions for doing so;

(4) Notice that the potential sponsor may submit additional evidence, in writing before a hearing occurs, or orally during a hearing;

(5) Notice that the potential sponsor may present witnesses and cross-examine ORR's witnesses, if such sponsor and ORR witnesses are willing to voluntarily testify; and

(6) Notice that the potential sponsor may be represented by counsel in proceedings related to the release denial at no cost to the Federal Government.

(d) The ORR Director, or a designee who is a neutral and detached decision maker, shall review denials of completed sponsor applications submitted by parents or legal guardians or close relative potential sponsors.

(e) ORR shall inform the unaccompanied child, the unaccompanied child's child advocate, and the unaccompanied child's counsel (or if the unaccompanied child has no attorney of record or DOJ Accredited Representative, the local legal service provider) of a denial of release to the unaccompanied child's parent or legal guardian or close relative potential sponsor and inform them that they have the right to inspect the evidence underlying ORR's decision upon request unless ORR determines that disclosure is not permitted by law.

(f) If the sole reason for denial of release is a concern that the unaccompanied child is a danger to self or others, ORR shall send the unaccompanied child and their counsel (if represented by counsel) a copy of the Notification of Denial described at paragraph (c) of this section. The child may seek an appeal of the denial.

(g) ORR shall permit unaccompanied children to have the assistance of counsel, at no cost to the Federal Government, with respect to release or the denial of release to a potential sponsor.

§ 410.1206 Appeals of release denials.

(a) Denied parent or legal guardian or close relative potential sponsors to whom ORR's Director or their designee, who is a neutral and detached decision maker, must send Notification of Denial letters pursuant to § 410.1205 may seek an appeal of ORR's decision by submitting a written request to the Assistant Secretary for ACF, or the Assistant Secretary's neutral and detached designee.

(b) The requestor may seek an appeal with a hearing or without a hearing. The Assistant Secretary, or their neutral and detached designee, shall acknowledge

the request for appeal within five business days of receipt.

(c) If the sole reason for denial of release is concern that the unaccompanied child is a danger to self or others, the unaccompanied child may seek an appeal of the denial as described in paragraphs (a) and (b) of this section. If the unaccompanied child expresses a desire to seek an appeal, the unaccompanied child may consult with their attorney of record at no cost to the Federal Government or a legal service provider for assistance with the appeal. The unaccompanied child may seek such appeal at any time after denial of release while the unaccompanied child is in ORR custody.

(d) ORR shall deliver the full evidentiary record including any countervailing or otherwise unfavorable evidence, apart from any legally required redactions, to the denied parent or legal guardian or close relative potential sponsor within a reasonable timeframe to be established by ORR, unless ORR determines that providing the evidentiary record, or part(s) thereof, to the potential sponsor would compromise the safety and well-being of the unaccompanied child.

(e) ORR shall deliver the unaccompanied child's complete case file, apart from any legally required redactions, to a parent or legal guardian potential sponsor on request within a reasonable timeframe to be established by ORR, unless ORR determines that providing the complete case file, or part(s) thereof, to the parent or legal guardian potential sponsor would compromise the safety and well-being of the unaccompanied child. ORR shall deliver the unaccompanied child's complete case file, apart from any legally required redactions, to the unaccompanied child and the unaccompanied child's attorney or legal service provider on request within a reasonable timeframe to be established by ORR.

(f) The appeal process, including notice of decision on appeal sent to the potential sponsor, shall be completed within 30 calendar days of the potential sponsor's request for an appeal, unless an extension of time is granted by the Assistant Secretary or their neutral and detached designee for good cause.

(g) The appeal of a release denial shall be considered, and any hearing shall be conducted, by the Assistant Secretary, or their neutral and detached designee. Upon making a decision to reverse or uphold the decision denying release to the potential sponsor, the Assistant Secretary or their neutral and detached designee, shall issue a written decision, either ordering or denying release to the potential sponsor within the timeframe described in § 410.1206(f). If the Assistant Secretary, or their neutral and detached designee, denies release to the potential sponsor, the decision shall set forth detailed, specific, and individualized reasoning for the decision. ORR shall also notify the unaccompanied child and the child's attorney of the denial. ORR shall inform the potential sponsor and the unaccompanied child of any right to seek review of an adverse decision in the United States District Court.

(h) ORR shall make qualified interpretation and/or translation services available to unaccompanied children and denied parent or legal guardian or close relative potential sponsors upon request for purposes of appealing denials of release. Such services shall be available to unaccompanied children and denied parent or legal guardian or close relative potential sponsors in enclosed, confidential areas.

(i) If a child is released to another sponsor during the pendency of the appeal process, the appeal will be deemed moot.

(j)(1) Denied parent or legal guardian or close relative potential sponsors to whom ORR must send Notification of Denial letters pursuant to § 410.1205 have the right to be represented by counsel in proceedings related to the release denial, including at any hearing, at no cost to the Federal Government.

(2) The unaccompanied child has the right to consult with counsel during the potential sponsor's appeal process at no cost to the Federal Government.

§ 410.1207 Ninety (90)-day review of pending sponsor applications.

(a) ORR supervisory staff who supervise field staff shall conduct an automatic review of all pending sponsor applications. The first automatic review shall occur within 90 days of an unaccompanied child entering ORR custody to identify and resolve in a timely manner the reasons that a sponsor application remains pending and to determine possible steps to accelerate the unaccompanied child's safe release.

(b) Upon completion of the initial 90-day review, unaccompanied child case managers or other designated agency or care provider staff shall update the potential sponsor and unaccompanied child on the status of the case, explaining the reasons that the release process is incomplete. Case managers or other designated agency or care provider staff shall work with the potential sponsor, relevant stakeholders, and ORR to address the portions of the sponsor application that remain unresolved.

(c) For cases that are not resolved after the initial 90-day review, ORR supervisory staff who supervise field staff shall conduct additional reviews as provided in § 410.1207(a) at least every 90 days until the pending sponsor application is resolved. ORR may in its discretion and subject to resource availability conduct additional reviews on a more frequent basis than every 90 days.

§ 410.1208 ORR's discretion to place an unaccompanied child in the Unaccompanied Refugee Minors Program.

(a) An unaccompanied child may be eligible for services through the ORR Unaccompanied Refugee Minors (URM) Program. Eligible categories of unaccompanied children include:

(1) Cuban and Haitian entrant as defined in section 501 of the Refugee Education Assistance Act of 1980, 8 U.S.C. 1522 note, and as provided for at 45 CFR 400.43;

(2) An individual determined to be a victim of a severe form of trafficking as defined in 22 U.S.C. 7102(11);

(3) An individual DHS has classified as a Special Immigrant Juvenile (SIJ) under section 101(a)(27)(J) of the Immigration and Nationality Act (INA), 8 U.S.C. 1101(a)(27)(J), and who was either in the custody of HHS at the time a dependency order was granted for such child or who was receiving services pursuant to section 501(a) of the Refugee Education Assistance Act of 1980, 8 U.S.C. 1522 note, at the time such dependency order was granted;

(4) U nonimmigrant status recipients under 8 U.S.C. 1101(a)(15)(U); or

(5) Other populations of children as authorized by Congress.

(b) With respect to unaccompanied children described in paragraph (a) of this section, ORR shall evaluate each unaccompanied child case to determine whether it is in the child's best interests to be placed in the URM Program.

(c) When ORR places an unaccompanied child pursuant to this section to receive services through the URM Program, legal responsibility of the child, including legal custody or guardianship, must be established under State law as required by 45 CFR 400.115. Until such legal custody or guardianship is established, the ORR Director shall retain legal custody of the child.

§ 410.1209 Requesting specific consent from ORR regarding custody proceedings.

(a) An unaccompanied child in ORR custody is required to request specific consent from ORR if the child seeks to

invoke the jurisdiction of a juvenile court to determine or alter the child's custody status or release from ORR custody.

(b) If an unaccompanied child seeks to invoke the jurisdiction of a juvenile court for a dependency order to petition for Special Immigrant Juvenile (SIJ) classification or to otherwise permit a juvenile court to establish jurisdiction regarding a child's placement and does not seek the juvenile court's jurisdiction to determine or alter the child's custody status or release, the unaccompanied child does not need to request specific consent from ORR.

(c) Prior to a juvenile court determining or altering the unaccompanied child's custody status or release from ORR, attorneys or others acting on behalf of an unaccompanied child must complete a request for specific consent.

(d) ORR shall acknowledge receipt of the request within two business days.

(e) Consistent with its duty to promptly place unaccompanied children in the least restrictive setting that is in the best interest of the child, ORR shall consider whether ORR custody is required to:

(1) Ensure a child's safety; or

(2) Ensure the safety of the community.

(f) ORR shall make determinations on specific consent requests within 60 business days of receipt of a request. When possible, ORR shall expedite urgent requests.

(g) ORR shall inform the unaccompanied child, or the unaccompanied child's attorney or other authorized representative of the decision on the specific consent request in writing, along with the evidence utilized to make the decision.

(h) The unaccompanied child, the unaccompanied child's attorney of record, or other authorized representative may request reconsideration of ORR's denial with the Assistant Secretary for ACF within 30 business days of receipt of the ORR notification of denial of the request. The unaccompanied child, the unaccompanied child's attorney, or authorized representative may submit additional (including new) evidence to be considered with the reconsideration request.

(i) The Assistant Secretary, or their designee, shall consider the request for reconsideration and any additional evidence, and send a final administrative decision to the unaccompanied child, or the unaccompanied child's attorney or other authorized representative, within 15 business days of receipt of the request.

§ 410.1210 Post-release services.

(a) *General.* (1) Before releasing unaccompanied children, care provider facilities shall work with sponsors and unaccompanied children to prepare for safe and timely release of the unaccompanied children, to assess whether the unaccompanied children may need assistance in accessing community resources, and to provide guidance regarding safety planning and accessing services.

(2) ORR shall offer post-release services (PRS) for unaccompanied children for whom a home study was conducted pursuant to § 410.1204. An unaccompanied child who receives a home study and PRS may also receive home visits by a PRS provider.

(3) To the extent that ORR determines appropriations are available, and in its discretion, ORR may offer PRS for all released children. ORR may give additional consideration, consistent with paragraph (c), for cases involving unaccompanied children with mental health or other needs who could particularly benefit from ongoing assistance from a community-based service provider, to prioritize potential cases as needed. ORR shall make an initial determination of the level and extent of PRS, if any, based on the needs of the unaccompanied children and the sponsors and the extent appropriations are available. PRS providers may conduct subsequent assessments based on the needs of the unaccompanied children and the sponsors that result in a modification to the level and extent of PRS assigned to the unaccompanied children.

(4) ORR shall not delay the release of an unaccompanied child if PRS are not immediately available.

(b) *Service areas.* PRS include services in the areas listed in paragraphs (b)(1) through (12) of this section, which shall be provided in a manner that is sensitive to the individual needs of the unaccompanied child and in a way they effectively understand regardless of spoken language, reading comprehension, or disability to ensure meaningful access for all eligible children, including those with limited English proficiency. The comprehensiveness of PRS shall depend on the extent appropriations are available.

(1) *Placement stability and safety.* PRS providers shall work with sponsors and unaccompanied children to address challenges in parenting and caring for unaccompanied children. This may include guidance about maintaining a safe home; supervision of unaccompanied children; protecting unaccompanied children from threats by smugglers, traffickers, and gangs; and information about child abuse, neglect, separation, grief, and loss, and how these issues affect children.

(2) *Immigration proceedings.* The PRS provider shall help facilitate the sponsor's plan to ensure the unaccompanied child's attendance at all immigration court proceedings and compliance with DHS requirements.

(3) *Guardianship.* If the sponsor is not a parent or legal guardian of the unaccompanied child, then the PRS provider shall provide the sponsor and unaccompanied child information about the benefits of obtaining legal guardianship of the child. If the sponsor is interested in becoming the unaccompanied child's legal guardian, then the PRS provider may assist the sponsor in identifying the legal resources to do so.

(4) *Legal services.* PRS providers shall assist sponsors and unaccompanied children in accessing relevant legal service resources including resources for immigration matters and unresolved juvenile justice issues.

(5) *Education.* PRS providers shall assist sponsors with school enrollment and shall assist the sponsors and unaccompanied children with addressing issues relating to the unaccompanied children's progress in school, including attendance. PRS providers may also assist with alternative education plans for unaccompanied children who exceed the State's maximum age requirement for mandatory school attendance. PRS providers may also assist sponsors with obtaining evaluations for unaccompanied children reasonably suspected of having a disability to determine eligibility for a free appropriate public education (which can include special education and related services) or reasonable modifications and auxiliary aids and services.

(6) *Employment.* PRS providers shall educate sponsors and unaccompanied children on U.S. child labor laws and requirements.

(7) *Medical services.* PRS providers shall assist the sponsor in obtaining medical insurance for the unaccompanied child if available and in locating medical providers that meet the individual needs of the unaccompanied child and the sponsor. If the unaccompanied child requires specialized medical assistance, the PRS provider shall assist the sponsor in making and keeping medical appointments and monitoring the unaccompanied child's medical requirements. PRS providers shall provide the unaccompanied child and

sponsor with information and referrals to services relevant to health-related considerations for the unaccompanied child.

(8) *Individual mental health services.* PRS providers shall provide the sponsor and unaccompanied child with relevant mental health resources and referrals for the child. The resources and referrals shall take into account the individual needs of the unaccompanied child and sponsor. If an unaccompanied child requires specialized mental health assistance, PRS providers shall assist the sponsor in making and keeping mental health appointments and monitoring the unaccompanied child's mental health requirements.

(9) *Family stabilization/counseling.* PRS providers shall provide the sponsor and unaccompanied child with relevant resources and referrals for family counseling and/or individual counseling that meet individual needs of the child and the sponsor.

(10) *Substance use.* PRS providers shall assist the sponsor and unaccompanied child in locating resources to help address any substance use-related needs of the child.

(11) *Gang prevention.* PRS providers shall provide the sponsor and unaccompanied child information about gang prevention programs in the sponsor's community.

(12) *Other services.* PRS providers may assist the sponsor and unaccompanied child with accessing local resources in other specialized service areas based on the needs and at the request of the unaccompanied child or the sponsor.

(c) *Additional considerations for prioritizing provision of PRS.* ORR may prioritize referring unaccompanied children with the following needs for PRS if appropriations are not available for it to offer PRS to all children:

(1) Unaccompanied children in need of particular services or treatment;

(2) Unaccompanied children with disabilities;

(3) Unaccompanied children who identify as LGBTQI+;

(4) Unaccompanied children who are adjudicated delinquent or who have been involved in, or are at high risk of involvement with the juvenile justice system;

(5) Unaccompanied children who entered ORR care after being separated by DHS from a parent or legal guardian;

(6) Unaccompanied children who are victims of human trafficking or other crimes;

(7) Unaccompanied children who are victims of, or at risk of, worker exploitation;

(8) Unaccompanied children who are at risk for labor trafficking;

(9) Unaccompanied children who are certain parolees; and

(10) Unaccompanied children enrolled in school who are chronically absent or retained at the end of their school year.

(d) *Assessments.* The PRS provider shall assess the released unaccompanied child and sponsor for PRS needs and shall document the assessment. The assessment shall be developmentally appropriate, trauma-informed, and focused on the needs of the unaccompanied child and sponsor.

(e) *Ongoing check-ins and in-home visits.* (1) In consultation with the released unaccompanied child and sponsor, the PRS provider shall make a determination regarding the appropriate methods, timeframes, and schedule for ongoing contact with the released unaccompanied child and sponsor based on the level of need and support needed.

(2) PRS providers shall document all ongoing check-ins and in-home visits, as well as document progress and outcomes of their home visits.

(f) *Referrals to community resources.* (1) PRS providers shall work with released unaccompanied children and their sponsors to access community resources.

(2) PRS providers shall document any community resource referrals and their outcomes.

(g) *Timeframes for PRS.* (1) For a released unaccompanied child who is required under the TVPRA at 8 U.S.C. 1232(c)(3)(B) to receive an offer of PRS, the PRS provider shall to the greatest extent practicable start services within two (2) days of the unaccompanied child's released from ORR care. If a PRS provider is unable to start PRS within two (2) days of the unaccompanied child's release, PRS shall, to the greatest extent possible, start no later than 30 days after release.

(2) For a released unaccompanied child who is referred by ORR to receive PRS but is not required to receive an offer of PRS following a home study, the PRS provider shall to the greatest extent practicable start services within two (2) days of accepting a referral.

(h) *Termination of PRS.* (1) For a released unaccompanied child who is required to receive an offer of PRS under the TVPRA at 8 U.S.C. 1232(c)(3)(B), PRS shall be offered for the unaccompanied child until the unaccompanied child turns 18 or the unaccompanied child is granted voluntary departure, granted immigration status, or the child leaves the United States pursuant to a final order of removal, whichever occurs first.

(2) For a released unaccompanied child who is not required to receive an offer of PRS under the TVPRA at 8 U.S.C. 1232(c)(3)(B), but who receives PRS as authorized under the TVPRA, PRS may be offered for the unaccompanied child until the unaccompanied child turns 18, or the unaccompanied child is granted voluntary departure, granted immigration status, or the child leaves pursuant to a final order of removal, whichever occurs first.

(3) If an unaccompanied child's sponsor, except for a parent or legal guardian, chooses to disengage from PRS and the child wishes to continue receiving PRS, ORR may continue to make PRS available to the child through coordination between the PRS provider and a qualified ORR staff member.

(i) *Records and reporting requirements for PRS providers*—(1) *General.* (i) PRS providers shall maintain comprehensive, accurate, and current case files on unaccompanied children that are kept confidential and secure at all times and shall be accessible to ORR upon request. PRS providers shall maintain all case file information together in the PRS provider's physical and electronic files.

(ii) PRS providers shall upload all PRS documentation on services provided to unaccompanied children and sponsors to ORR's case management system within seven (7) days of completion of the services.

(2) *Records management and retention.* (i) PRS providers shall have written policies and procedures for organizing and maintaining the content of active and closed case files, which incorporate ORR policies and procedures. The PRS provider's policies and procedures shall also address preventing the physical damage or destruction of records.

(ii) Before providing PRS, PRS providers shall have established administrative and physical controls to prevent unauthorized access to both electronic and physical records.

(iii) PRS providers may not release records to any third party without prior approval from ORR, except for program administration purposes.

(iv) If a PRS provider is no longer providing PRS for ORR, the PRS provider shall provide all active and closed case file records to ORR according to instructions issued by ORR.

(3) *Privacy.* (i) PRS providers shall have written policy and procedure in place that protects the information of

released unaccompanied children from access by unauthorized users.

(ii) PRS providers shall explain to released unaccompanied children and their sponsors how, when, and under what circumstances sensitive information may be shared while the unaccompanied children receive PRS.

(iii) PRS providers shall have appropriate controls on information-sharing within the PRS provider network, including, but not limited to, subcontractors.

(4) *Notification of Concern.* (i) If the PRS provider is concerned about the unaccompanied child's safety and well-being, the PRS provider shall document a Notification of Concern (NOC) and report the concern(s) to ORR, and as applicable, the appropriate investigative agencies (including law enforcement and child protective services).

(ii) PRS providers shall document and submit NOCs to ORR within 24 hours of first suspicion or knowledge of the event(s).

(5) *Case closures.* (i) PRS providers shall formally close a case when ORR terminates PRS in accordance with paragraph (h) of this section.

(ii) ORR shall provide appropriate instructions, including any relevant forms, that PRS providers must follow when closing a case.

(iii) PRS providers shall upload any relevant forms into ORR's case management system within 30 calendar days of a case's closure.

Subpart D—Minimum Standards and Required Services

§ 410.1300 Purpose of this subpart.

This subpart covers standards and required services that care provider facilities must meet and provide in keeping with the principles of treating unaccompanied children in custody with dignity, respect, and special concern for their particular vulnerability.

§ 410.1301 Applicability of this subpart.

This subpart applies to all standard programs and secure facilities. This subpart is applicable to other care provider facilities and to PRS providers where specified.

§ 410.1302 Minimum standards applicable to standard programs and secure facilities.

Standard programs and secure facilities shall:

(a) Be licensed by an appropriate State agency, or meet the State's licensing requirements if located in a State that does not allow State licensing of programs providing or proposing to provide care and services to unaccompanied children.

(b) Comply with all State child welfare laws and regulations (such as mandatory reporting of abuse) and all State and local building, fire, health, and safety codes.

(c) Provide or arrange for the following services for each unaccompanied child in care:

(1) Proper physical care and maintenance, including suitable living accommodations, food that is of adequate variety, quality, and in sufficient quantity to supply the nutrients needed for proper growth and development, which can be accomplished by following the USDA Dietary Guidelines for Americans, and appropriate for the child and activity level, drinking water that is always available to each unaccompanied child, appropriate clothing, personal grooming and hygiene items such as soap, toothpaste and toothbrushes, floss, towels, feminine care items, and other similar items, access to toilets, showers, and sinks, adequate temperature control and ventilation, maintenance of safe and sanitary conditions that are consistent with ORR's concern for the particular vulnerability of children, and adequate supervision to protect unaccompanied children from others;

(2) An individualized needs assessment that shall include:

(i) Various initial intake forms;

(ii) Essential data relating to the identification and history of the unaccompanied child and family;

(iii) Identification of the unaccompanied child's individualized needs including any specific problems that appear to require immediate intervention;

(iv) An educational assessment and plan;

(v) Identification of whether the child is an Indigenous language speaker;

(vi) An assessment of family relationships and interaction with adults, peers and authority figures;

(vii) A statement of religious preference and practice;

(viii) An assessment of the unaccompanied child's personal goals, strengths, and weaknesses; and

(iv) Identifying information regarding immediate family members, other relatives, godparents, or friends who may be residing in the United States and may be able to assist in family unification;

(3) Educational services appropriate to the unaccompanied child's level of development, communication skills, and disability, if applicable, in a structured classroom setting, Monday through Friday, which concentrate on the development of basic academic competencies and on English Language Training (ELT), as well as acculturation and life skills development including:

(i) Instruction and educational and other reading materials in such languages as needed;

(ii) Instruction in basic academic areas that may include science, social studies, math, reading, writing, and physical education; and

(iii) The provision to an unaccompanied child of appropriate reading materials in languages other than English for use during the unaccompanied child's leisure time;

(4) Activities according to a recreation and leisure time plan that include daily outdoor activity, weather permitting, at least one hour per day of large muscle activity and one hour per day of structured leisure time activities, which do not include time spent watching television. Activities must be increased to at least three hours on days when school is not in session;

(5) At least one individual counseling session per week conducted by certified counseling staff with the specific objectives of reviewing the unaccompanied child's progress, establishing new short and long-term objectives, and addressing both the developmental and crisis-related needs of each unaccompanied child;

(6) Group counseling sessions at least twice a week;

(7) Acculturation and adaptation services that include information regarding the development of social and inter-personal skills that contribute to those abilities necessary to live independently and responsibly;

(8) An admissions process, including:

(i) Meeting unaccompanied children's immediate needs to food, hydration, and personal hygiene including the provision of clean clothing and bedding;

(ii) An initial intakes assessment covering biographic, family, migration, health history, substance use, and mental health history of the unaccompanied child. If the unaccompanied child's responses to questions during any examination or assessment indicate the possibility that the unaccompanied child may have been a victim of human trafficking or labor exploitation, the care provider facility must notify the ACF Office of Trafficking in Persons within twenty-four (24) hours;

(iii) A comprehensive orientation regarding program purpose, services, rules (provided in writing and orally), expectations, their rights in ORR care, and the availability of legal assistance, information about U.S. immigration and employment/labor laws, and services from the Unaccompanied Children Office of the Ombuds (UC Office of the

Ombuds) in simple, non-technical terms and in a language and manner that the child understands, if practicable; and

(iv) Assistance with contacting family members, following the ORR Guide and the care provider facility's internal safety procedures;

(9) Whenever possible, access to religious services of the unaccompanied child's choice, celebrating culture-specific events and holidays, being culturally aware in daily activities as well as food menus, choice of clothing, and hygiene routines, and covering various cultures in children's educational services;

(10) Visitation and contact with family members (regardless of their immigration status) which is structured to encourage such visitation, including at least 15 minutes of phone or video contact three times a week with parents and legal guardians, family members, and caregivers located in the United States and abroad, in a private space that ensures confidentiality and at no cost to the unaccompanied child, parent, legal guardian, family member, or caregiver. The staff shall respect the unaccompanied child's privacy while reasonably preventing the unauthorized release of the unaccompanied child;

(11) Assistance with family unification services designed to identify and verify relatives in the United States as well as in foreign countries and assistance in obtaining legal guardianship when necessary for release of the unaccompanied child;

(12) Legal services information regarding the availability of free legal assistance, and that they may be represented by counsel at no expense to the Government, the right to a removal hearing before an immigration judge; the ability to apply for asylum with U.S. Citizenship and Immigration Services (USCIS) in the first instance, and the ability to request voluntary departure in lieu of removal;

(13) Information about U.S. child labor laws and education around permissible work opportunities in a manner that is sensitive to the age, culture, and native or preferred language of each unaccompanied child; and

(14) Unaccompanied children must have a reasonable right to privacy, which includes the right to wear the child's own clothes when available, retain a private space in the residential facility, group or foster home for the storage of personal belongings, talk privately on the phone and visit privately with guests, as permitted by the house rules and regulations, and receive and send uncensored mail unless there is a reasonable belief that the mail contains contraband.

(d) Deliver services in a manner that is sensitive to the age, culture, native or preferred language, and the complex needs of each unaccompanied child.

(e) Develop a comprehensive and realistic individual service plan for the care of each unaccompanied child in accordance with the unaccompanied child 's needs as determined by the individualized needs assessment. Individual plans must be implemented and closely coordinated through an operative case management system. Service plans should identify individualized, person-centered goals with measurable outcomes and with steps or tasks to achieve the goals, be developed with input from the unaccompanied child, and be reviewed and updated at regular intervals. Unaccompanied children ages 14 and older should be given a copy of the plan, and unaccompanied children under age 14 should be given a copy of the plan when appropriate for that particular child's development. Individual plans shall be in that child's native or preferred language or other mode of auxiliary aid or services and/or use clear, easily understood language, using concise and concrete sentences and/or visual aids and checking for understanding where appropriate.

§ 410.1303 ORR Reporting, monitoring, quality control, and recordkeeping standards.

(a) *Monitoring activities.* ORR shall monitor all care provider facilities for compliance with the terms of the regulations in this part and 45 CFR part 411. ORR monitoring activities include:

(1) Desk monitoring that is ongoing oversight from ORR headquarters;

(2) Routine site visits that are day-long visits to facilities to review compliance for policies, procedures, and practices and guidelines;

(3) Site visits in response to ORR or other reports that are for a specific purpose or investigation; and

(4) Monitoring visits that are part of comprehensive reviews of all care provider facilities.

(b) *Corrective actions.* If ORR finds a care provider facility to be out of compliance with the regulations in this part and 45 CFR part 411 or subregulatory policies such as its guidance and the terms of its contracts or cooperative agreements, ORR will communicate the concerns in writing to the care provider facility director or appropriate person through a written monitoring or site visit report, with a list of corrective actions and child welfare best practice recommendations, as appropriate. ORR will request a response to the corrective action findings from the care provider facility and specify a timeframe for resolution and the disciplinary consequences for not responding within the required timeframes.

(c) *Monitoring of secure facilities.* At secure facilities, in addition to other monitoring activities, ORR shall review individual unaccompanied child case files to make sure children placed in secure facilities are assessed at least every 30 days for the possibility of a transfer to a less restrictive setting.

(d) *Monitoring of long-term home care and transitional home care facilities.* ORR long-term home care and transitional home care facilities are subject to the same types of monitoring as other care provider facilities, but the activities are tailored to the foster care arrangement. ORR long-term home care and transitional home care facilities that provide services through a sub-contract or sub-grant are responsible for conducting annual monitoring or site visits of the sub-recipient, as well as weekly desk monitoring. Upon request, care provider facilities must provide findings of such reviews to the designated ORR point of contact.

(e) *Enhanced monitoring of unlicensed standard programs and emergency or influx facilities.* In addition to the other requirements of this section, for all standard programs that are not State-licensed because the State does not allow State licensing of programs providing care and services to unaccompanied children, and emergency or influx facilities, ORR shall conduct enhanced monitoring, including on-site visits and desk monitoring.

(f) *Care provider facility quality assurance.* Care provider facilities shall develop quality assurance assessment procedures that accurately measure and evaluate service delivery in compliance with the requirements of the regulations in this part, as well as those delineated in 45 CFR part 411.

(g) *Reporting.* Care provider facilities shall report to ORR any emergency incident, significant incident, or program-level event and in accordance with any applicable Federal, State, and local reporting laws. Such reports are subject to the following rules:

(1) Care provider facilities shall document incidents with sufficient detail to ensure that any relevant entity can facilitate any required follow-up; document incidents in a way that is trauma-informed and grounded in child welfare best practices; and update the report with any findings or

documentation that are made after the fact.

(2) Care provider facilities shall not fabricate, exaggerate, or minimize incidents; use disparaging or judgmental language about unaccompanied children in incident reports; use incident reporting or the threat of incident reporting as a way to manage the behavior of unaccompanied children or for any other illegitimate reason.

(3) Care provider facilities shall not use reports of significant incidents as a method of punishment or threat towards any child in ORR care for any reason.

(4) The existence of a report of a significant incident shall not be used by ORR as a basis for an unaccompanied child's step-up to a restrictive placement or as the sole basis for a refusal to step a child down to a less restrictive placement. Care provider facilities are likewise prohibited from using the existence of a report of a significant incident as a basis for refusing an unaccompanied child's placement in their facilities. Reports of significant incidents may be used as examples or citations of concerning behavior. However, the existence of a report itself is not sufficient for a step-up, a refusal to step-down, or a care provider facility to refuse a placement.

(h) *Develop, maintain, and safeguard each individual unaccompanied child's case file.* This paragraph (h) applies to all care provider facilities responsible for the care and custody of unaccompanied children.

(1) Care provider facilities and PRS providers shall preserve the confidentiality of unaccompanied child case file records and information, and protect the records and information from unauthorized use or disclosure;

(2) The records included in an unaccompanied child's case file are ORR's property, regardless of whether they are in ORR's possession or in the possession of a care provider facility or PRS provider. Care providers facilities and PRS providers shall not release those records or information within the records without prior approval from ORR, except for program administration purposes;

(3) Care provider facilities and PRS providers shall provide unaccompanied child case file records to ORR immediately upon ORR's request; and

(4) Subject to applicable whistleblower protection laws, employees, former employees, or contractors of a care provider facility or PRS provider shall not disclose case file records or information about unaccompanied children, their sponsors, family, or household members to anyone for any purpose, except for purposes of program administration, without first providing advanced notice to ORR to allow ORR to ensure that disclosure of unaccompanied children's information is compatible with program goals and to ensure the safety and privacy of unaccompanied children.

(i) *Records.* Care provider facilities and PRS providers shall maintain adequate records in the unaccompanied child case file and make regular reports as required by ORR that permit ORR to monitor and enforce the regulations in this part and other requirements and standards as ORR may determine are in the interests of the unaccompanied child.

§ 410.1304 Behavior management and prohibition on seclusion and restraint.

(a) Care provider facilities shall develop behavior management strategies that include evidence-based, trauma-informed, and linguistically responsive program rules and behavior management policies that take into consideration the range of ages and maturity in the program and that are culturally sensitive to the needs of each unaccompanied child. Care provider facilities shall not use any practices that involve negative reinforcement or involve consequences or measures that are not constructive and are not logically related to the behavior being regulated. Care provider facilities shall not:

(1) Use or threaten use of corporal punishment, significant incident reports as punishment, unfavorable consequences related to sponsor unification or legal matters (*e.g.,* immigration, asylum); use forced chores or work that serves no purpose except to demean or humiliate the child; forced physical movement, such as push-ups and running, or uncomfortable physical positions as a form of punishment or humiliation; search an unaccompanied child's personal belongings solely for the purpose of behavior management; apply medical interventions that are not prescribed by a medical provider acting within the usual course of professional practice for a medical diagnosis or that increase risk of harm to the unaccompanied child or others; and

(2) Use any sanctions employed in relation to an individual unaccompanied child that:

(i) Adversely affect an unaccompanied child's health, or physical, emotional, or psychological well-being; or

(ii) Deny unaccompanied children meals, hydration, sufficient sleep, routine personal grooming activities, exercise (including daily outdoor activity), medical care, correspondence or communication privileges, religious observation and services, or legal assistance.

(3) Use prone physical restraints, chemical restraints, or peer restraints for any reason in any care provider facility setting.

(b) Involving law enforcement should be a last resort. A call by a facility to law enforcement may trigger an evaluation of staff involved regarding their qualifications and training in trauma-informed, de-escalation techniques.

(c) Standard programs and residential treatment centers (RTCs) are prohibited from using seclusion. Standard programs and RTCs are also prohibited from using restraints, except as described at paragraphs (d) and (f) of this section.

(d) Standard programs and RTCs may use personal restraint only in emergency safety situations.

(e) Secure facilities (that are not RTCs):

(1) May use personal restraints, mechanical restraints and/or seclusion in emergency safety situations, and as consistent with State licensure requirements. All instances of seclusion must be supervised and for the short time-limited purpose of ameliorating the underlying emergency risk that poses a serious and immediate danger to the safety of others.

(2) May restrain an unaccompanied child for their own immediate safety or that of others during transport.

(3) May restrain an unaccompanied child while at an immigration court or asylum interview if the child exhibits imminent runaway behavior, makes violent threats, demonstrates violent behavior, or if the secure facility has made an individualized determination that the child poses a serious risk of violence or running away if the child is unrestrained in court or the interview.

(4) Must provide all mandated services under this subpart to the unaccompanied child to the greatest extent practicable under the circumstances while ensuring the safety of the unaccompanied child, other unaccompanied children at the secure facility, and others.

(f) Care provider facilities may only use soft restraints (*e.g.,* zip ties and leg or ankle weights) during transport to and from secure facilities, and only when the care provider believes a child poses a serious risk of physical harm to self or others or a serious risk of running away from ORR custody.

§ 410.1305 Staff, training, and case manager requirements.

(a) Standard programs, restrictive placements, and post-release service

(PRS) providers shall provide training to all staff, contractors, and volunteers, to ensure that they understand their obligations under ORR regulations in this part and policies and are responsive to the challenges faced by staff and unaccompanied children. Standard programs and restrictive placements shall ensure that staff are appropriately trained on its behavior management strategies, including de-escalation techniques, as established pursuant to § 410.1304. All trainings should be tailored to the unique needs, attributes, and gender of the unaccompanied children in care at the individual care provider facility. Standard programs, restrictive placements, and PRS providers must document the completion of all trainings in personnel files. All staff, contractors, and volunteers must have completed required background checks and vetting for their respective roles required by ORR;

(b) Care provider facilities shall meet the staff to child ratios established by their respective States or other licensing entities; and

(c) Care provider facilities shall have case managers based on site at the facility.

§ 410.1306 Language access services.

(a) *General.* (1) To the greatest extent practicable, care provider facilities shall consistently offer unaccompanied children the option of interpretation and translation services in their native or preferred language, depending on the unaccompanied children's preference, and in a way they effectively understand. If after taking reasonable efforts, care provider facilities are unable to obtain a qualified interpreter or translator for the unaccompanied children's native or preferred language, depending on the children's preference, care provider facilities shall consult with qualified ORR staff for guidance on how to ensure meaningful access to their programs and activities for the children, including those with limited English proficiency.

(2) Care provider facilities shall prioritize the ability to provide in-person, qualified interpreters for unaccompanied children who need them, particularly for rare or indigenous languages. After care provider facilities take reasonable efforts to obtain in-person, qualified interpreters, then they may use qualified remote interpreter services.

(3) Care provider facilities shall translate all documents and materials shared with the unaccompanied children, including those posted in the facilities, in the unaccompanied children's native or preferred language, depending on the children's preference, and in a timely manner.

(b) *Placement considerations.* ORR shall make placement decisions for the unaccompanied children that are informed in part by language access considerations and other factors as listed in § 410.1103(b). To the extent appropriate and practicable, giving due consideration to an unaccompanied child's individualized needs, ORR shall place unaccompanied children with similar language needs within the same care provider facility.

(c) *Intake, orientation, and confidentiality.* (1) Prior to completing the UC Assessment and starting counseling services, care provider facilities shall provide a written notice of the limits of confidentiality they share while in ORR care and custody, and orally explain the contents of the written notice to the unaccompanied children, in their native or preferred language, depending on the children's preference, and in a way they can effectively understand.

(2) Care provider facilities shall conduct assessments and initial medical exams with unaccompanied children in their native or preferred language, depending on the children's preference, and in a way they effectively understand.

(3) Care provider facilities shall provide a standardized and comprehensive orientation to all unaccompanied children in their native or preferred language, depending on the children's preference, and in a way they effectively understand regardless of spoken language, reading comprehension level, or disability.

(4) For all step-ups to and step-downs from restrictive placements, care provider facilities shall explain to the unaccompanied children why they were placed in a restrictive setting and/or if their placement was changed and do so in the unaccompanied children's native or preferred language, depending on the children's preference, and in a way they effectively understand. All documents shall be translated into the unaccompanied children's and/or sponsor's native or preferred language, depending on the children's preference.

(5) If the unaccompanied children are not literate, or if the documents provided during intakes and/or orientation are not translated into a language that they can read and effectively understand, the care provider facility shall have a qualified interpreter orally translate or sign language translate and explain all the documents in the unaccompanied children's native or preferred language, depending on the children's preference, and confirm with the unaccompanied children that they fully comprehend all material.

(6) Care provider facilities shall provide information regarding grievance reporting policies and procedures in the unaccompanied children's native or preferred language, depending on the children's preference, and in a way they effectively understand. Care provider facilities shall also provide grievance reporting policies and procedures in a manner accessible to unaccompanied children with disabilities.

(7) Care provider facilities shall educate unaccompanied children on ORR's sexual abuse and sexual harassment policies in the unaccompanied children's native or preferred language, depending on the children's preference, and in a way they effectively understand.

(8) Care provider facilities shall notify the unaccompanied children that care provider facilities shall accommodate the unaccompanied children's language needs while they remain in ORR care.

(9) For paragraphs (c)(1) through (8) of this section, care provider facilities shall document that the unaccompanied children acknowledge that they effectively understand what was provided to them in the child's case files.

(d) *Education.* (1) Care provider facilities shall provide educational instruction and relevant materials in a format and language accessible to all unaccompanied children, regardless of the child's native or preferred language, including, but not limited to, providing services from an in-person, qualified interpreter, written translations of materials, and qualified remote interpretation when in-person interpretation options have been exhausted.

(2) Care provider facilities shall provide unaccompanied children with appropriate recreational reading materials in languages in formats and languages accessible to all unaccompanied children for use during their leisure time.

(3) Care provider facilities shall translate all ORR-required documents provided to unaccompanied children that are part of educational lessons in formats and languages accessible to all unaccompanied children. If written translations are not available, care provider facilities shall orally translate or sign language translate all documents, prioritizing services from an in-person, qualified interpreter and translation before using qualified remote interpretation and translation services.

(e) *Religious and cultural observation and services.* If an unaccompanied child

requests religious and/or cultural information or items, the care provider facility shall provide the requested items in the unaccompanied child's native or preferred language, depending on the child's preference, and as long as the request is reasonable.

(f) *Parent and sponsor communications.* Care provider facilities shall utilize any necessary qualified interpretation or translation services needed to ensure meaningful access by an unaccompanied child's parent(s), guardian(s), and/or potential sponsor(s). Care provider facilities shall translate all documents and materials shared with the parent(s), guardian, and/or potential sponsors in their native or preferred language, depending on their preference.

(g) *Healthcare services.* While providing or arranging healthcare services for unaccompanied children, care provider facilities shall ensure that unaccompanied children are able to communicate with physicians, clinicians, and healthcare staff in their native or preferred language, depending on the unaccompanied children's preference, and in a way the unaccompanied children effectively understand, prioritizing services from an in-person, qualified interpreter before using qualified remote interpretation services.

(h) *Legal services.* Care provider facilities shall make qualified interpretation and/or translation services available to unaccompanied children, child advocates, and legal service providers upon request while unaccompanied children are being provided with those services. Such services shall be available to unaccompanied children in enclosed, confidential areas.

(i) *Interpreter's and translator's responsibility with respect to confidentiality of information.* Qualified interpreters and translators shall keep confidential all information they receive about the unaccompanied children's cases and/or services while assisting ORR, its grantees, and its contractors, with the provision of case management or other services. Qualified interpreters and translators shall not disclose case file information to other interested parties or to individuals or entities that are not employed by ORR or its grantees and contractors or that are not providing services under the direction of ORR. Qualified interpreters and translators shall not disclose any communication that is privileged by law or protected as confidential under this part unless authorized to do so by the parties to the communication or pursuant to court order.

§ 410.1307 Healthcare services.

(a) ORR shall ensure that all unaccompanied children in ORR custody will be provided with routine medical and dental care; access to medical services requiring heightened ORR involvement, consistent with paragraph (c) of this section; family planning services; and emergency healthcare services.

(b) Standard programs and restrictive placements shall be responsible for:

(1) Establishment of a network of licensed healthcare providers established by the care provider facility, including specialists, emergency care services, mental health practitioners, and dental providers that will accept ORR's fee-for-service billing system;

(2) A complete medical examination (including screening for infectious disease) within 2 business days of admission, excluding weekends and holidays, unless the unaccompanied child was recently examined at another facility and if unaccompanied children are still in ORR custody 60 to 90 days after admission, an initial dental exam, or sooner if directed by State licensing requirements;

(3) Appropriate immunizations as recommended by the Advisory Committee on Immunization Practices' Child and Adolescent Immunization Schedule and approved by HHS's Centers for Disease Control and Prevention;

(4) An annual physical examination, including hearing and vision screening, and follow-up care for acute and chronic conditions;

(5) Administration of prescribed medication and special diets;

(6) Appropriate mental health interventions when necessary;

(7) Having policies and procedures for identifying, reporting, and controlling communicable diseases that are consistent with applicable State, local, and Federal laws and regulations.

(8) Having policies and procedures that enable unaccompanied children, including those with language and literacy barriers, to convey written and oral requests for emergency and non-emergency healthcare services;

(9) Having policies and procedures based on State or local laws and regulations to ensure the safe, discreet, and confidential provision of prescription and nonprescription medications to unaccompanied children, secure storage of medications, and controlled administration and disposal of all drugs. A licensed healthcare provider must write or orally order all nonprescription medications, and oral orders must be documented in the unaccompanied child's file;

(10) Medical isolation may be used according to the following requirements:

(i) An unaccompanied child may be placed in medical isolation and excluded from contact with the general population in order to prevent the spread of an infectious disease due to a potential exposure, protect other unaccompanied children, and care provider facility staff for a medical purpose or as required under State, local, or other licensing rules, as long as the medically required isolation is limited only to the extent necessary to ensure the health and welfare of the unaccompanied child, other unaccompanied children at a care provider facility and care provider facility staff, or the public at large.

(ii) Standard programs and restrictive placements must provide all mandated services under this subpart to the greatest extent practicable under the circumstances to unaccompanied children in medical isolation. Medically isolated unaccompanied children still must be supervised under State, local, or other licensing ratios, and, if multiple unaccompanied children are in medical isolation, they should be placed in units or housing together (as practicable, given the nature or type of medical issue giving rise to the requirement for isolation in the first instance); and

(11) Urgent dental care if an unaccompanied child is experiencing an urgent dental issue (acute tooth pain, procedure(s) needed to maintain basic function, *i.e.,* severe and/or acute infection or a severe and/or acute infection is imminent). Care should be provided as soon as possible and not be delayed while awaiting the initial dental exam.

(c) ORR must not prevent unaccompanied children in ORR care from accessing healthcare services, including medical services requiring heightened ORR involvement and family planning services. ORR must make reasonable efforts to facilitate access to those services if requested by the unaccompanied child. Further, if there is a potential conflict between the standards and requirements set forth in this section and State law, such that following the requirements of State law would diminish the services available to unaccompanied children under this section and ORR policies, ORR will review the circumstances to determine how to ensure that it is able to meet its responsibilities under Federal law. If a State law or license, registration, certification, or other requirement conflicts with an ORR employee's duties within the scope of their ORR employment, the ORR employee is required to abide by their Federal

duties, subject to applicable Federal religious freedom and conscience protections, to ensure unaccompanied children have access to all services available under this section and other ORR policies.

(1) *Initial placement and transfer considerations*—(i) *Initial placement.* Consistent with § 410.1103, when placing an unaccompanied child, ORR shall consider the child's individualized needs and any specialized services or treatment required or reasonably requested. Such services or treatment include but are not limited to access to medical specialists, family planning services, and medical services requiring heightened ORR involvement. When such care is determined to be medically necessary during the referral, intake process, Initial Medical Exam, or at any point while the unaccompanied child is in ORR custody, or the unaccompanied child reasonably requests such medical care while in ORR custody, ORR shall, to the greatest extent possible, identify available and appropriate bed space and place the unaccompanied child at a care provider facility that is able to provide or arrange such care, is in an appropriate location to support the unaccompanied child's healthcare needs, and affords access to an appropriate medical provider who is able to perform any reasonably requested or medically necessary services.

(ii) *Transfers.* If an appropriate initial placement is not immediately available or if the unaccompanied child's need or request for medical care is identified after the Initial Medical Exam, care providers shall immediately notify ORR and ORR shall, to the greatest extent possible, transfer the unaccompanied child needing medical care to an ORR program that meets the qualifications in paragraph (c)(1)(i) of this section.

(2) *Transportation.* ORR shall ensure unaccompanied children have access to medical care, including transportation across State lines and associated ancillary services if necessary to access appropriate medical services, including access to medical specialists, family planning services, and medical services requiring heightened ORR involvement. The requirement in this paragraph (c)(2) applies regardless of whether Federal appropriations law prevents ORR from paying for the medical care itself.

(d) Care provider facilities shall notify ORR within 24 hours of an unaccompanied child's need or request for medical services requiring heightened ORR involvement or the discovery of a pregnancy.

§ 410.1308 Child advocates.

(a) *Child advocates.* This section sets forth the provisions relating to the appointment and responsibilities of independent child advocates for child trafficking victims and other especially vulnerable unaccompanied children.

(b) *Role of the child advocate.* Child advocates are third parties who make independent recommendations regarding the best interests of an unaccompanied child. Their recommendations are based on information obtained from the unaccompanied child and other sources (including, but not limited to, the unaccompanied child's parents, the family, potential sponsors/sponsors, government agencies, legal service providers, protection and advocacy system representatives in appropriate cases, representatives of the unaccompanied child's care provider, health professionals, and others). Child advocates formally submit their recommendations to ORR and/or the immigration court, where appropriate, in the form of best interest determinations (BIDs).

(c) *Responsibilities of the child advocate.* The child advocate's responsibilities include, but are not limited to:

(1) Visiting with their unaccompanied child client;

(2) Explaining the consequences and potential outcomes of decisions that may affect their unaccompanied child client;

(3) Advocating for their unaccompanied child client's best interest with respect to care, placement, services, release, and within proceedings to which the child is a party;

(4) Providing best interest determinations, where appropriate and within a reasonable time to ORR, an immigration court, and/or other stakeholders involved in a proceeding or matter in which the unaccompanied child is a party or has an interest; and,

(5) Regularly communicating case updates with the care provider facility, ORR, and/or other stakeholders in the planning and performance of advocacy efforts, including updates related to services provided to an unaccompanied child after their release from ORR care.

(d) *Appointment of child advocates.* ORR may appoint child advocates for unaccompanied children who are victims of trafficking or especially vulnerable.

(1) An interested party may refer an unaccompanied child for a child advocate when the unaccompanied child is currently, or was previously in, ORR's care and custody, and when that child has been determined to be a victim of trafficking or especially vulnerable. As used in this paragraph (d)(1), *interested parties* means individuals or organizations involved in the care, service, or proceeding involving an unaccompanied child, including but not limited to, ORR Federal or contracted staff; an immigration judge; DHS Staff; a legal service provider, attorney of record, or DOJ Accredited Representative; an ORR care provider; healthcare professional; or a child advocate organization.

(2) ORR shall make an appointment decision within five (5) business days of a referral for a child advocate, except under exceptional circumstances which may delay a decision regarding an appointment. ORR will appoint child advocates for unaccompanied children who are currently in or were previously in ORR care and custody. ORR does not appoint child advocates for unaccompanied children who are not in or were not previously in ORR care and custody.

(3) Child advocate appointments terminate upon the closure of the unaccompanied child's case by the child advocate; when the unaccompanied child turns 18; or when the unaccompanied child obtains lawful immigration status.

(e) *Child advocate's access to information.* After a child advocate is appointed for an unaccompanied child, the child advocate shall be provided access to materials to effectively advocate for the best interest of the unaccompanied child. Child advocates shall be provided access to their clients during normal business hours at an ORR care provider facility and shall be provided access to all their client's case file information and may request copies of the case file directly from the unaccompanied child's care provider without going through ORR's standard case file request process.

(f) *Child advocate's responsibility with respect to confidentiality of information.* Child advocates shall keep the information in the case file, and information about the unaccompanied child's case, confidential. A child advocate may only disclose information from the case file with informed consent from the child when this is in the child's best interests. With regard to an unaccompanied child in ORR care, ORR shall allow the child advocate of that unaccompanied child to conduct private communications with the unaccompanied child, in a private area that allows for confidentiality for in-person and virtual or telephone meetings.

(g) *Non-retaliation against child advocates.* ORR shall presume that child advocates are acting in good faith with respect to their advocacy on behalf of unaccompanied children, and shall not retaliate against a child advocate for actions taken within the scope of their responsibilities. For example, ORR shall not retaliate against child advocates because of any disagreement with a best interest determination in regard to an unaccompanied child, or because of a child advocate's advocacy on behalf of an unaccompanied child.

§ 410.1309 Legal services.

(a) *Unaccompanied children's access to immigration legal services*—(1) *Purpose.* This paragraph (a) describes ORR's responsibilities in relation to legal services for unaccompanied children, consistent with 8 U.S.C. 1232(c)(5).

(2) *Orientation.* An unaccompanied child in ORR's legal custody shall receive:

(i) An in-person, telephonic, or video presentation concerning the rights and responsibilities of undocumented children in the immigration system, presented in the native or preferred language of the unaccompanied child and in an age-appropriate manner.

(A) Such presentation shall be provided by an independent legal service provider that has appropriate qualifications and experience, as determined by ORR, to provide such presentation and shall include information notifying the unaccompanied child of their legal rights and responsibilities, including protections under child labor laws, and of services to which they are entitled, including educational services. The presentation must be delivered in the native or preferred language of the unaccompanied child and in an age-appropriate manner.

(B) Such presentation shall occur within 10 business days of child's admission to ORR, within 10 business days of a child's transfer to a new ORR facility (except ORR long-term home care or ORR transitional home care), and every 6 months for unrepresented children who remain in ORR custody, as practicable. If the unaccompanied child is released before 10 business days, a legal service provider shall follow up as soon as practicable to complete the presentation, in person or remotely.

(ii) Information regarding the availability of free legal assistance and that they may be represented by counsel at no expense to the Government. When an unaccompanied child requests legal counsel, ORR shall ensure that the child is provided with a list and contact information for pro bono counsel, and reasonable assistance to ensure that the child is able to successfully engage an attorney at no cost to the Government.

(iii) Notification regarding the child's ability to petition for Special Immigrant Juvenile (SIJ) classification, to request that a juvenile court determine dependency or placement in accordance with § 410.1209, and notification of the ability to apply for asylum or other forms of relief from removal.

(iv) Information regarding the unaccompanied child's right to a removal hearing before an immigration judge, the ability to apply for asylum with United States Citizenship and Immigration Services (USCIS) in the first instance, and the ability to request voluntary departure in lieu of removal.

(v) A confidential legal consultation with a qualified attorney (or paralegal working under the direction of an attorney, or DOJ Accredited Representative) to determine possible forms of relief from removal in relation to the unaccompanied child's immigration case, as well as other case disposition options such as, but not limited to, voluntary departure. Such consultation shall occur within 10 business days of a child's transfer to a new ORR facility (except ORR long-term home care or ORR transitional home care) or upon request from ORR. ORR shall request an additional legal consultation on behalf of a child, if the child has been identified as:

(A) A potential victim of a severe form of trafficking;

(B) Having been abused, abandoned, or neglected; or

(C) Having been the victim of a crime or domestic violence; or

(D) Persecuted or in fear of persecution due to race, religion, nationality, membership in a particular social group, or for a political opinion.

(vi) An unaccompanied child in ORR care shall be able to conduct private communications with their attorney of record, DOJ Accredited Representative, or legal service provider in a private enclosed area that allows for confidentiality for in-person, virtual, or telephonic meetings.

(vii) Information regarding the child's right to a hearing before an independent HHS hearing officer, to determine, through a written decision, whether the unaccompanied child would present a risk of danger to self or to the community if released, as described at § 410.1903(a) and (b).

(3) *Accessibility of information.* In addition to the requirements in paragraphs (a)(1) and (2) of this section for orienting and informing unaccompanied children of their legal rights and access to services while in ORR care, ORR shall also require this information be posted for unaccompanied children in an age-appropriate format and translated into each child's preferred language, in any ORR contracted or grant-funded facility where unaccompanied children are in ORR care.

(4) *Direct immigration legal representation services for unaccompanied children currently or previously under ORR care.* To the extent ORR determines that appropriations are available, and insofar as it is not practicable for ORR to secure pro bono counsel, ORR shall fund legal service providers to provide direct immigration legal representation for certain unaccompanied children, subject to ORR's discretion and available appropriations. Examples of direct immigration legal representation include, but are not limited to:

(i) For unrepresented unaccompanied children who become enrolled in ORR Unaccompanied Refugee Minor (URM) programs, provided they have not yet obtained immigration relief or reached 18 years of age at the time of retention of an attorney;

(ii) For unaccompanied children in ORR care who are in proceedings before EOIR, including unaccompanied children seeking voluntary departure, and for whom other available assistance does not satisfy the legal needs of the individual child;

(iii) For unaccompanied children released to a sponsor residing in the defined service area of the same legal service provider who provided the child legal services in ORR care, to promote continuity of legal services; and

(iv) For other unaccompanied children, to the extent ORR determines that appropriations are available.

(b) *Legal services for the protection of unaccompanied children's interests in certain matters not involving direct immigration representation*—(1) *Purpose.* This paragraph (b) provides for the use of additional funding for legal services, to the extent that ORR determines it to be available, to help ensure that the interests of unaccompanied children are considered in certain matters relating to their care and custody, to the greatest extent practicable.

(2) *Funding.* To the extent ORR determines that appropriations are available, and insofar as it is not practicable for ORR to secure pro bono counsel, ORR may fund access to counsel for unaccompanied children, including for purposes of legal representation, in the following enumerated non-immigration related

matters, subject to ORR's discretion and in no particular order of priority:

(i) ORR appellate procedures, including Placement Review Panel (PRP), under § 410.1902, and risk determination hearings, under § 410.1903;

(ii) For unaccompanied children upon their placement in ORR long-term home care or in a residential treatment center outside a licensed ORR facility, and for whom other legal assistance does not satisfy the legal needs of the individual child;

(iii) For unaccompanied children with no identified sponsor who are unable to be placed in ORR long-term home care or ORR transitional home care;

(iv) For purposes of judicial bypass or similar legal processes as necessary to enable an unaccompanied child to access certain lawful medical procedures that require the consent of the parent or legal guardian under State law, and when the unaccompanied child is unable or unwilling to obtain such consent;

(v) For the purpose of representing an unaccompanied child in state juvenile court proceedings, when the unaccompanied child already possesses SIJ classification; and

(vi) For the purpose of helping an unaccompanied child to obtain an employment authorization document.

(c) *Standards for legal services for unaccompanied children.* (1) In-person meetings are preferred during the course of providing legal counsel to any unaccompanied child under paragraph (a) or (b) of this section, though telephonic or teleconference meetings between the unaccompanied child's attorney or DOJ Accredited Representative and the unaccompanied child may substitute as appropriate. Either the unaccompanied child's attorney, DOJ Accredited Representative, or a care provider staff member or care provider shall always accompany the unaccompanied child to any in-person courtroom hearing or proceeding, in connection with any legal representation of an unaccompanied child pursuant to this section.

(2) Upon receipt by ORR of proof of representation and authorization for release of records signed by the unaccompanied child or other authorized representative, ORR shall share, upon request and within a reasonable timeframe to be established by ORR, the unaccompanied child's complete case file, apart from any legally required redactions, to assist in the legal representation of the unaccompanied child. In addition to sharing the complete case file, upon request by an attorney of record or DOJ Accredited Representative, ORR shall promptly provide the attorney of record or DOJ Accredited Representative with the name and telephone number of potential sponsors who have submitted a completed family reunification application to ORR for their client, if the potential sponsors have provided consent to release of their information. Furthermore, and absent a reasonable belief based upon articulable facts that doing so would endanger an unaccompanied child, ORR shall ensure that unaccompanied children are allowed to review, upon request and in the company of their attorney of record or DOJ Accredited Representative if any, such papers, notes, and other writings they possessed at the time they were apprehended by DHS or another Federal department or agency, that are in ORR or an ORR care provider facility's possession.

(3) If an unaccompanied child's attorney of record or DOJ Accredited Representative properly requests their client's case file on an expedited basis, ORR shall, within seven calendar days, unless otherwise provided herein, provide the attorney of record or DOJ Accredited Representative with key documents from the unaccompanied child's case file, as determined by ORR.

(4) Expedited basis refers to any of the following situations:

(i) Unaccompanied child has been reported missing to the National Center for Missing and Exploited Children;

(ii) Unaccompanied child has a court hearing scheduled within 30 calendar days;

(iii) Unaccompanied child is turning 18 years old in less than 30 calendar days;

(iv) Unaccompanied child has a risk determination hearing pursuant to § 410.1903 of this part scheduled within 30 calendar days;

(v) Records are needed for the provision of medical services to the child;

(vi) Records are needed for the child's enrollment or continued enrollment in school;

(vii) Records are needed for a Federal, State, or local agency investigation related to the subject of the request; or

(viii) Any other situation in which ORR determines, in its discretion, that an expedited response is warranted.

(d) *Grants or contracts for unaccompanied children's immigration legal services.* (1) This paragraph (d) prescribes requirements concerning grants or contracts to legal service providers to ensure that all unaccompanied children who are or have been in ORR care have access to counsel to represent them in immigration legal proceedings or matters and to protect them from mistreatment, exploitation and trafficking, to the greatest extent practicable, in accordance with the TVPRA [at 8 U.S.C. 1232(c)(5)] and 292 of the Immigration and Nationality Act [at 8 U.S.C. 1362].

(2) ORR may make grants, in its discretion and subject to available resources—including formula grants distributed geographically in proportion to the population of released unaccompanied children—or contracts under this section to qualified agencies or organizations, as determined by ORR and in accordance with the eligibility requirements outlined in the authorizing statute, for the purpose of providing immigration legal representation, assistance and related services to unaccompanied children who are in ORR care, or who have been released from ORR care and living in a State or region.

(3) Subject to the availability of funds, grants or contracts shall be calculated based on the historic proportion of the unaccompanied child population in the State within a lookback period determined by the Director, provided annually by the State.

(e) *Non-retaliation against legal service providers.* ORR shall presume that legal service providers and other legal representatives are acting in good faith with respect to their advocacy on behalf of unaccompanied children and ORR shall not retaliate against a legal service provider or other legal representative for actions taken within the scope of the legal service provider's or representative's responsibilities. For example, ORR shall not engage in retaliatory actions against legal service providers or any other representative for reporting harm or misconduct on behalf of an unaccompanied child or appearance in an action adverse to ORR.

(f) *Resource email box.* ORR shall create and maintain a resource email box for feedback from legal services providers regarding emerging issues related to immediate performance of legal services at care provider facilities. ORR shall address such emerging issues as needed.

§ 410.1310 Psychotropic medications.

(a) Except in the case of a psychiatric emergency, ORR shall ensure that authorized individuals provide informed consent prior to the administration of psychotropic medications to unaccompanied children.

(1) Three categories of persons can serve as an ''authorized consenter'' and

provide informed consent for the administration of psychotropic medication to unaccompanied children in ORR custody: the child's parent or legal guardian, followed by a close relative sponsor, and then the unaccompanied child themself if the child is of sufficient age and a doctor has obtained informed consent; and

(2) Consent must be obtained voluntarily, without undue influence or coercion, and ORR will not retaliate against an unaccompanied child or an authorized consenter for refusing to take or consent to any psychotropic medication; and

(3) Any emergency administration of psychotropic medication must be documented, the child's authorized consenter must be notified as soon as possible, and the care provider and ORR must review the incident to ensure compliance with ORR policies and reasonably avoid future emergency administrations of medication.

(b) ORR shall ensure meaningful oversight of the administration of psychotropic medication(s) to unaccompanied children including reviewing cases flagged by care providers and conducting additional reviews of the administration of psychotropic medications in high-risk circumstances, including but not limited to cases involving young children, simultaneous administration of multiple psychotropic medications, and high dosages. ORR must engage qualified professionals who are able to oversee prescription practices and provide guidance to care providers, such as a child and adolescent psychiatrist.

(c) ORR shall permit unaccompanied children to have the assistance of counsel, at no cost to the Federal Government, with respect to the administration of psychotropic medications.

§ 410.1311 Unaccompanied children with disabilities.

(a) ORR shall provide notice to the unaccompanied children in its custody of the protections against discrimination under section 504 of the Rehabilitation Act at 45 CFR part 85 assured to children with disabilities in its custody. ORR must also provide notice of the available procedures for seeking reasonable modifications or making a complaint about alleged discrimination against children with disabilities in ORR's custody. This notice must be provided in a manner that is accessible to children with disabilities.

(b) ORR shall administer the UC Program in the most integrated setting appropriate to the needs of unaccompanied children with disabilities in accordance with 45 CFR 85.21(d), unless ORR can demonstrate that this would fundamentally alter the nature of its UC Program.

(c) ORR shall make reasonable modifications to its programs, including the provision of services, equipment, and treatment, so that an unaccompanied child with one or more disabilities can have equal access to the UC Program in the most integrated setting appropriate to their needs. ORR is not required, however, to take any action that it can demonstrate would fundamentally alter the nature of a program or activity.

(d) Where applicable, ORR shall document in the child's ORR case file any services, supports, or program modifications being provided to an unaccompanied child with one or more disabilities.

(e) In addition to the requirements for release of unaccompanied children established elsewhere in this part and through any subregulatory guidance ORR may issue, ORR shall adhere to the following requirements when releasing unaccompanied children with disabilities to a sponsor:

(1) ORR's assessment under § 410.1202 of a potential sponsor's capability to provide for the physical and mental well-being of the child must necessarily include explicit consideration of the impact of the child's disability or disabilities. Correspondingly, ORR must consider the potential benefits to the child of release to a community-based setting.

(2) In planning for a child's release and conducting post-release services (PRS), ORR and any entities through which ORR provides PRS shall make reasonable modifications in their policies, practices, and procedures if needed to enable released unaccompanied children with disabilities to live in the most integrated setting appropriate to their needs, such as with a sponsor. ORR is not required, however, to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity. ORR will affirmatively support and assist otherwise viable potential sponsors in accessing and coordinating appropriate post-release community-based services and supports available in the community to support the sponsor's ability to care for a child with one or more disabilities, as provided for under § 410.1210.

(3) ORR shall not delay the release of a child with one or more disabilities solely because post-release services are not in place before the child's release.

Subpart E—Transportation of an Unaccompanied Child

§ 410.1400 Purpose of this subpart.

This subpart concerns the safe transportation of each unaccompanied child while in ORR's care.

§ 410.1401 Transportation of an unaccompanied child in ORR's care.

(a) ORR care provider facilities shall transport an unaccompanied child in a manner that is appropriate to the child's age and physical and mental needs, including proper use of car seats for young children, and consistent with § 410.1304.

(b) When ORR plans to release an unaccompanied child from its care to a sponsor under the provisions at subpart C of this part, ORR shall assist without undue delay in making transportation arrangements. In its discretion, ORR may require the care provider facility to transport an unaccompanied child. In these circumstances, ORR may, in its discretion, either reimburse the care provider facility or directly pay for the child and/or sponsor's transportation, as appropriate, to facilitate timely release.

(c) The care provider facility shall comply with all relevant State and local licensing requirements and state and Federal regulations regarding transportation of children, such as meeting or exceeding the minimum staff/child ratio required by the care provider facility's licensing agency, maintaining and inspecting all vehicles used for transportation, etc.

(d) If there is a potential conflict between ORR's regulations in this part and State law, ORR shall review the circumstances to determine how to ensure that it is able to meet its statutory responsibilities. If a State law or license, registration, certification, or other requirement conflicts with an ORR employee's duties within the scope of their ORR employment, the ORR employee is required to abide by their Federal duties, subject to applicable Federal religious freedom and conscience protections.

(e) The care provider facility or contractor shall conduct all necessary background checks for individuals transporting unaccompanied children, in compliance with § 410.1305(a).

(f) If a care provider facility is transporting an unaccompanied child, it shall assign at least one transport staff of the same gender as the child being transported, to the greatest extent possible under the circumstances.

Subpart F—Data and Reporting Requirements

§ 410.1500 Purpose of this subpart.

ORR shall maintain statistical and other data on the unaccompanied children for whom it is responsible. ORR shall be responsible for coordinating with other Departments to obtain some of the statistical data and shall obtain additional data from care provider facilities. This subpart describes information that care provider facilities shall report to ORR such that ORR may compile and maintain statistical information and other data on unaccompanied children.

§ 410.1501 Data on unaccompanied children.

Care provider facilities are required to report information necessary for ORR to maintain data in accordance with this section. Data shall include:

(a) Biographical information, such as an unaccompanied child's name, gender, date of birth, country of birth, whether of indigenous origin, country of habitual residence, and, if voluntarily disclosed, self-identified LGBTQI+ status or identity;

(b) The date on which the unaccompanied child came into Federal custody by reason of the child's immigration status, including the date on which the unaccompanied child came into ORR custody;

(c) Information relating to the unaccompanied child's placement, removal, or release from each care provider facility in which the unaccompanied child has resided, including the date on which and to whom the child is transferred, removed, or released;

(d) In any case in which the unaccompanied child is placed in detention or released, an explanation relating to the detention or release;

(e) The disposition of any actions in which the unaccompanied child is the subject;

(f) Information gathered from assessments, evaluations, or reports of the child; and,

(g) Data necessary to evaluate and improve the care and services for unaccompanied children, including:

(1) Data relating to the administration of psychotropic medications. Such information shall include children's diagnoses, the prescribing physician's information, the name and dosage of the medication prescribed, documentation of informed consent, and any emergency administration of medication. Such data shall be compiled in a manner that enables ORR to track how psychotropic medications are administered across the network and in individual facilities.

(2) Data relating to the treatment of unaccompanied children with disabilities. Such information shall include whether an unaccompanied child has been identified as having a disability, the unaccompanied child's diagnosis, the unaccompanied child's need for reasonable modifications or other services, and information related to release planning. Such data shall be compiled in a manner that enables ORR ongoing oversight to ensure unaccompanied children with disabilities are receiving appropriate care while in ORR care across the network and in individual facilities.

Subpart G—Transfers

§ 410.1600 Purpose of this subpart.

This subpart provides guidelines for the transfer of an unaccompanied child.

§ 410.1601 Transfer of an unaccompanied child within the ORR care provider facility network.

(a) *General requirements for transfers.* The care provider facility shall continuously assess unaccompanied children in their care to review whether the children's placements are appropriate. An unaccompanied child shall be placed in the least restrictive setting that is in the best interests of the child, subject to considerations regarding danger to self or the community and runaway risk. Care provider facilities shall follow ORR guidance, including guidance regarding placement considerations, when making transfer recommendations.

(1) If the care provider facility identifies an alternate placement for the unaccompanied child that would best meet the child's needs, the care provider facility shall make a transfer recommendation to ORR for approval within three business days of identifying the need for a transfer.

(2) The care provider facility shall ensure the unaccompanied child is medically cleared for transfer within three business days of ORR identifying the need for a transfer, unless otherwise waived by ORR. For an unaccompanied child with acute or chronic medical conditions, or seeking medical services requiring heightened ORR involvement, the appropriate care provider facility staff and ORR shall meet to review the transfer recommendation. If a child is not medically cleared for transfer within three business days, the care provider facility shall notify ORR, and ORR shall review and determine if the child is fit for travel. If ORR determines the child is not fit for travel, ORR shall notify the care provider facility of the denial and specify a timeframe for the care provider facility to re-evaluate the child for transfer.

(3) Within 48 hours prior to the unaccompanied child's physical transfer, the referring care provider facility shall notify all appropriate interested parties of the transfer, including the child's attorney of record or DOJ Accredited Representative, legal service provider, or child advocate, as applicable. However, such advance notice is not required in unusual and compelling circumstances, such as the following cases in which notices shall be provided within 24 hours following transfer:

(i) Where the safety of the unaccompanied child or others has been threatened;

(ii) Where the unaccompanied child has been determined to be a runaway risk consistent with § 410.1107; or

(iii) Where the interested party has waived such notice.

(4) The unaccompanied child shall be transferred with the child's possessions and legal papers, including, but not limited to:

(i) Personal belongings;

(ii) The transfer request and tracking form;

(iii) 30-day medication supply, if applicable;

(iv) All health records; and

(v) Original documents (including birth certificates).

(5) If the unaccompanied child's possessions exceed the amount permitted normally by the carrier in use, the care provider shall ship the possessions to a subsequent placement of the unaccompanied child in a timely manner.

(b) *Restrictive care provider facility placements and transfers.* When an unaccompanied child is placed in a restrictive setting (secure, heightened supervision, or residential treatment center), the care provider facility in which the child is placed and ORR shall review the placement at least every 30 days to determine whether a new level of care is appropriate for the child. If the care provider facility and ORR determine in the review that continued placement in a restrictive setting is appropriate, the care provider facility shall document the basis for its determination and, upon request, provide documentation of the review and rationale for continued placement to the child's attorney of record, legal service provider, and/or child advocate.

(c) *Group transfers.* At times, circumstances may require a care provider facility to transfer more than one unaccompanied child at a time (*e.g.,*

emergencies, natural disasters, program closures, and bed capacity constraints). For group transfers, the care provider facility shall follow ORR guidance and the requirements in paragraph (a) of this section.

(d) *Residential treatment center placements.* A care provider facility may request ORR to transfer an unaccompanied child in its care to a residential treatment center (RTC), pursuant to the requirements described at § 410.1105(c). The care provider facility shall review the placement of a child into an RTC every 30 days in accordance with paragraph (b) of this section.

(e) *Emergency placement changes.* An unaccompanied child who is placed pursuant to subpart B of this part remains in the legal custody of ORR and may only be transferred or released by ORR. However, in the event of an emergency, a care provider facility may temporarily change the physical placement of an unaccompanied child prior to securing permission from ORR but shall notify ORR of the change of physical placement, as soon as possible, but in all cases within eight hours of transfer.

Subpart H—Age Determinations

§ 410.1700 Purpose of this subpart.

This subpart sets forth the provisions for determining the age of an individual in ORR custody.

§ 410.1701 Applicability.

This subpart applies to individuals in the custody of ORR. To meet the definition of an unaccompanied child and remain in ORR custody, an individual must be under 18 years of age.

§ 410.1702 Conducting age determinations.

Procedures for determining the age of an individual must take into account the totality of the circumstances and evidence, including the non-exclusive use of radiographs, to determine the age of the individual. ORR may require an individual in ORR custody to submit to a medical or dental examination, including X-rays, conducted by a medical professional or to submit to other appropriate procedures to verify their age. If ORR subsequently determines that such an individual is an unaccompanied child, the individual will be treated in accordance with ORR's UC Program regulations in this part for all purposes.

§ 410.1703 Information used as evidence to conduct age determinations.

(a) ORR considers multiple forms of evidence in making age determinations, and determinations are made based upon a totality of evidence.

(b) ORR may consider information or documentation to make an age determination, including but not limited to:

(1) If there is no original birth certificate, certified copy, or photocopy or facsimile copy of a birth certificate acceptable to ORR, consulting with the consulate or embassy of the individual's country of birth to verify the validity of the birth certificate presented.

(2) Authentic government-issued documents issued to the bearer.

(3) Other documentation, such as baptismal certificates, school records, and medical records, which indicate an individual's date of birth.

(4) Sworn affidavits from parents or other relatives as to the individual's age or birth date.

(5) Statements provided by the individual regarding the individual's age or birth date.

(6) Statements from parents or legal guardians.

(7) Statements from other persons apprehended with the individual.

(8) Medical age assessments, which should not be used as a sole determining factor but only in concert with other factors. If an individual's estimated probability of being 18 years or older is 75 percent or greater according to a medical age assessment, and the totality of the evidence indicates that the individual is 18 years old or older, ORR must determine that the individual is 18 years old or older. The 75 percent probability threshold applies to all medical methods and approaches identified by the medical community as appropriate methods for assessing age. Ambiguous, debatable, or borderline forensic examination results are resolved in favor of finding the individual is a child.

§ 410.1704 Treatment of an individual whom ORR has determined to be an adult.

If the procedures in this subpart would result in ORR reasonably concluding that an individual is an adult, despite the individual's claim to be under the age of 18, ORR shall treat such person as an adult for all purposes.

Subpart I—Emergency and Influx Operations

§ 410.1800 Contingency planning and procedures during an emergency or influx.

(a) ORR shall regularly reevaluate the number of standard program placements needed for unaccompanied children to determine whether the number of shelters, heightened supervision facilities, and ORR transitional home care beds should be adjusted to accommodate an increased or decreased number of unaccompanied children eligible for placement in care in ORR care provider facilities.

(b) In the event of an emergency or influx that prevents the prompt placement of unaccompanied children in standard programs, ORR shall place each unaccompanied child in a standard program as expeditiously as possible.

(c) ORR activities during an influx or emergency include the following:

(1) ORR shall implement its contingency plan on emergencies and influxes, which may include opening facilities to house unaccompanied children and prioritization of placement at such facilities of certain unaccompanied children;

(2) ORR shall continually develop standard programs that are available to accept emergency or influx placements; and

(3) ORR shall maintain a list of unaccompanied children affected by the emergency or influx including each unaccompanied child's:

(i) Name;

(ii) Date and country of birth;

(iii) Date of placement in ORR's custody; and

(iv) Place and date of current placement.

§ 410.1801 Minimum standards for emergency or influx facilities.

(a) In addition to the ''standard program'' and ''restrictive placements'' defined in this part, ORR provides standards in this section for all emergency or influx facilities (EIFs).

(b) EIFs shall provide the following minimum services for all unaccompanied children in their care:

(1) Proper physical care and maintenance, including suitable living accommodations, sufficient quantity of food appropriate for children, drinking water, appropriate clothing, and personal grooming items.

(2) Appropriate routine medical and dental care; family planning services, including pregnancy tests; medical services requiring heightened ORR involvement; and emergency healthcare services; a complete medical examination (including screenings for infectious diseases) within 48 hours of admission, excluding weekends and holidays, unless the unaccompanied child was recently examined at another ORR care provider facility; appropriate immunizations as recommended by the Advisory Committee on Immunization

Practices' Child and Adolescent Immunization Schedule and approved by HHS's Centers for Disease Control and Prevention; administration of prescribed medication and special diets; and appropriate mental health interventions when necessary.

(3) An individualized needs assessment, which includes the various initial intake forms, identification of the unaccompanied child's individualized needs including any specific problems which appear to require immediate intervention, an educational assessment and plan, and whether an indigenous language speaker; a statement of religious preference and practice; and an assessment of the unaccompanied child's personal goals, strengths, and weaknesses.

(4) Educational services appropriate to the unaccompanied child's level of development and communication skills in a structured classroom setting Monday through Friday, which concentrates on the development of basic academic competencies, and on English Language acquisition. The educational program shall include instruction and educational and other reading materials in such languages as needed. Basic academic areas may include such subjects as science, social studies, math, reading, writing, and physical education. The program must provide unaccompanied children with appropriate reading materials in languages other than English for use during leisure time.

(5) Activities according to a recreation and leisure time plan that include daily outdoor activity—weather permitting—with at least one hour per day of large muscle activity and one hour per day of structured leisure time activities (that must not include time spent watching television). Activities should be increased to a total of three hours on days when school is not in session.

(6) At least one individual counseling session per week conducted by trained social work staff with the specific objective of reviewing the child's progress, establishing new short-term objectives, and addressing both the developmental and crisis-related needs of each child.

(7) Group counseling sessions at least twice a week.

(8) Acculturation and adaptation services that include information regarding the development of social and interpersonal skills that contribute to those abilities necessary to live independently and responsibly.

(9) Whenever possible, access to religious services of the child's choice.

(10) Visitation and contact with family members (regardless of their immigration status), which is structured to encourage such visitation. The staff must respect the child's privacy while reasonably preventing the unauthorized release of the unaccompanied child.

(11) A reasonable right to privacy, which includes the right to wear the child's own clothes when available, retain a private space for the storage of personal belongings, talk privately on the phone and visit privately with guests, as permitted by the house rules and regulations, receive and send uncensored mail unless there is a reasonable belief that the mail contains contraband.

(12) Legal services information, including the availability of free legal assistance, and that they may be represented by counsel at no expense to the Government, the right to a removal hearing before an immigration judge, the ability to apply for asylum with USCIS in the first instance, and the ability to request voluntary departure in lieu of removal.

(13) EIFs, whether state-licensed or not, must comply, to the greatest extent possible, with all State child welfare laws and regulations (such as mandatory reporting of abuse), as well as all State and local building, fire, health and safety codes, that ORR determines are applicable to non-State licensed facilities.

(14) EIFs must deliver services in a manner that is sensitive to the age, culture, native language, and complex needs of each unaccompanied child. EIFs must develop an individual service plan for the care of each child.

(c) EIFs shall do the following when providing services to unaccompanied children:

(1) Maintain safe and sanitary conditions that are consistent with ORR's concern for the particular vulnerability of children;

(2) Provide access to toilets, showers and sinks, as well as personal hygiene items such as soap, toothpaste and toothbrushes, floss, towels, feminine care items, and other similar items;

(3) Provide drinking water and food;

(4) Provide medical assistance if the unaccompanied child is in need of emergency services and provide a modified medical examination;

(5) Maintain adequate temperature control and ventilation;

(6) Provide adequate supervision to protect unaccompanied children;

(7) Separate from other unaccompanied children those unaccompanied children who are subsequently found to have past criminal or juvenile detention histories or have perpetrated sexual abuse that present a danger to themselves or others;

(8) Provide contact with family members who were apprehended with the unaccompanied child; and

(9) Provide access to legal services described in § 410.1309(a).

(10) Provide family unification services designed to identify relatives in the United States as well as in foreign countries and assistance in obtaining legal guardianship when necessary for the release of the unaccompanied child.

(11) Provide an individualized needs assessment, which includes the collection of essential data relating to the identification and history of the child and the child's family; an assessment of family relationships and interaction with adults, peers and authority figures; and identifying information regarding immediate family members, other relatives, godparents or friends who may be residing in the United States and may be able to assist in connecting the child with family members.

(12) Provide a comprehensive orientation regarding program intent, services, rules (written and verbal), expectations, information about U.S. child labor laws, and the availability of legal assistance.

(13) Maintain records of case files and make regular reports to ORR. EIFs must have accountability systems in place, which preserve the confidentiality of client information and protect the records from unauthorized use or disclosure.

(d) ORR may grant waivers of standards under paragraph (b) of this section, in whole or in part, during the first six months of an EIF activation, to the extent that ORR determines that the specific waivers requested are necessary because it would be operationally infeasible to comply with the specified standards, and are granted for no longer than necessary in light of operational feasibility, and the waivers are granted in accordance with law. Such waiver or waivers must be made publicly available. Even where a waiver is granted, EIFs shall make all efforts to meet requisite standards under § 410.1801(b) as expeditiously as possible.

§ 410.1802 Placement standards for emergency or influx facilities.

(a) Unaccompanied children who are placed in an emergency or influx facility (EIF) must meet all of the following criteria to the extent feasible. If ORR becomes aware that a child does not meet any of the following criteria at any time after placement into an EIF, ORR shall transfer the unaccompanied child

to the least restrictive setting appropriate for that child's need as expeditiously as possible. ORR shall only place a child in an EIF if the child:

(1) Is expected to be released to a sponsor within 30 days;

(2) Is age 13 or older;

(3) Speaks English or Spanish as their preferred language;

(4) Does not have a known disability or other mental health or medical issue or dental issue requiring additional evaluation, treatment, or monitoring by a healthcare provider;

(5) Is not a pregnant or parenting teenager;

(6) Would not have a diminution of legal services as a result of the transfer to the EIF; and

(7) Is not a danger to self or others (including not having been charged with or convicted of a criminal offense).

(b) ORR shall also consider the following factors for the placement of an unaccompanied child in an EIF:

(1) The unaccompanied child should not be part of a sibling group with a sibling(s) age 12 years or younger;

(2) The unaccompanied child should not be subject to a pending age determination;

(3) The unaccompanied child should not be involved in an active State licensing, child protective services, or law enforcement investigation, or an investigation resulting from a sexual abuse allegation;

(4) The unaccompanied child should not have a pending home study;

(5) The unaccompanied child should not be turning 18 years old within 30 days of the transfer to an EIF;

(6) The unaccompanied child should not be scheduled to be discharged in three days or less;

(7) The unaccompanied child should not have a scheduled hearing date in immigration court or State/family court (juvenile included), and not have an attorney of record or DOJ Accredited Representative;

(8) The unaccompanied child should be medically cleared and vaccinated as required by the EIF (for instance, if the EIF is on a U.S. Department of Defense site); and

(9) The unaccompanied child should have no known mental health, dental, or medical issues, including contagious diseases requiring additional evaluation, treatment, or monitoring by a healthcare provider.

Subpart J—Availability of Review of Certain ORR Decisions

§ 410.1900 Purpose of this subpart.

This subpart describes the availability of review of certain ORR decisions regarding the care and placement of unaccompanied children.

§ 410.1901 Restrictive placement case reviews.

(a) In all cases involving a restrictive placement, ORR shall have the burden to determine, based on clear and convincing evidence, that sufficient grounds exist for stepping up or continuing to hold an unaccompanied child in a restrictive placement. The evidence supporting a restrictive placement decision shall be recorded in the unaccompanied child's case file.

(b) ORR shall provide an unaccompanied child with a Notice of Placement (NOP) in the child's native or preferred language no later than 48 hours after step-up to a restrictive placement, as well as every 30 days the unaccompanied child remains in a restrictive placement.

(1) The NOP shall clearly and thoroughly set forth the reason(s) for placement and a summary of supporting evidence.

(2) The NOP shall inform the unaccompanied child of their right to contest the restrictive placement before a Placement Review Panel (PRP) upon receipt of the NOP and the procedures by which the unaccompanied child may do so. The NOP shall further inform the unaccompanied child of all other available administrative review processes.

(3) The NOP shall include an explanation of the unaccompanied child's right to be represented by counsel at no cost to the Federal Government in challenging such restrictive placement.

(4) A case manager shall explain the NOP to the unaccompanied child, in a language the unaccompanied child understands.

(c) The care provider facility shall provide a copy of the NOP to the unaccompanied child's attorney of record, legal service provider, child advocate, and to a parent or legal guardian of record, no later than 48 hours after step-up as well as every 30 days the unaccompanied child remains in a restrictive placement.

(1) Service of the NOP on a parent or legal guardian shall not be required where there are child welfare reasons not to do so, where the parent or legal guardian cannot be reached, or where an unaccompanied child 14 or over states that the unaccompanied child does not wish for the parent or legal guardian to receive the NOP.

(2) Child welfare rationales include but are not limited to: a finding that the automatic provision of the notice could endanger the unaccompanied child; potential abuse or neglect by the parent or legal guardian; a parent or legal guardian who resides in the United States but refuses to act as the unaccompanied child's sponsor; or a scenario where the parent or legal guardian is non-custodial and the unaccompanied child's prior caregiver (such as a caregiver in home country) requests that the non-custodial parent not be notified of the placement.

(3) When an NOP is not automatically provided to a parent or legal guardian, ORR shall document, within the unaccompanied child's case file, the child welfare reason for not providing the NOP to the parent or legal guardian.

(d) ORR shall further ensure the following automatic administrative reviews:

(1) At minimum, a 30-day administrative review for all restrictive placements;

(2) A more intensive 90-day review by ORR supervisory staff for unaccompanied children in secure facilities; and

(3) For unaccompanied children in residential treatment centers, the 30-day review at paragraph (d)(1) of this section must involve a psychiatrist or psychologist to determine whether the unaccompanied child should remain in restrictive residential care.

§ 410.1902 Placement Review Panel.

(a) All determinations to place an unaccompanied child in a secure facility that is not a residential treatment center will be reviewed and approved by ORR federal field staff. An unaccompanied child placed in a restrictive placement may request reconsideration of such placement. Upon such request, ORR shall afford the unaccompanied child a hearing before the Placement Review Panel (PRP) at which the unaccompanied child may, with the assistance of counsel at no cost to the Federal Government, present evidence on their own behalf. An unaccompanied child may present witnesses and cross-examine ORR's witnesses, if such child and ORR witnesses are willing to voluntarily testify. An unaccompanied child shall be provided access at the PRP hearing to interpretation services in their native or preferred language, depending on the unaccompanied child's preference, and in a way they effectively understand. An unaccompanied child that does not wish to request a hearing may also have their placement reconsidered by submitting a written request for a reconsideration along with any supporting documents as evidence. Where the unaccompanied child does not have an attorney, ORR shall

encourage the care provider facility to seek assistance for the unaccompanied child from a contracted legal service provider or child advocate.

(b) The PRP shall afford any unaccompanied child in a restrictive placement the opportunity to request a PRP review as soon as the unaccompanied child receives a Notice of Placement (NOP). ORR shall permit the unaccompanied child or the unaccompanied child's counsel to review the evidence in support of step-up or continued restrictive placement, and any countervailing or otherwise unfavorable evidence, within a reasonable time before the PRP review is conducted. ORR shall also share the unaccompanied child's complete case file apart from any legally required redactions with their counsel within a reasonable timeframe to be established by ORR to assist in the legal representation of the unaccompanied child.

(c) ORR shall convene the PRP within 7 days of an unaccompanied child's request for a hearing. ORR may institute procedures to request clarification or additional evidence if warranted, or to extend the 7-day deadline as necessary under specified circumstances.

(d) The PRP shall issue a written decision in the child's native or preferred language within 7 days of a hearing and submission of evidence or, if no hearing or review of additional evidence is requested, within 7 days following receipt of an unaccompanied child's written statement. ORR may institute procedures to request clarification or additional evidence if warranted, or to extend the 7-day deadline as necessary under specified circumstances.

(e) An ORR staff member who was involved with the decision to step-up an unaccompanied child to a restrictive placement shall not serve as a PRP member with respect to that unaccompanied child's placement.

§ 410.1903 Risk determination hearings.

(a) All unaccompanied children in restrictive placements based on a finding of dangerousness shall be afforded a hearing before an independent HHS hearing officer, to determine, through a written decision, whether the unaccompanied child would present a risk of danger to self or to the community if released, unless the unaccompanied child indicates in writing that they refuse such a hearing. Unaccompanied children placed in restrictive placements shall receive a written notice of the procedures under this section and may use a form provided to them to decline a hearing under this section. Unaccompanied children in restrictive placements may decline the hearing at any time, including after consultation with counsel.

(b) All other unaccompanied children in ORR custody may request a hearing under this section to determine, through a written decision, whether the unaccompanied child would present a risk of danger to self or to the community if released. Requests under this section must be made in writing by the unaccompanied child, their attorney of record, or their parent or legal guardian by submitting a form provided by ORR to the care provider facility or by making a separate written request that contains the information requested in ORR's form.

(c) In hearings conducted under this section, ORR bears the burden of proof to establish by clear and convincing evidence that the unaccompanied child would be a danger to self or to the community if released.

(d) In hearings under this section, the unaccompanied child may be represented by a person of their choosing. The unaccompanied child may present oral and written evidence to the hearing officer and may appear by video or teleconference. ORR may also present evidence at the hearing, whether in writing, or by appearing in person or by video or teleconference.

(e) Within a reasonable time prior to the hearing, ORR shall provide to the unaccompanied child and their attorney of record the evidence and information supporting ORR's determination, including the evidentiary record.

(f) A hearing officer's decision that an unaccompanied child would not be a danger to self or to the community if released is binding upon ORR, unless the provisions of paragraph (e) of this section apply.

(g) A hearing officer's decision under this section may be appealed by either the unaccompanied child or ORR to the Assistant Secretary of ACF, or the Assistant Secretary's designee.

(1) Any such appeal request shall be in writing and must be received by ACF within 30 days of the hearing officer decision.

(2) The Assistant Secretary, or the Assistant Secretary's designee, shall review the record of the underlying hearing, and will reverse a hearing officer's decision only if there is a clear error of fact, or if the decision includes an error of law.

(3) If the hearing officer's decision found that the unaccompanied child would not pose a danger to self or to the community if released from ORR custody, and such decision would result in ORR releasing the unaccompanied child from its custody (*e.g.,* because the only factor preventing release was ORR's determination that the unaccompanied child posed a danger to self or to the community), an appeal to the Assistant Secretary shall not effect a stay of the hearing officer's decision, unless the Assistant Secretary issues a decision in writing within five business days of such hearing officer decision that release of the unaccompanied child would result in a danger to self or to the community. Such a stay decision must include a description of behaviors of the unaccompanied child while in ORR custody and/or documented criminal or juvenile behavior records from the unaccompanied child demonstrating that the unaccompanied child would present a danger to self or to the community if released.

(h) Decisions under this section are final and binding on the Department, and an unaccompanied child who was determined to pose a danger to self or to the community if released may only seek another hearing under this section if the unaccompanied child can demonstrate a material change in circumstances. Similarly, ORR may request the hearing officer to make a new determination under this section only if ORR can show that a material change in circumstances means the unaccompanied child should no longer be released due to presenting a danger to self or to the community.

(i) This section cannot be used to determine whether an unaccompanied child has a suitable sponsor.

(j) Determinations made under this section will not compel an unaccompanied child's release; nor will determinations made under this section compel transfer of an unaccompanied child to a different placement. Regardless of the outcome of a risk determination hearing or appeal, an unaccompanied child may not be released unless ORR identifies a safe and appropriate placement pursuant to subpart C of this part; and regardless of the outcome of a risk determination hearing or appeal, an unaccompanied child may only be transferred to another placement by ORR pursuant to requirements set forth at subparts B and G of this part.

Subpart K—Unaccompanied Children Office of the Ombuds (UC Office of the Ombuds)

§ 410.2000 Establishment of the UC Office of the Ombuds.

(a) The Unaccompanied Children Office of the Ombuds (hereafter, the ''UC Office of the Ombuds'') is located

within the Office of the ACF Assistant Secretary, and reports to the ACF Assistant Secretary.

(b) The UC Office of the Ombuds shall be an independent, impartial office with authority to receive reports, including confidential and informal reports, of concerns regarding the care of unaccompanied children; to investigate such reports; to work collaboratively with ORR to potentially resolve such reports; and issue reports concerning its efforts.

§ 410.2001 UC Office of the Ombuds policies and procedures; contact information.

(a) The UC Office of the Ombuds shall develop appropriate standards, practices, and policies and procedures, giving consideration to the recommendations by nationally recognized Ombudsperson organizations.

(b) The UC Office of the Ombuds shall make its standards, practices, reports and findings, and policies and procedures publicly available.

(c) The UC Office of the Ombuds shall make information about the office and how to contact it publicly available, in both English and other languages spoken and understood by unaccompanied children in ORR care. The Ombuds may identify preferred methods for raising awareness of the office and its activities, which may include, but not be limited to, visiting ORR facilities, or publishing aggregated information about the type and number of concerns the office receives, as well as giving recommendations.

§ 410.2002 UC Office of the Ombuds scope and responsibilities.

(a) The UC Office of the Ombuds may engage in activities consistent with § 410.2001, including but not limited to:

(1) Receiving reports from unaccompanied children, potential sponsors, other stakeholders in a child's case, and the public regarding ORR's adherence to its own regulations and standards.

(2) Investigating implementation of or adherence to Federal law and ORR regulations, in response to reports it receives, and meeting with interested parties to receive input on ORR's compliance with Federal law and ORR policy;

(3) Requesting and receiving information or documents, such as the Ombuds deems relevant, from ORR and ORR care provider facilities, to determine implementation of and adherence to Federal law and ORR policy;

(4) Preparing formal reports and recommendations on findings to publish, including an annual report describing activities conducted in the prior year;

(5) Conducting investigations, interviews, and site visits at care provider facilities as necessary to aid in the preparation of reports and recommendations;

(6) Visiting ORR care providers in which unaccompanied children are or will be housed;

(7) Reviewing individual circumstances, including but not limited to concerns about unaccompanied children's access to services, ability to communicate with service providers, parents or legal guardians of children in ORR custody, sponsors, and matters related to transfers within or discharge from ORR care;

(8) Making efforts to resolve complaints or concerns raised by interested parties as it relates to ORR's implementation or adherence to Federal law or ORR policy;

(9) Hiring and retaining others, including but not limited to independent experts, specialists, assistants, interpreters, and translators to assist the Ombuds in the performance of their duties;

(10) Making non-binding recommendations to ORR regarding its policies and procedures, specific to protecting unaccompanied children in the care of ORR;

(11) Providing general educational information about pertinent laws, regulations and policies, ORR child advocates, and legal services as appropriate; and

(12) Advising and updating the Director of ORR, Assistant Secretary, and the Secretary, as appropriate, on the status of ORR's implementation and adherence to Federal law or ORR policy.

(b) The UC Office of the Ombuds may in its discretion refer matters to other Federal agencies or offices with jurisdiction over a particular matter, for further investigation where appropriate, including to Federal or State law enforcement.

(c) To accomplish its work, the UC Office of the Ombuds may, as needed, have timely and direct access to:

(1) Unaccompanied children in ORR care;

(2) ORR care provider facilities;

(3) Case file information;

(4) Care provider and Federal staff responsible for children's care; and

(5) Statistical and other data that ORR maintains.

§ 410.2003 Organization of the UC Office of the Ombuds.

(a) The UC Ombuds shall be hired as a career civil servant.

(b) The UC Ombuds shall have the requisite knowledge and experience to effectively fulfill the work and the role, including membership in good standing of a nationally recognized organization, association of ombudsmen, or State bar association throughout the course of employment as the Ombuds, and to also include but not be limited to having demonstrated knowledge and experience in:

(1) Informal dispute resolution practices;

(2) Services and matters related to unaccompanied children and child welfare;

(3) Oversight and regulatory matters; and

(4) ORR policy and regulations.

(c) The Ombuds may engage additional staff as it deems necessary and practicable to support the functions and responsibilities of the Office.

(d) The Ombuds shall establish procedures for training, certification, and continuing education for staff and other representatives of the Office.

§ 410.2004 Confidentiality.

(a) The Ombuds shall manage the files, records, and other information of the program, regardless of format, and such files must be maintained in a manner that preserves the confidentiality of the records except in instances of imminent harm or judicial action and is prohibited from using or sharing information for any immigration enforcement related purpose.

(b) The UC Office of the Ombuds may accept reports of concerns from anonymous reporters.

Dated: April 15, 2024.

Xavier Becerra,

Secretary, Department of Health and Human Services.

Endnotes

[1] Unaccompanied Children Program Foundational Rule, 88 FR 68908 (Oct. 4, 2023).

[2] Public Law 107–296, sec. 462, 116 Stat. 2135, 2202.

[3] Public Law 110–457, title II, subtitle D, 122 Stat. 5044.

[4] *See also* 45 CFR 75.101.

[5] 6 U.S.C. 279(g)(2).

[6] *See generally* 8 U.S.C. 1232.

[7] 6 U.S.C. 279(a).

[8] *See* 6 U.S.C. 279(b)(1).

[9] 6 U.S.C. 279(b)(2).

[10] Memorandum of Agreement Among the Office of Refugee Resettlement of the U.S. Department of Health and Human Services and U.S. Immigration and Customs Enforcement and U.S. Customs and Border Protection of the U.S. Department of Homeland Security Regarding Consultation and Information Sharing in Unaccompanied Alien Children Matters (Mar. 11, 2021).

[11] *See* 8 U.S.C. 1232(a).

[12] 8 U.S.C. 1232(b)(2).

[13] 8 U.S.C. 1232(c)(1).

[14] *See* Delegation of Authority, 74 FR 14564 (Mar. 31, 2009); *see also* Delegation of Authority, 74 FR 19232 (Apr. 28, 2009).

[15] As discussed further, below, INS was abolished when the Department of Homeland Security was established in 2002. 6 U.S.C. 291.

[16] *See* Complaint for Injunctive and Declaratory Relief, and Relief in the Nature of Mandamus at 2, *Flores* v. *Meese,* No. 85–4544 (C.D. Cal. filed July 11, 1985).

[17] *Id. Flores* Compl. at paragraph 1.

[18] *See id.* at paragraph 66–69.

[19] *See* Stipulated Settlement Agreement, *Flores* v. *Reno,* No. CV 85–4544–RJK(Px) (C.D. Cal. Jan. 17, 1997, as amended Dec. 7, 2001).

[20] *See Flores* v. *Lynch,* 828 F.3d 898 (9th Cir. 2016) (holding that the FSA applies to accompanied children as well as unaccompanied children).

[21] *Id.* at paragraph 11.

[22] *Id.* at paragraphs 12A, 14.

[23] *Id.* at paragraph 24A.

[24] *Id.* at paragraph 9.

[25] *See* 63 FR 39759 (July 24, 1998).

[26] Stipulated Settlement Agreement, *Flores* v. *Reno,* No. CV 85–4544–RJK(Px) (C.D. Cal. Jan. 17, 1997, as amended Dec. 7, 2001), at paragraph 40.

[27] 67 FR 1670 (Jan. 14, 2002).

[28] 83 FR 45486 (Sep. 7, 2018).

[29] *Id.*

[30] Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 84 FR 44392, 44530 through 44535 (Aug. 23, 2019).

[31] *Id.* at 44526.

[32] *Flores* v. *Barr,* 407 F. Supp. 3d 909 (C.D. Cal. 2019).

[33] *Flores* v. *Rosen,* 984 F.3d 720 (9th Cir. 2020).

[34] *See id.*

[35] 984 F.3d 720, 737 (9th Cir. 2020).

[36] *Id.* With respect to the DHS portions of the 2019 Final Rule, the Ninth Circuit held that some of the DHS regulations regarding initial apprehension and detention were consistent with the FSA and could take effect, but that the remaining DHS regulations were inconsistent with the FSA and the district court properly enjoined them and the inconsistent HHS regulations from taking effect. *See id.* at 744.

[37] *California* v. *Mayorkas,* No. 2:19–v–07390 (C.D. Cal. filed Aug. 26, 2019).

[38] *See* Stipulation re Request to Hold Plaintiffs' Claims as to HHS Under Abeyance, *California* v. *Mayorkas,* No. 2:19–v–07390 (C.D. Cal. Apr. 12, 2022), ECF No. 159. *See also* Order Approving Stipulation, ECF No. 160.

[39] *See id.*

[40] Pending E.O. 12866 Regulatory Review, *https://www.reginfo.gov/public/do/eoDetails?rrid=312162.*

[41] *Lucas R.* v. *Becerra,* Case No. 2:18–cv–5741 (C.D. Cal. filed Jun. 29, 2018).

[42] Amended Order re Defendants' Motion to Dismiss [101] and Plaintiff's Motion for Class Certification [97], *Lucas R.* v. *Becerra,* No. 2:18–cv–05741 (C.D. Cal. December 27, 2018), ECF No. 141 at 27–28.

[43] Order re Preliminary Approval of Settlement and Approval of the Parties' Joint Proposal re Notice to Lucas R Class Members of Settlement of Plaintiffs' Third, Fourth, and Fifth Claims for Relief [Psychotropic Medications, Legal Representation, and Disability, *Lucas R.* v. *Becerra,* No. 2:18–cv–05741 (C.D. Cal. January 5, 2024), ECF No. 410.

[44] Since publication of the NPRM, the title of the ORR Director was updated to Deputy Assistant Secretary for Humanitarian Services and Director of the Office of Refugee Resettlement. The definition of ''Director'' has been updated in the regulation text, but the term has not been replaced in this final rule when discussing statutory authorities or delegations of power under the HSA or TVPRA.

[45] 6 U.S.C. 279(b)(1).

[46] 8 U.S.C. 1232(b)(2).

[47] 8 U.S.C. 1232(c)(1).

[48] 74 FR 14564 (2009).

[49] 74 FR 1232 (2009).

[50] *See* 8 U.S.C. 1232(c)(1); *see also* 6 U.S.C. 279(b)(1)(L).

[51] *https://www.acf.hhs.gov/sites/default/files/documents/olab/fy-2025-congressional-justification.pdf.*

[52] 8 U.S.C. 1232(c)(1).

[53] *See, e.g.,* Memorandum of Agreement between U.S. Department of Labor and HHS Regarding Inter-agency Data Sharing (Mar. 23, 2023), *https://www.acf.hhs.gov/sites/default/files/documents/main/23-MOA-096-between-DOL-WHD-and-HHS-ACF-Regarding-Inter-Agency-Data-Sharing-Agreement_0.pdf* (expanding interagency efforts to identify communities and employers where children may be at risk of child labor exploitation; aiding investigations with information to help identify circumstances where children are unlawfully employed; and facilitating coordination to ensure that child labor trafficking victims or potential victims have access to critical services).

[54] *https://www.hhs.gov/about/hhs-manuals/gam-part-30/302000/index.html.*

[55] To find information regarding regulatory reviews by the Office of Management and Budget, visit *https://www.reginfo.gov/public/* . To confirm the status of review of this rule, search ''Foundational Rule'' in the search box.

[56] ORR Unaccompanied Children Program Policy Guide, *https://www.acf.hhs.gov/orr/policy-guidance/unaccompanied-children-program-policy-guide.*

[57] Unaccompanied Children's Program Field Guidance, *https://www.acf.hhs.gov/orr/policy-guidance/uc-program-field-guidance.*

[58] 8 U.S.C. 1232(c)(2)(A).

[59] *See, e.g.,* 8 U.S.C. 1226(c)(2) (authorizing the Attorney General to release certain noncitizens from custody where, among other circumstances, ''the alien satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding''). *See also Matter of Guerra,* 24 I&N Dec. 37, 40 (BIA 2006) (discussing factors immigration judges may look to in determining whether an alien merits release on bond, and noting among those factors, ''any attempts by the alien to flee prosecution or otherwise escape from authorities.'').

[60] *See, e.g.,* Proclamation by the Governor of the State of Texas, May 31, 2021, *available at: https://gov.texas.gov/uploads/files/press/DISASTER_border_security_IMAGE_05-31-2021.pdf (*directing the Texas Health and Human Service Commission (HHSC) to amend its regulations to ''discontinue State licensing of any child-care facility in this state that shelters or detains [UC] under a contract with the Federal Government.''); *see also* Fl. Executive Order No. 21–223 (Sept. 28, 2021), *available at: https://www.flgov.com/wp-content/uploads/orders/2021/EO_21-223.pdf.*

[61] Separate from this final rule, ACF is currently developing a notice of proposed rulemaking that would describe the creation of a Federal licensing scheme for ORR care providers located in states where licensure is unavailable to programs serving unaccompanied children.

[62] Office to Monitor and Combat Trafficking in Persons. (2020, June). *Trauma Bonding in Human Trafficking.* U.S. Department of State. *https://www.state.gov/wp-content/uploads/2020/10/TIP_Factsheet-Trauma-Bonding-in-Human-Trafficking-508.pdf.*

[63] *See* 6 U.S.C. 279(b)(1)(B); 8 U.S.C. 1232(c)(2)(A).

[64] *See* 81 FR 46683 (''As a matter of discretion, ORR will treat information that it maintains in its mixed systems of records as being subject to the provisions of the Privacy Act, regardless of whether or not the information relates to U.S. persons covered by the Privacy Act.'').

[65] *See e.g.,* 42 CFR 59.2 (defining ''family planning'' to include: ''Food and Drug Administration (FDA)-approved contraceptive products and natural family planning methods, for clients who want to prevent pregnancy and space births, pregnancy testing and counseling, assistance to achieve pregnancy, basic infertility services, sexually transmitted infection (STI) services, and other preconception health services''); the joint Centers for Disease Control and Office of Population Affairs Quality Family Planning guidebook, available at: *https://opa.hhs.gov/sites/*

default/files/2020-10/providing-quality-family-planning-services-2014_1.pdf; and the State Medicaid Manual at section 4270, available at: *https://www.hhs.gov/guidance/sites/default/files/hhs-guidance-documents/sm_4_4270_to_4390.1_181.doc.*

[66] 45 CFR 92.101.

[67] *See, e.g.,* 6 U.S.C. 279(b)(1); *see also* 8 U.S.C. 1232(c)(1) and (c)(2)(A).

[68] *See* 8 U.S.C. 1232(c)(1).

[69] *See, e.g.,* 79 FR 77776 (''. . . ORR requires that all care provider facilities refer all allegations, regardless of how an allegation is made or who it comes from, to the proper investigating authorities. ORR and care provider facilities have no control over whether law enforcement, Child Protective Services, or a State or local licensing agency conducts an investigation. Both ORR and care provider facilities, however, must attempt to remain informed of ongoing investigations and fully cooperate as necessary.'').

[70] *See* 8 U.S.C. 1232(b)(1).

[71] *See* FSA at paragraph 19.

[72] 8 U.S.C. 1232(b)(1).

[73] 6 U.S.C. 279(b)(1)(A).

[74] *See, e.g.,* paragraph 10 (defining the class in the action as ''All minors who are detained in the legal custody of the INS''); paragraph 14E (listing ''a licensed program willing to accept legal custody'' within the preferred order of release of children; paragraph 19 (''in any case in which the INS does not release a minor pursuant to paragraph 14, the minor shall remain in INS legal custody . . . All minors placed in . . . a licensed program remain in the legal custody of the INS and may only be transferred or released under the authority of the INS . . .'').

[75] *Jenny L. Flores* v. *William P. Barr,* No. CV854544DMGAGRX, 2020 WL 5491445, at *3 (C.D. Cal. Sept. 4, 2020).

[76] 6 U.S.C. 279(b)(1). *See also* 8 U.S.C. 1232(c)(2)(A).

[77] The TVPRA also contains specific provisions for DHS to screen children who are from contiguous countries to determine whether such children meet statutory criteria to return to the child's country of nationality or of last habitual residence. If the child does not meet the criteria to return or no determination can be made within 48 hours of apprehension, the child shall ''immediately be transferred to the Secretary of HHS and treated in accordance with subsection (b).'' 8 U.S.C. 1232(a)(4). ORR reads this language in concert with the language in 8 U.S.C. 1232(b)(3) and, thus, include the one 72-hour standard in this final rule.

[78] ORR has existing policies relating to the placement and transfer of *Saravia* class members, defined as noncitizen minors who (1) came to the United States as unaccompanied children, as defined at 6 U.S.C. 279(g)(2); (2) were previously detained in the custody of ORR but then released to a sponsor by ORR; and (3) have been or will be rearrested by DHS on the basis of a removability warrant based in whole or in part on allegations of gang affiliation. *See* Order Certifying the Settlement Class and Granting Final Approval of Class Action Settlement, *Saravia* v. *Barr,* Case No.: 3:17–cv–03615 (N.D. Cal. Jan. 19, 2021), ECF No. 249. In *Saravia* bond hearings DHS bears the burden to demonstrate changed circumstances since the minor's release by ORR which demonstrate the minor is a danger to the community. DHS must demonstrate that circumstances have changed since the child's release from ORR custody such that the child poses a danger to the community or is a flight-risk.

[79] 8 U.S.C. 1232(b)(3).

[80] *See, e.g.,* ORR Policy Guide 1.1.

[81] *See also infra* preamble discussion at subpart C.

[82] 8 U.S.C. 1232(b)(3).

[83] *See* 8 U.S.C. 1232(b)(2), (3).

[84] *See www.acf.hhs.gov/orr/fact-sheet/programs/uc/influx-care-facilities-fact-sheet.*

[85] *See* FSA paragraph 21.

[86] *See generally* 6 U.S.C. 279(b)(1).

[87] *See* FSA at paragraph 19 and Exhibit 3.

[88] The case manager is the case manager assigned at the child's initial in-network placement.

[89] *See* 8 U.S.C. 1232(c).

[90] ORR is adopting recommendations to use the term ''LGBTQI+ status or identity'' in the final rule in lieu of ''LGBTQI+ status'' as proposed in the NPRM. As used by ORR, these terms have the same meaning. Accordingly, for clarity, ORR has replaced ''LGBTQI+ status'' with ''LGBTQI+ status or identity'' in this final rule.

[91] *See generally* 6 U.S.C. 279(b)(1); 8 U.S.C. 1232(c)(2).

[92] *See* 8 U.S.C. 1232(c)(2)(A); *see also* 2019 Final Rule at § 410.203(c).

[93] *See* 6 U.S.C. 279(b)(1)(C) and (D).

[94] *See* 8 U.S.C. 1232(b)(3).

[95] *See* 6 U.S.C. 279(b)(2)(A).

[96] 6 U.S.C. 279(b)(2)(A).

[97] ORR notes that under 45 CFR 411.11(c), care provider facilities must have a written policy mandating zero tolerance toward all forms of sexual abuse and sexual harassment and outlining the care provider facility's approach to preventing, detecting, and responding to such conduct. Under 45 CFR 411.11(a), the care provider facility also must ensure that all policies and services related to part 411 are implemented in a culturally sensitive and knowledgeable manner that is tailored for a diverse population.

[98] *See* ORR Policy Guide 1.2.2.

[99] 45 CFR 87.3(c); *see also* 45 CFR 87.3(e) (2014).

[100] 45 CFR 87.3(b) and (n) (2014).

[101] 88 FR 66752.

[102] *See, e.g.,* 6 U.S.C. 279(b)(2)(A)(ii); 8 U.S.C. 1232(c)(1).

[103] 8 U.S.C. 1232(c)(2)(A).

[104] *The Office of Refugee Resettlement Needs to Improve Its Oversight Related to the Placement and Transfer of Unaccompanied Children* (A–06–20–07002), May 2023.

[105] 6 U.S.C. 279(b)(1).

[106] 8 U.S.C. 1232(c)(2)(A).

[107] *See* 8 U.S.C. 1232(c)(2)(A) (''A child shall not be placed in a secure facility absent a determination that the child poses a danger to self or others or has been charged with having committed a criminal offense.'').

[108] *See, e.g.,* 8 U.S.C. 1232(c)(2)(A) (requiring that unaccompanied children ''shall be promptly placed in the least restrictive setting that is in the best interest of the child.'').

[109] FSA at paragraph 21C.

[110] *See also* Order Re Plaintiffs' Motion to Enforce Class Action Settlement at *11, *Flores* v. *Sessions,* No. 2:85–cv–04544, (C.D. Cal. Jul. 30, 2018), ECF No. 470 (ordering ORR to transfer all unaccompanied children placed at a particular RTC out of that facility unless a licensed psychologist or psychiatrist determined that a particular child posed a risk of harm to self or others).

[111] *See* 8 U.S.C. 1232(c)(2)(A) (''In making such placements, the Secretary may consider danger to self, danger to the community, and risk of flight.'').

[112] *See* 6 U.S.C. 279(b)(1)(G).

[113] *See, e.g.,* §§ 410.1003, 410.1103, 410.1300, 410.1302, 410.1801(b)).

[114] *See* 8 U.S.C. 1232(c)((2)(A)).

[115] *See, e.g.,* §§ 410.1302 through 1309, 1311.

[116] 8 U.S.C. 1232(c)(2)(A).

[117] *See generally* subpart J.

[118] 8 U.S.C. 1232(c)(2)(A).

[119] *Id.*

[120] *See* FSA at paragraph 21A (''. . . is the subject of delinquency proceedings, has been adjudicated delinquent, or is chargeable with a delinquent act . . .'').

[121] The Family First Prevention Services Act, which was enacted as part of Public Law 115–123 and established a Title IV–E prevention program in the domestic child welfare context, defines the term Qualified Residential Treatment Program at 42 U.S.C. 672(k)(4).

[122] 53 FR 25591, 25600 (July 8, 1988).

[123] 8 U.S.C. 1232(c)(2)(A).

[124] *See* FSA at paragraph 22 (''Factors to consider when determining whether a minor is an escape-risk or not include, but are not limited to . . .'').

[125] Existing § 410.204 also does not limit ORR to considering just the factors listed in the regulation and states ''ORR considers, among other factors . . .''

[126] Office to Monitor and Combat Trafficking in Persons. (2020, June). *Trauma Bonding in Human Trafficking.* U.S. Department of State. *https://www.state.gov/wp-content/uploads/2020/10/TIP_Factsheet-Trauma-Bonding-in-Human-Trafficking-508.pdf.*

[127] *See, e.g.,* 6 U.S.C. 279(b)(1)(B) (making ORR responsible for ''ensuring that the interests of the child are considered in decisions and actions relating to the care and custody of an unaccompanied alien child'').

[128] Exhibit 6 of the FSA provides the following notice language: ''The INS usually houses persons under the age of 18 in an open setting, such as a foster or group home, and not in detention facilities. If you believe that you have not been properly placed or that you have been treated improperly, you may ask a Federal judge to review your case. You may call a lawyer to help you do this. If you cannot afford a lawyer, you may call one from the list of free legal services given to you with this form.''

[129] *See, e.g., Nat'l Archives & Records Admin.* v. *Favish,* 541 U.S. 157, 174 (2004).

[130] 8 U.S.C. 1232(c)(3)(A).

[131] *See, e.g.,* FSA at paragraph 15 (requiring sponsors to sign an Affidavit of Support and an agreement to, among other things, provide for the unaccompanied child's physical,

mental, and financial well-being); see also paragraph 19 (noting that in any case where an unaccompanied child is not released to a sponsor, the unaccompanied child ''shall remain in INS legal custody.'').

[132] *See* 6 U.S.C. 279(b)(1); *see also* 8 U.S.C. 1232(c)(2)(A).

[133] *See* FSA at paragraph 14.

[134] *See* 8 U.S.C. 1232(c)(2)(A) (requiring HHS to ''promptly'' place unaccompanied children).

[135] *See* 88 FR 68928.

[136] 8 U.S.C. 1232(c)(3)(A).

[137] *See* 8 U.S.C. 1232(c)(3)(A); *see also* FSA paragraph 17.

[138] *See* 8 U.S.C. 1232(c)(3).

[139] *See* 8 U.S.C. 1232(c)(3).

[140] 8 U.S.C. 1232(c)(3).

[141] *See, e.g.,* 6 U.S.C. 279(b)(2).

[142] See, *e.g., Plyler* v. *Doe,* 457 U.S. 202 (1982) (finding that under the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution, a State may not deny access to a basic public education to any child residing in the State, whether present in the United States legally or otherwise); Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.,* and the Equal Educational Opportunity Act of 1974, 20 U.S.C. 1701 *et seq.* (prohibiting public schools from discriminating on the basis of race, color, or national origin).

[143] *See* 42 U.S.C. 2000d; *see also* U.S. Dep't of Justice, Civil Rights Division & U.S. Dep't of Education, Office for Civil Rights, *Information on the Rights of All Children to Enroll in School: Questions and Answers for States, School Districts and Parents,* Answers 3, 5, 7, and 8 (rev. May 8, 2014), *https://www2.ed.gov/about/offices/list/ocr/docs/qa-201405.pdf.*

[144] *See, e.g.,* ORR Policy Guide 2.1, 2.2.

[145] ORR. Unaccompanied Children Fact Sheet. *https://www.acf.hhs.gov/orr/about/ucs/facts-and-data#lengthofcare.*

[146] *See* 8 U.S.C. 1232(c)(3)(B).

[147] 8 U.S.C. 1232(c)(3)(A).

[148] 8 U.S.C. 1232(c)(1).

[149] 8 U.S.C. 1232(c)(3)(A).

[150] *See generally* 6 U.S.C. 279(b)(1); 8 U.S.C. 1232(c).

[151] *See, e.g.,* 8 U.S.C. 1232(c) and (c)(3)(A); and 6 U.S.C. 279(b)(1).

[152] *Id.*

[153] A home study provider is a non-governmental agency funded by ORR to conduct home studies.

[154] *Lucas R* v. *Becerra,* Summ. J. Order, Mar. 11, 2022, at 42, No. 18–CV–5741 (C.D. Cal.).

[155] *Id.* at 41. In the Court's Summary Judgment Order, the Court was addressing instances where providing information to the child may cause distress to the child. Here, ORR is recognizing that by providing some information to a sponsor, the child may also be harmed.

[156] *Id.*

[157] *Lucas R* v. *Becerra,* Summ. J. Order, Mar. 11, 2022, at 37, No. 18–CV–5741 (C.D. Cal.).

[158] *See generally* 6 U.S.C. 279(b)(1); 8 U.S.C. 1232(c).

[159] *See* 8 U.S.C. 1232(c)(1).

[160] *See Lucas R* v. *Becerra,* Summ. J. Order, Mar. 11, 2022, at 40, No. 18–CV–5741 (C.D. Cal.) (''Furthermore, in recognition of ORR's need to serve thousands of minors and potential sponsors and the limited liberty interests at issue for minors with no familial sponsor, the Court will not require such notice or an opportunity to be heard for denial of a Category 3 sponsor.''). The definition of a Category 3 sponsor as relied on by the court in Lucas R. includes distant relatives and unrelated adult individuals. *Id.* at 11.

[161] ORR is revising the heading of § 410.1207 to update the term ''release application'' to ''sponsor application,'' which is consistent with the terminology used in ORR's policies regarding release. *See* ORR Policy Guide 2.7.9. For clarity, ORR is also updating the term ''release application'' to ''sponsor application'' throughout the rest of this final rule, even where summarizing NPRM language, which used the term ''release application.''

[162] *See* ORR Policy Guide 2.7.9.

[163] 8 U.S.C. 1232(c)(2)(A).

[164] *See* 45 CFR 400.115.

[165] *See generally* 45 CFR 410.1001; 6 U.S.C. 279(b)(1); 8 U.S.C. 1232(c).

[166] *See* 8 U.S.C. 1101(a)(27)(J). *See also* 8 U.S.C. 1232(d)(2).

[167] *See, e.g.,* 8 U.S.C. 1232(d).

[168] *See generally* U.S. Citizenship and Immigration Services Policy Manual, Vol. 6, Part J, Ch. 1, available at: *https://www.uscis.gov/policy-manual/volume-6-part-j-chapter-1.*

[169] Administration for Children and Families. Program Instruction: Specific Consent Requests. Issued Dec. 9, 2009. Available at *https://www.acf.hhs.gov/sites/default/files/documents/orr/special_immigrant_juvenile_status_specific_consent_program.pdf.*

[170] *See, e.g.,* Administration for Children and Families. Program Instruction: Specific Consent Requests. Issued Dec. 9, 2009. Available at *https://www.acf.hhs.gov/sites/default/files/documents/orr/special_immigrant_juvenile_status_specific_consent_program.pdf.*

[171] *See* 8 U.S.C. 1232(c)(3)(B).

[172] *See* Section 6 of the ORR Policy Guide.

[173] *See* 8 U.S.C. 1232(c)(3)(B).

[174] ORR's revised PRS policies state that all released children are eligible to receive PRS.

[175] ORR Policy Guide section 2.4.2 requires a home study before releasing an unaccompanied child to a non-relative sponsor who is seeking to sponsor: (1) multiple unaccompanied children; (2) additional unaccompanied children and the non-relative sponsor has previously sponsored or sought to sponsor an unaccompanied child; or (3) unaccompanied children who are 12 years and under.

[176] The types of services that would be available as part of PRS are described in ORR Policy Guide 6.2.5 through 6.5.

[177] The types of services that would be available as part of PRS are described in ORR Policy Guide 6.2.5 through 6.5.

[178] Office to Monitor and Combat Trafficking in Persons. (2020, June). *Trauma Bonding in Human Trafficking.* U.S. Department of State. *https://www.state.gov/wp-content/uploads/2020/10/TIP_Factsheet-Trauma-Bonding-in-Human-Trafficking-508.pdf.*

[179] Currently, ORR provides three levels of PRS—Levels One, Two, and Three. *See* ORR Policy Guide 6.3 through 6.5.

[180] ORR notes that care provider facilities currently conduct safety and well-being follow-up calls 30 days after the unaccompanied child's release date.

[181] *See* ORR Policy Guide 6.4, 6.5, and 6.6 (requiring PRS providers to start PRS within two (2) days of the child's release from ORR custody for Level Two and Three PRS).

[182] As revised since publication of the NPRM, ORR Policy Guide 6.3 states that for Level One PRS, PRS providers conduct three virtual check-ins at seven (7) business days, fourteen (14) business days, and thirty (30) business days after the child's release from ORR custody to a sponsor. ORR Policy Guide 6.4 states that for Level Two PRS, PRS case managers must make initial contact with the child and/or sponsor within two (2) business days of a referral being accepted by the PRS provider. ORR Policy Guide 6.5 states that for Level Three PRS, a PRS clinician must make initial contact with the child and/or sponsor within two (2) business days of a referral being accepted by the PRS provider.

[183] ORR revised the termination guidelines, and they vary by PRS level and are described in ORR Policy Guide 6.3 through 6.6.

[184] ORR Policy Guide 6.8.6 describes the list of reasons for concern that necessitates the PRS provider to submit a NOC.

[185] ORR Policy Guide 6.8.6.

[186] *See* 8 U.S.C. 1232(c)(3)(B) (''. . . The Secretary of Health and Human Services shall conduct follow-up services, during the pendency of removal proceedings, on children for whom a home study was conducted . . .'').

[187] *See* ORR Policy Guide 6.2.3 (describing identification of appropriate services).

[188] 8 U.S.C. 1232(c)(3)(B).

[189] *See generally* ORR Policy Guide 6.1; 6.2.9; and 6.2.13.

[190] *See, e.g.,* ORR Guide 6.2.4 (requiring PRS providers to help educate children and their sponsor families on identifying risks and red flags that may lead to child exploitation; sex and labor trafficking; substance abuse; physical, emotional, or sexual abuse; coercion by gangs or gang affiliation; or other situations where the child would be in danger or at risk of harm).

[191] *See, e.g.,* ORR Policy Guide at 6.2.8; 6.2.9; 6.2.10.

[192] *See* ORR Policy Guide 6.2.5 (stating that the PRS case manager refers the sponsor to legal services that can assist with establishing guardianship with a local court in a reasonable timeframe).

[193] 45 CFR 87.3(c) (2014).

[194] 45 CFR 87.3(b) and (n).

[195] *See* ORR Policy Guide 6.3 through 6.6.

[196] *See* ORR Policy Guide 6.2.1.

[197] *See* ORR Policy Guide 6.1; 6.2.13.

[198] The Refugee Health Screener-15 ''screens for common mental health conditions (anxiety, depression, PTSD, adjustment, coping), but not for domestic violence, substance use, or psychotic disorders.'' CDC. (2022, March 24). *Guidance for Mental Health Screening during the Domestic Medical Examination for Newly Arrived Refugees. https://www.cdc.gov/immigrantrefugeehealth/guidelines/*

domestic/mental-health-screening-guidelines.html.

[199] The Trauma History Profile is a tool ''comprehensive list of trauma, loss, and separation exposures paired with a rating scale on which the interviewer records whether each trauma occurred or was suspected to occur.'' Betancourt, T.S., Newnham, E.A., Layne, C.M., Kim, S., Steinberg, A.M., Ellis, H., & Birman, D. (2012). Trauma History and Psychopathology in War-Affected Refugee Children Referred for Trauma-Related Mental Health Services in the United States. Journal of Traumatic Stress, 25(6), 682–690. *https://doi.org/10.1002/jts.21749.*

[200] *See* ORR Policy Guide 6.2.7.

[201] *See* ORR Policy Guide 6.7.3.

[202] *See generally* ORR Policy Guide 6.3 through 6.6.

[203] *See* ORR Policy Guide 6.3 through 6.6.

[204] *See* ORR Policy Guide 6.3; 6.4; 6.5.

[205] *See* ORR Policy Guide 6.8.5.

[206] *See also* ORR Policy Guide 6.9.

[207] *See, e.g.,* ORR Policy Guide 6.2.5; 6.2.6; and 6.2.7.

[208] *See* ORR Policy Guide 6.8.2 (stating PRS providers must upload all PRS documentation to ORR's online case management system within five to seven days of completion).

[209] *See* ORR Policy Guide 6.8.7.

[210] *See* ORR Policy Guide 6.8.2.

[211] *See, e.g.,* 45 CFR 75.364 (''The HHS awarding agency, Inspectors General, the Comptroller General of the United States, and the pass-through entity, or any of their authorized representatives, must have the right of access to any documents, papers, or other records of the non-Federal entity which are pertinent to the Federal award, in order to make audits, examinations, excerpts, and transcripts. The right also includes timely and reasonable access to the non-Federal entity's personnel for the purpose of interview and discussion related to such documents.'').

[212] *See* ORR Policy Guide 6.8.3.

[213] *See* ORR Policy Guide 6.8.3.

[214] *See* 5 U.S.C. 552a(b).

[215] *See* 81 FR 46683 (''As a matter of discretion, ORR will treat information that it maintains in its mixed systems of records as being subject to the provisions of the Privacy Act, regardless of whether or not the information relates to U.S. persons covered by the Privacy Act.'').

[216] *See* 5 U.S.C. 552a(h) (''For the purposes of this section, the parent of any minor, or the legal guardian of any individual who has been declared to be incompetent due to physical or mental incapacity or age by a court of competent jurisdiction, may act on behalf of the individual.'').

[217] *See* ORR Policy Guide 6.8.5.

[218] *See* 5 U.S.C. 552a(b).

[219] *See* ORR Policy Guide 6.8.6.

[220] *See* ORR Policy Guide 6.2.1.

[221] *See* ORR Policy Guide 6.3 through 6.6.

[222] *See, e.g.,* 8 U.S.C. 1232(c)(1).

[223] *See* ORR Policy Guide 6.2.1.

[224] *See* ORR Policy Guide 6.3 through 6.6.

[225] *See, e.g.,* 45 CFR 75.371 (describing remedies for noncompliance with Federal statutes, regulations, or the terms and conditions of a Federal award).

[226] *See* ORR Policy Guide 6.9.2.

[227] For reasons discussed in our responses to comments received regarding § 410.1307(c), ORR is updating the regulation to state that the ORR employee is required to abide by their Federal duties ''subject to applicable Federal religious freedom and conscience protections.''

[228] Dietary Guidelines for Americans. Available at *https://www.dietaryguidelines.gov/current-dietary-guidelines.*

[229] *See* 45 CFR part 87.

[230] *See, e.g.,* FSA at paragraphs 6, 12, and 19; *see also* paragraph 40, as amended.

[231] FSA paragraph 6.

[232] *See* Proclamation by the Governor of the State of Texas, May 31, 2021, *available at: https://gov.texas.gov/uploads/files/press/DISASTER_border_security_IMAGE_05-31-2021.pdf.*

[233] *See* 26 Tex. Admin. Code 745.115.

[234] Fl. Executive Order No. 21–223 (Sep. 28, 2021), *available at: https://www.flgov.com/wp-content/uploads/orders/2021/EO_21-223.pdf.*

[235] S.C. Exec. Order No. 2021–19 (Apr. 12, 2021), *https://governor.sc.gov/sites/default/files/Documents/Executive-Orders/2021-04-12%20FILED%20Executive%20Order%20No.%202021-19%20-%20Prioritizing%20SC%20Children.pdf.*

[236] *See* ORR Fact Sheets and Data, available at *https://www.acf.hhs.gov/orr/about/ucs/facts-and-data.*

[237] Calculations based on data available at ORR, Unaccompanied Children Released to Sponsors by State, *https://www.acf.hhs.gov/orr/grant-funding/unaccompanied-children-released-sponsors-state* (last accessed Feb. 14, 2024).

[238] *See, e.g.,* ORR Policy Guide 3.5.

[239] *See* ORR Policy Guide 3.5.

[240] *https://www.dol.gov/agencies/whd/resources/videos/know-your-rights.*

[241] *See, e.g.,* 6 U.S.C. 279(b)(1) (describing ORR responsibilities including implementing policies with the respect to the care of unaccompanied children, ensuring the interests of unaccompanied children are considered, and overseeing the infrastructure and personnel of facilities where unaccompanied children reside).

[242] ORR also notes that to the extent that a care provider has acted contrary to the terms and conditions of its funding, they may be subject to consequences described at 45 CFR part 75, subpart D.

[243] ORR Unaccompanied Children Policy Guide 4.3.5. Available at *https://www.acf.hhs.gov/orr/policy-guidance/unaccompanied-children-program-policy-guide-section-4#4.3.5.*

[244] *See* 6 U.S.C. 279(b).

[245] *See* 8 U.S.C. 1232(c)(1); *see also id.* at 1232(b).

[246] *See* 81 FR 46682 (July 18, 2016) (stating that ''[t]he case file contains information that is pertinent to the care and placement of unaccompanied children, including . . . post-release service records[.]'').

[247] Exposing the Risks of Deliberate Ignorance: Years of Mismanagement and Lack of Oversight by the Office of Refugee Resettlement, Leading to Abuses and Substandard Care of Unaccompanied Alien Children October 2021, available at: *https://www.finance.senate.gov/imo/media/doc/102821%20Finance%20Committee%20Report%20ORR%20UAC%20Program.pdf.*

[248] *See, e.g.,* 45 CFR 75.371.

[249] H.R. REP. 116–450.

[250] See 81 FR 46683.

[251] 8 U.S.C. 1232(c)(6)(A).

[252] *See* Joint Motion for Preliminary Approval of Class Action Settlement, And to Certify Settlement Class, *Ms. L.* v. *U.S Immigr. & Customs Enf't,* No. 3:18–cv–00428, (S.D. Cal. Oct. 16, 2023), ECF No. 711; Order Granting Final Approval of Settlement Agreement and Certifying the Settlement Classes, *Ms. L.* v. *U.S Immigr. & Customs Enf't,* No. 3:18–cv–00428, (S.D. Cal. Dec. 11, 2023), ECF No. 727.

[253] *See, e.g.,* 45 CFR 75.364(a).

[254] *See* 6 U.S.C. 279(b)(1)(G).

[255] Operational Challenges Within ORR and the ORR Emergency Intake Site at Fort Bliss Hindered Case Management for Children. Available at: *https://oig.hhs.gov/oei/reports/OEI-07-21-00251.pdf.*

[256] *See* 45 CFR 87.3(a).

[257] Atena Aire. *How to Build Language Justice.* (pg. 4). Available at: *https://antenaantena.org/wp-content/uploads/2020/10/AntenaAire_HowToBuildLanguageJustice.pdf.*

[258] *See, e.g.,* ORR Policy Guide 4.3.5, Staff Code of Conduct.

[259] *See* ORR Policy Guide 3.3.7 and 4.3.6.

[260] *See, e.g.,* Administration for Children and Families. Field Guidance #22—Interpreters Working with the Unaccompanied Children (UC) Program. Available at *https://www.acf.hhs.gov/sites/default/files/documents/orr/field-guidance-22_interpreters-at-ucp-sites_10.26.2021-v2.pdf.*

[261] *See* ORR Policy Guide 5.9.

[262] *See, e.g.,* Policy Memorandum, Medical Services Requiring Heightened ORR Involvement, available at *https://www.acf.hhs.gov/sites/default/files/documents/orr/garza_policy_memorandum.pdf;* Field Guidance #21—Compliance with Garza Requirements and Procedures for Unaccompanied Children Needing Reproductive Healthcare, available at *https://www.acf.hhs.gov/sites/default/files/documents/orr/field-guidance-21.pdf. See also* 45 CFR 411.92(d) (requiring timely and comprehensive information about lawful pregnancy-related medical services and timely access to such services for unaccompanied children who experience sexual abuse while in ORR care).

[263] *See* 6 U.S.C. 279(b)(1)(B), (E).

[264] *See, e.g.,* Consolidated Appropriations Act, 2023, Public Law 117–328, Div. H, tit. V, sections 506–507; *see also* Department of Justice, Office of Legal Counsel, *Application of the Hyde Amendment to the Provision of Transportation for Women Seeking Abortions* (Sept. 27, 2022), *https://www.justice.gov/d9/2022-11/2022-09-27-hyde_amendment_application_to_hhs_transportation.pdf.*

[265] *See* 45 CFR part 87.

[266] 6 U.S.C. 279(b)(1)(B), (E).

[267] Administration for Children and Families. Field Guidance #21—Compliance with Garza Requirements and Procedures for Unaccompanied Children Needing

Reproductive Healthcare, available at *https://www.acf.hhs.gov/sites/default/files/documents/orr/field-guidance-21.pdf.*

[268] 6 U.S.C. 279(b)(1)(B), (E)).

[269] *See* Administration for Children and Families. Field Guidance #21—Compliance with Garza Requirements and Procedures for Unaccompanied Children Needing Reproductive Healthcare, available at *https://www.acf.hhs.gov/sites/default/files/documents/orr/field-guidance-21.pdf.*

[270] Administration for Children and Families. Field Guidance #21—Compliance with Garza Requirements and Procedures for Unaccompanied Children Needing Reproductive Healthcare, available at *https://www.acf.hhs.gov/sites/default/files/documents/orr/field-guidance-21.pdf.*

[271] Administration for Children and Families. Policy Memorandum, Medical Services Requiring Heightened ORR Involvement, available at *https://www.acf.hhs.gov/sites/default/files/documents/orr/garza_policy_memorandum.pdf.*

[272] Department of Justice, Office of Legal Counsel, *Application of the Hyde Amendment to the Provision of Transportation for Women Seeking Abortions* (Sept. 27, 2022), *https://www.justice.gov/d9/2022-11/2022-09-27-hyde_amendment_application_to_hhs_transportation.pdf.*

[273] 6 U.S.C. 279(b)(1)(B), (E)).

[274] *See* Administration for Children and Families, Policy Memorandum, Medical Services Requiring Heightened ORR Involvement (Sept. 29, 2020), available at *https://www.acf.hhs.gov/sites/default/files/documents/orr/garza_policy_memorandum.pdf.*

[275] *See* 6 U.S.C. 279(b)(1)(B); *see also* 1 U.S.C. 8(a).

[276] Administration for Children and Families. Policy Memorandum, Medical Services Requiring Heightened ORR Involvement, available at *https://www.acf.hhs.gov/sites/default/files/documents/orr/garza_policy_memorandum.pdf.*

[277] Administration for Children and Families. Field Guidance #21—Compliance with Garza Requirements and Procedures for Unaccompanied Children Needing Reproductive Healthcare, available at *https://www.acf.hhs.gov/sites/default/files/documents/orr/field-guidance-21.pdf.*

[278] 85 FR 82037, codified under 45 CFR Part 87.

[279] 89 FR 2078, codified under 45 CFR Part 88.

[280] *See* GAO, April 19, 2016, ''Unaccompanied Children: HHS Should Improve Monitoring and Information Sharing Policies to Enhance Child Advocate Program Effectiveness,'' GAO–16–367.

[281] *See* 8 U.S.C. 1232(c)(6)(A) (''. . . A child advocate shall be provided access to materials necessary to effectively advocate for the best interest of the child . . .'').

[282] 8 U.S.C. 1232(c)(6)(A).

[283] *See* 8 U.S.C. 1232(c)(6)(A).

[284] *See* 6 U.S.C. 279(b)(1)(B), (E), and (G).

[285] *See* Joint Motion for Preliminary Approval of Class Action Settlement, And to Certify Settlement Class, *Ms. L.* v. *U.S. Immigr. & Customs Enf't,* No. 3:18–cv–00428, (S.D. Cal. Oct. 16, 2023), ECF No. 711; Order Granting Final Approval of Settlement Agreement and Certifying the Settlement Classes, *Ms. L.* v. *U.S. Immigr. & Customs Enf't,* No. 3:18–cv–00428, (S.D. Cal. Dec. 11, 2023), ECF No. 727.

[286] 8 U.S.C. 1232(c)(6)(A).

[287] *See* FSA, Exhibit 1, paragraph A14 (''Legal services information regarding the availability of free legal assistance, the right to be represented by counsel at no expense to the Government . . .''). With respect to information regarding the availability of free legal assistance, ORR understands the proposed language at § 410.1309(a)(2)(ii) to be consistent with paragraph A14 but updated to avoid potential confusion. As discussed above, the TVPRA describes unaccompanied children's access to counsel as a ''privilege,'' and also makes HHS responsible for ensuring such privilege ''to the greatest extent practicable.'' ORR notes that this clarification does not represent a change in ORR's existing policies or practices, and as described elsewhere in this section, ORR proposes to expand the availability of legal services to unaccompanied children beyond current practice.

[288] *See* 6 U.S.C. 279(b)(1)(I). *See also* Office of Refugee Resettlement Division of Unaccompanied Children Operations, Legal Resource Guide—Legal Service Provider List for [UC] in ORR Care, *https://www.acf.hhs.gov/sites/default/files/documents/orr/english_legal_service_providers_guide_with_form_508.pdf.*

[289] *See* 8 U.S.C. 1232(c)(5).

[290] ORR cited the expansion of legal services in its budget request for FY 2024. ACF, Fiscal Year 2024 Justification for Estimates for Appropriations Committees, *https://www.acf.hhs.gov/sites/default/files/documents/olab/fy-2024-congressional-justification.pdf.*

[291] Amended Order re Defendants' Mot. to Dismiss and Plaintiffs' Mot. for Class Cert., *Lucas R., et al.* v. *Xavier Becerra, et al.,* No. 18–CV–5741 (C.D. Cal. Dec. 27, 2018), ECF No. 141.

[292] Order re Preliminary Approval of Settlement and Approval of the Parties' Joint Proposal re Notice to Lucas R Class Members of Settlement of Plaintiffs' Third, Fourth, and Fifth Claims for Relief [Psychotropic Medications, Legal Representation, and Disability, *Lucas R.* v. *Becerra,* No. 2:18–cv–05741 (C.D. Cal. Jan. 5, 2024), ECF No. 410.

[293] Amended Order re Defendants' Mot. to Dismiss and Plaintiffs' Mot. for Class Cert., *Lucas R., et al.* v. *Xavier Becerra, et al.,* No. 18–CV–5741 (C.D. Cal. Dec. 27, 2018).

[294] 45 CFR 85.21(d).

[295] 53 FR 25595, 25600 (July 8, 1988).

[296] *See* 8 U.S.C. 1232(b)(3).

[297] *See* 8 U.S.C. 1232(b)(3).

[298] 6 U.S.C. 279(b)(1)(J).

[299] 8 U.S.C. 1232(c)(3)(A).

[300] *See* 8 U.S.C. 1232(b)(4).

[301] *See* 6 U.S.C. 279(g)(2).

[302] *See* 1.6.2 Instructions for Age Determinations at *https://www.acf.hhs.gov/orr/policy-guidance/cunaccompanied-children-program-policy-guide-record-posting-and-revision-dates.*

[303] Office of the Inspector General. February 8, 2022. CBP Officials Implemented Rapid DNA Testing to Verify Claimed Parent-Child Relationships *https://www.oig.dhs.gov/sites/default/files/assets/2022-02/OIG-22-27-Feb22.pdf.*

[304] ORR Guide 1.6.2, ''Instructions for Age Determinations''. Available at: *https://www.acf.hhs.gov/orr/policy-guidance/unaccompanied-children-program-policy-guide-section-1.*

[305] *See* 8 U.S.C. 1232(b)(4).

[306] ORR Policy Guide 7.2.2.

[307] *See, e.g.,* FSA paragraph 12A; Exhibit 3.

[308] *See* ORR Influx Care Facilities for Unaccompanied Children Fact Sheet (March 1, 2024), available at: *https://www.acf.hhs.gov/orr/fact-sheet/programs/uc/influx-care-facilities-fact-sheet.* Accessed on March 1, 2024.

[309] *See Flores* v. *Lynch,* 212 F. Supp. 3d 907, 914 (C.D. Cal. 2015), *aff'd in part, rev'd in part and remanded,* 828 F.3d 898 (9th Cir. 2016).

[310] *See* ORR Fact Sheets and Data, available at: *https://www.acf.hhs.gov/orr/fact-sheet/programs/uc/influx-care-facilities-fact-sheet.*

[311] ''Each year the INS will reevaluate the number of regular placements needed for detained minors to determine whether the number of regular placements should be adjusted to accommodate an increased or decreased number of minors eligible for placement in licensed programs . . .''

[312] *See* 45 CFR 87.3(a).

[313] In this final rule, ORR is updating this language to clarify that ORR employees must abide by their Federal duties if there is a conflict between ORR's regulations and State law, subject to applicable Federal conscience protections and civil rights.

[314] *See* 6 U.S.C. 279(b)(1)(B); 8 U.S.C. 1232(c)(2)(A).

[315] *See, e.g.,* Public Law 117–328, Div. H, Tit. II, Sec. 231.

[316] *See* ORR Policy Guide 7.2.1.

[317] For example, U.S. Department of Defense or other Federal sites may have this requirement.

[318] In § 410.1001, restrictive placement is defined to include a secure facility, heightened supervision facility, or RTC.

[319] 8 U.S.C. 1232(c)(2)(A).

[320] If, hypothetically, an unaccompanied child was in secure care for 90 days, they would receive both their third 30-day review and their second, more intensive 45-day review concurrently.

[321] *Lucas R* v. *Becerra,* Summ. J. Order, Mar. 11, 2022, at 28, No. 18–CV–5741 (C.D. Cal.).

[322] *Lucas R* v. *Becerra,* Summ. J. Order, Mar. 11, 2022, at 28, No. 18–CV–5741 (C.D. Cal.).

[323] *Id.* at 31.

[324] *See* FSA at paragraph 24A.

[325] *See* 6 U.S.C. 279(a).

[326] *See Flores* v. *Rosen,* 984 F. 3d 720, 736 (9th Cir. 2020).

[327] *See, e.g.,* 8 CFR 1003.19, 1236.1.

[328] In contrast, under paragraph 14 of the FSA the former INS would detain a minor if detention was required ''to secure his or her timely appearance before the INS or immigration court.'' As a result, as they pertained to the former INS, bond hearings afforded an opportunity for the unaccompanied children to have a hearing

before an independent officer to determine whether the unaccompanied children in fact posed a risk of flight if released from custody.

[329] *See* 8 U.S.C. 1232(c)(3); *see also Flores* v. *Sessions,* 862 F.3d 863, 868 (9th Cir. 2017) (''As was the case under the *Flores* Settlement prior to the passage of the HSA and TVPRA, the determinations made at hearings held under paragraph 24A will not compel a child's release. Regardless of the outcome of a bond hearing, a minor may not be released unless the agency charged with his or her care identifies a safe and appropriate placement.'').

[330] *Flores* v. *Rosen,* 984 F.3d 720, 734 (9th Cir. 2020).

[331] 6 U.S.C. 279(b)(1)(B).

[332] *See, e.g.,* Standards Committee of the United States Ombudsman Association, Governmental Ombudsmen Standards (2003) at 1, *https://www.usombudsman.org/wp-content/uploads/USOA-STANDARDS1.pdf (promoting a model that defines a governmental ombudsman as an independent, impartial public official with authority and responsibility to receive, investigate or informally address complaints about Government actions, and, when appropriate, make findings and recommendations, and publish reports);* Houk et al., A Reappraisal—The Nature and Value of Ombudsmen in Federal Agencies, Administrative Conference of the United States (2016) at 258–67, *https://www.acus.gov/report/ombudsman-federal-agencies-final-report-2016* (''2016 ACUS Report'') (reviewing association standards and practices of different Federal ombudsman offices, and concluding that independence, confidentiality, and impartiality are essential to the ombudsman profession.).

[333] 2016 ACUS Report at 28.

[334] 8 U.S.C. 1232(c)(1).

[335] *See, e.g.,* 9 NYCRR 177.7 (NYS Office of Children and Family Services; Regulations for the Office of the Ombudsman; Visits to Facilities and Programs) and 6 U.S.C. 205 (Ombudsman for Immigration Detention).

[336] 2016 ACUS Report at 28.

[337] 2016 ACUS Report at 29.

[338] 2016 ACUS Report at 2.

[339] 2016 ACUS Report at 56.

[340] 2016 ACUS Report at 66.

[341] 2016 ACUS Report at 41.

[342] *https://aspe.hhs.gov/reports/valuing-time-us-department-health-human-services-regulatory-impact-analyses-conceptual-framework.*

[343] *https://www.bls.gov/news.release/pdf/wkyeng.pdf.* Accessed February 13, 2024.

[344] *https://www.census.gov/library/stories/2023/09/median-household-income.html.* Accessed February 13, 2024.

[345] *https://www.bls.gov/oes/current/oes231011.htm.* Accessed February 13, 2024.

[346] Under OMB control number 0970–0565, it is assumed these forms will be completed by ''Child, Family, and School Social Workers in the industry of Other Residential Care Facilities''. The most recent BLS mean wage rate associated with this occupation is $21.47 per hour (*https://www.bls.gov/oes/current/oes211021.htm;* accessed February 13, 2024). Including a 100% adjustment for overhead and fringe, this wage rate is calculated to be $21.47 × 2 or $42.94 per hour.

[347] Annual Report to Congress, Office of Refugee Resettlement (FY 2019), *https://www.acf.hhs.gov/sites/default/files/documents/orr/orr-arc-fy2019.pdf.*

[348] ACF, Justification of Estimates for Appropriations Committees, page 70, (FY 2024) *https://www.acf.hhs.gov/sites/default/files/documents/olab/fy-2024-congressional-justification.pdf.*

[349] *Id.* at 77.

[350] *https://www.acf.hhs.gov/sites/default/files/documents/olab/fy-2025-congressional-justification.pdf.*

[351] *https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/circulars/A76/a76_incl_tech_correction.pdf.*

[352] *See, e.g., Flores* v. *Sessions,* 862 F.3d 863 (9th Cir. 2017); *Flores* v. *Lynch,* 828 F.3d 898 (9th Cir. 2016); *Flores* v. *Sessions,* No. 2:85–cv–04544 (C.D. Cal. June 27, 2017).

[353] 6 U.S.C. 279(a).

[354] 6 U.S.C. 279(f)(1).

[355] 8 U.S.C. 1232(b)(1) (referencing 6 U.S.C. 279).

[356] INA sec. 103(a)(3), 8 U.S.C. 1103(a)(3) (2002); 8 CFR 2.1 (2002).

[357] *See* 6 U.S.C. 279(e) and (f). See also 6 U.S.C. 552, 557; 8 U.S.C. 1232(b)(1).

[358] *See Flores* v. *Rosen,* 984 F. 3d 720, 737 (9th Cir. 2020).

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Part IV

Department of Transportation

14 CFR Parts 259 and 399
Enhancing Transparency of Airline Ancillary Service Fees; Final Rule

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

14 CFR Parts 259 and 399

[Docket No. DOT–OST–2022–0109]

RIN 2105–AF10

Enhancing Transparency of Airline Ancillary Service Fees

AGENCY: Office of the Secretary (OST), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: The U.S. Department of Transportation (Department or DOT) is issuing a final rule to strengthen protections for consumers by ensuring that they have access to fee information for transporting baggage and changing or canceling a flight before ticket purchase. Under the final rule, U.S. air carriers, foreign air carriers, and ticket agents must clearly disclose passenger-specific or itinerary-specific fees for these services to consumers whenever fare and schedule information is provided for flights to, within, and from the United States. The Department is further requiring that carriers provide useable, current, and accurate information regarding fees for these critical ancillary services to any entity that is required to disclose critical ancillary service fee information to consumers. This final rule is in response to the Executive order on Promoting Competition in the American Economy, which directs the Department to take various actions to promote the interests of American workers, businesses, and consumers. The rule will ensure that consumers have the information they need to understand the true costs of air transportation that apply to them, which will create a more competitive market with better outcomes for consumers.

DATES: This rule becomes effective on July 1, 2024.

FOR FURTHER INFORMATION CONTACT: Heather Filemyr, Ryan Patanaphan, or Blane A. Workie, Office of Aviation Consumer Protection, U.S. Department of Transportation, 1200 New Jersey Ave. SE, Washington, DC 20590, 202–366–9342, 202–366–7152 (fax), *heather.filemyr@dot.gov, ryan.patanaphan@dot.gov,* or *blane.workie@dot.gov* (email).

SUPPLEMENTARY INFORMATION:

A. Executive Summary

(1) Purpose of the Regulatory Action

The purpose of this final rule is to ensure that consumers know upfront the fees carriers charge for transporting a first checked bag, a second checked bag, and a carry-on bag and for canceling or changing a reservation to avoid surprise fees that can add up quickly and add significant cost to what may, at first, look like a cheap ticket. Airlines [1] have imposed separate fees for ancillary services related to air travel beyond passenger air transportation as part of their business model for many years.[2] Ancillary service fees are not subject to the 7.5% airline ticket tax that is used to support the Aviation Trust Fund. These ancillary fees have become more complex over time and continue to confuse consumers, as explained in section B (2). Which airlines impose such fees, what services require payment of a fee, the amount of the fee, and whether the same fees apply to all passengers are in a continuous state of change. For example, during the Coronavirus-19 (COVID–19) public health emergency, several airlines advertised the elimination of ticket change fees, but despite these general announcements, airlines continued to impose, or later reimposed, change fees for certain fare types such as ''basic economy.'' [3] In this context, consumer organizations have long advocated for more upfront disclosure of ancillary fees.[4]

On July 9, 2021, the President issued E.O. 14036, ''Promoting Competition in the American Economy,'' [5] which launched a whole-of-government approach to strengthen competition across many sectors, including commercial aviation. Section 5, paragraph (m)(i)(F) of E.O. 14036 directed the Department to ''consider initiating a rulemaking to ensure that consumers have ancillary fee information, including 'baggage fees,' 'change fees,' and 'cancellation fees,' at the time of ticket purchase.'' This rulemaking responds to the direction in E.O. 14036 to provide improved ancillary fee disclosures to consumers purchasing air transportation.[6]

(2) Overview of Existing Requirements

In 2011, the Department issued a final rule titled, ''Enhancing Airline Passenger Protections,'' [7] that sought to address consumer concerns regarding the proliferation of ancillary fees. In the rule, the Department added several disclosure requirements for airlines: (1) a disclosure on the homepage for at least three months of any increase in the fee for passenger baggage or any change in the free baggage allowance for checked or carry-on baggage; (2) a notice on the first screen with a fare disclosure that additional airline fees for baggage may apply and where consumers can go to access these baggage fees; (3) a notice on e-ticket confirmations regarding the free baggage allowance for that flight and any applicable fee for the first and second checked bag and carry-on bag; and (4) a disclosure of all fees for optional services in one central place on the seller's website, with non-baggage fees permitted to be expressed as ranges. Under the 2011 rule, the Department determined that checked and carry-on baggage were ''fundamental'' to air travel, and the Department required that fees for such services be expressed as specific charges on a central place on the airline's website (alongside other ancillary fees), with information about any differing prices and allowances based on the passenger's status. Based on ticket agent concerns that the rule would be costly to ticket agents as airlines are ''updating and changing fees constantly,'' [8] the Department applied fewer or modified disclosure requirements to ticket agents.

Based on continued feedback by various stakeholders and advisory

[1] The preamble in this final rule uses the term ''airlines'' to refer to ''air carriers'' and ''foreign air carriers'' as those terms are used in the Department's regulations. The two terms are defined in 49 U.S.C. 40102(a)(2) and (a)(21).

[2] *See, e.g.,* Comment from the International Air Transport Association, p.4 (''Airlines have been separating baggage fees from the core transportation service for more than 14 years . . . .''), *available at https://www.regulations.gov/comment/DOT-OST-2022-0109-0085.*

[3] *See, e.g.,* Delta Air Lines, Delta Eliminates Change Fees, Building On Commitment to Flexibility for Consumers, Aug. 31, 2020, Alaska Airlines, Fly with Peace of Mind: Alaska Airlines Eliminates Change Fees Permanently, Sept. 1, 2020, American Airlines, Wave Goodbye to Change Fees, Spirit Airlines, How Can I Change or Cancel My Reservation? (visited Feb. 29, 2024). Website screenshots available in docket at *https://www.regulations.gov/docket/DOT-OST-2022-0109.*

[4] *See, e.g.,* Final Rule, Enhancing Airline Passenger Protections, 74 FR 68983, 68984 (Dec. 30, 2009) (noting that the subject of baggage fees disclosure would be included in future rulemaking following concerns raised by consumers and consumer associations). *See also* Final Rule, Enhancing Airline Passenger Protections, 76 FR 23110, 23142 (Apr. 25, 2011).

[5] 86 FR 36987 (*https://www.federalregister.gov/documents/2021/07/14/2021-15069/promoting-competition-in-the-american-economy*).

[6] This rulemaking also addresses section 5, paragraph (m)(i)(B) of E.O.14036. That section directed the Department to promote enhanced transparency and consumer safeguards, as appropriate and consistent with applicable law, including through potential rulemaking, enforcement actions, or guidance documents, with the aims of enhancing consumer access to airline flight information so that consumers can more easily find a broader set of available flights, including by new or lesser known airlines; and ensuring that consumers are not exposed or subject to advertising, marketing, pricing, and charging of ancillary fees that may constitute an unfair or deceptive practice or an unfair method of competition.

[7] 76 FR 23110, *supra.*

[8] *Id.* at 23145.

committees (further discussed below), the Department explored further changes to ancillary fee disclosure requirements in a 2014 notice of proposed rulemaking (NPRM) [9] and a 2017 supplemental notice of proposed rulemaking (SNPRM).[10] These efforts are further described in section B below, though neither resulted in changes to the regulation.

(3) Summary of Major Provisions

This final rule increases the protections provided to consumers as set forth in the summary table below.

Subject	Requirement
Covered Entities	The final rule applies to U.S. air carriers, foreign air carriers, and ticket agents (excluding corporate travel agents) that advertise or sell air transportation directly to consumers. The Department defers for a later rulemaking the determination of whether metasearch sites that do not sell airline tickets but display airline flight search options directly to consumers are ticket agents that must disclose ancillary fee information required by this rule.
Critical Ancillary Services	The rule defines critical ancillary services as any ancillary service critical to consumers' purchasing decisions. The ancillary services that this final rule identifies as critical to consumers are as follows: (1) transporting a first checked bag, second checked bag, and carry-on bag; and (2) changing or canceling a reservation. Any other service may also be determined, after notice and opportunity to comment, to be critical by the Secretary.
Disclosure of Fees and Policies for Critical Ancillary Services.	The final rule requires airlines and ticket agents to disclose fees for critical ancillary services during the itinerary search process at the first point where a fare and schedule is provided in connection with a specific flight itinerary. The fee disclosure includes noting that a fare category does not allow changing or canceling a reservation or transporting a checked or carry-on bag if that is the case. Policies for critical ancillary services must be disclosed before ticket purchase when a search is conducted online but are not required to be disclosed with the fare and schedule. The information disclosed must be accurate, clear, and conspicuous. Fees cannot be displayed through a hyperlink, but disclosure is permitted using pop-ups, expandable text, or other means.
Links to Book a Flight with a Carrier or an Online Travel Agency (OTA).	This final rule requires airlines and ticket agents that sell airline tickets to disclose critical ancillary service fees on the first page of their online platforms to which consumers are directed after searching for flight options on another entity's online platform (a metasearch site) unless the consumer was already provided accurate fee information on the directing entity's online platform.
Passenger-Specific and Anonymous Searches	This final rule requires carriers and ticket agents to disclose the fees for critical ancillary services as passenger-specific itinerary information if a consumer conducts a passenger-specific itinerary search. A passenger-specific itinerary search refers to a search that takes into account information specific to the passenger (*e.g.,* the passenger's status in the airline's frequent flyer program, the passenger's military status, or the passenger's status as a holder of a particular credit card) that was affirmatively provided by that passenger and information specific to the itinerary (*e.g.,* geography, travel dates, cabin class, and ticketed fare class such as full fare ticket) that may impact the critical ancillary service fees to be charged or policies to be applied. An anonymous itinerary search refers to a search that does not take into account information specific to the passenger but does take into account information specific to the itinerary (*e.g.,* geography, travel dates, cabin class, and ticketed fare class such as full fare ticket) that may impact the critical ancillary service fees to be charged or policies to be applied.
Opting Out of Disclosures	The final rule does not permit airlines and ticket agents to omit disclosure of first checked, second checked, or carry-on baggage fees with the fare and schedule information on their online platform unless: (1) the airline/ticket agent asks consumers at the beginning of a search if they intend to travel with a carry-on bag or checked bags; and (2) a consumer affirmatively indicates that no one in the booking party intends to travel with carry-on bag or first or second checked bags. The final rule does not permit airlines or ticket agents to enable consumers to opt out of display of change and cancellation fees on the airline's or ticket agent's online platform.
Disclosures on Online Platforms	The final rule requires airlines and ticket agents to disclose the fees and policies for critical ancillary services on airlines' or ticket agents' online platforms. The final rule defines ''online platforms'' to be any interactive electronic medium, including, but not limited to, websites and mobile applications, that allow the consumer to search for or purchase air transportation from a U.S. carrier, foreign carrier, or ticket agent.
Offline (Telephone, In-person) Disclosures of Airline Ancillary Service Fees.	The final rule requires airlines and ticket agents to disclose to consumers during an in-person or telephone inquiry that critical ancillary fees apply if that is the case and upon request disclose those fees to consumers.
Sharing of Airline Ancillary Service Fee Information.	This final rule requires airlines to provide critical ancillary fee information to any entity that is required to disclose critical ancillary service fee information to consumers.
Percentage-Off Advertisements	The final rule requires airlines and ticket agents that advertise percentage-off discounts of a ''flight,'' ''ticket,'' or ''fare'' to apply the percentage-off discount to the full fare (*i.e.,* all mandatory government taxes/fees and carrier-imposed charges/fees). The final rule requires airlines and ticket agents that advertise percentage-off discounts of a ''base fare'' to apply the percentage-off discount to the full fare amount excluding all government taxes and charges (*i.e.,* all mandatory carrier-imposed charges/fees).

[9] 79 FR 29970 (May 23, 2014).

[10] 82 FR 7536 (Jan. 19, 2017).

Subject	Requirement
Compliance/Implementation Period	The final rule requires that: (1) airlines must provide required critical ancillary fee data to ticket agents not later than six months after this rule's publication date, or October 30, 2024; (2) airlines must comply with all other regulatory requirements no later than 12 months after this rule's publication date, or April 30, 2025; (3) ticket agents that do not meet the Small Business Administration (SBA) definition of small entity must comply with all regulatory requirements no later than 18 months after this rule's publication date, or October 30, 2025; and (4) ticket agents that that meet the SBA definition of small entity must comply with all regulatory requirements no later than 24 months after this rule's publication date, or April 30, 2026.

(4) Costs and Benefits

The final rule changes how U.S. air carriers, foreign air carriers, and ticket agents disclose information about certain ancillary fees for flights. Expected benefits of the rule result from the reduction of excess consumption of air travel, or deadweight loss, which occurs because consumers who are unaware of ancillary service fees behave as if the price for air travel is lower than it is. Annual benefits from reducing deadweight loss are expected to amount to $5.5 million. The other source of benefits estimated by the Department is from the time consumers will save when they search for airfare because they no longer need to interrupt their search to find information on ancillary service fees. Depending on assumptions regarding the number of consumers who consider ancillary fee information when they search for airfare, time savings benefits are expected to range from $365 million to $484 million annually.

Expected costs of this rule include costs to consumers due to the time needed to navigate increased amounts of information, which range from $239 million to $331 million annually. The primary estimated costs of the rule to carriers and ticket agents are the costs that they would incur to modify their websites by adjusting their displays of fares, schedules, and fees. Third parties involved in data exchange, such as Global Distribution Systems (GDSs) and direct-channel companies might incur some costs due the need to upgrade their systems, though the Department acknowledges that these entities are already upgrading systems for market reasons and have been for several years. Quantified costs range from $286 million to $378 million annually.

One effect of better information on ancillary fees is that some consumers will pay less for the ancillary services they use when they travel by air. These economic effects are not societal benefits or costs but represent a transfer from airlines to consumers, estimated to be about $543 million annually. This transfer represents $543 million in overpayment in fees for consumers, or from the perspective of airlines, additional revenue from consumers who are surprised by fees and, for example, then need to pay a higher fee at the airport to check a bag. This transfer, as well as the benefits due to any reduction in deadweight loss, accrue to consumers and are expected to occur regardless of any time savings impacts.

B. Background

(1) Existing Ancillary Fee Disclosure Requirements

As noted above, the Department's existing regulations in 14 CFR 399.85 contain the requirements for ancillary fee disclosures as promulgated in the 2011 final rule. Under 14 CFR 399.85(a), airlines must promptly and prominently disclose any increase in fees for a carry-on or first and second checked bags and any change in bag allowances on the homepages of their websites. Paragraph (b) requires airlines and ticket agents to disclose clearly and prominently on the first screen with a fare quotation for a specific itinerary that additional airline fees for baggage may apply and where consumers can see these fees. Ticket agents may refer consumers to the airline websites for specific baggage fee information or to their own sites if they display airline baggage fees. Paragraph (c) requires airlines and ticket agents to disclose on e-ticket confirmations information regarding passengers' free baggage allowances and applicable fees for a carry-on bag and a first and second checked bag, expressed as specific charges taking into account any factors that affect those charges such as passenger status. Paragraph (d) requires airlines to disclose the fees for all ancillary services on their websites, accessible through a conspicuous link from the carrier's homepage. The paragraph notes that such fees may generally be expressed as a range, but baggage fees must be expressed as specific charges taking into account any factors that affect those charges.

Requirements in other regulations also have an impact on ancillary fees. Under 14 CFR 253.7, airlines may not impose any terms restricting refunds of the ticket price, charging monetary penalties on passengers, or raising the ticket price, unless the passenger receives conspicuous written notice of the salient features of those terms on or with the ticket. In 14 CFR 399.88, sellers of scheduled air transportation may not increase the price of passenger baggage after the air transportation has been purchased by the consumer. As stated in the NPRM for this rulemaking, while the text of 14 CFR 399.88 references ancillary fees such as seat fees, the Department announced in 2011 that it would enforce the prohibition on post-purchase price increases only for carry-on bags and first and second checked bags.[11]

(2) Problems With Existing Requirements and Efforts To Improve Disclosures

Following the 2011 final rule, described above, the Department issued an NPRM titled ''Transparency of Airline Ancillary Service Fees and Other Consumer Protection Issues'' in 2014.[12] The 2014 rulemaking contained various proposals to enhance consumer protections, including a proposal to require the disclosure of certain airline ancillary service fees (*i.e.,* first checked bag, second checked bag, one carry-on item, and advance seat selection) to consumers through all sales channels on the first page on which a fare is displayed in response to a specific flight itinerary search request. The proposal to require disclosure of certain ancillary fees was based in part on a recommendation by the Future of Aviation Advisory Committee (FAAC).[13] The FAAC's 2010 report had

[11] *See also Guidance on Price Increases of Ancillary Services and Products not Purchased with the Ticket* (December 28, 2011). The application of the prohibition of the post-purchase price increase was at issue in a lawsuit filed by two airlines against the Department. The court considered the rule as applied under the December 28, 2011, guidance and upheld the Department's rule prohibiting post-purchase price increases as it is currently being applied. *Spirit Airlines, Inc.,* v. *U.S. Dept. of Transportation* (D.C. Cir. July 24, 2012), slip op. at 20–21. Petition for Writ of Certiorari denied on April 1, 2013.

[12] 79 FR 29970 (May 23, 2014).

[13] *See* Recommendation 11, in FAAC Final Report (2010), *available at https://www.transportation.gov/highlights/future-aviation-advisory-committee/faac-final-report.*

noted that, despite improvements in the air consumer experience, FAAC members felt that consumers sought greater transparency in the total cost of their tickets and that they should have the ability to choose between carriers that either do not charge for certain services or charge differing fees. The 2014 NPRM also relied on the statements of a successor committee, the Advisory Committee on Aviation Consumer Protection (ACACP), which in 2012 adopted the FAAC recommendation and added that all participants in the airfare and fee distribution system should be guided by principles of transparency, providing choices and offers that meet consumer needs, and knowing the full price before purchase.[14] While the ACACP commended the Department's regulatory efforts to add transparency, it noted that the aviation industry offered a variety of business models, network choices, and optional services, and that the level of choice was creating complexity for consumers. The ACACP had heard from advocates and ticket agents that consumers expect to know the cost of the entire trip before purchasing a ticket.[15]

In issuing the 2014 proposal on disclosure of certain airline ancillary service fees, the Department explained that the proposal was necessary because the 2011 rule, while a step in the right direction, did not fully address the problem of lack of transparency of ancillary services and products. The 2014 proposal on disclosure of airline ancillary service fees generated significant comments from consumers, airlines, ticket agents, and other interested parties. During the pendency of the 2014 rulemaking, the ACACP recommended that DOT require that change and cancellation fees be clear and displayed before ticket purchase.[16] Consumer advocates had asserted at an ACACP meeting held on June 23, 2015, that such fees had become significant and difficult to ascertain.[17] At that time, the ACACP also discussed baggage fees and allowances, with consumer advocates noting that baggage allowance rules were confusing to consumers and that it was difficult for consumers to understand which airline's rules apply. At the same meeting, a ticket agent representative stated that every baggage fee scheme had ''multiple layers and exceptions'' that were not always dynamically available to ticket agents.[18]

In 2016, the Department decided not to issue a final rule on the issue of transparency of airline ancillary services given the complexity of the issues and additional considerations identified by comments submitted on the 2014 NPRM. Instead, the Department decided to seek additional information on the disclosure of fees for ancillary services in a supplemental rulemaking.[19] In January 2017, the Department issued an SNPRM, which focused solely on the issue of transparency of certain ancillary service fees.[20] In the 2017 SNPRM, the Department proposed to require fees for a first and second checked bag and a carry-on bag to be disclosed at all points of sale wherever fare and schedule information is provided to consumers. While the SNPRM was pending, in September 2017, the U.S. Government Accountability Office (GAO) noted that consumer group representatives stated that it had become ''increasingly difficult for consumers to compare airfare ticket prices, fees, and associated rules, and understand what is included in their purchases.'' [21] On December 14, 2017, the SNPRM was withdrawn with the Department noting that the withdrawal is consistent with Executive Order (E.O.) 13771, Reducing Regulation and Controlling Regulatory Costs.[22] After the withdrawal, a number of State attorneys general urged the Department to reverse its decision, stating that they ''regularly hear reports from consumers in [their] states who are confused and frustrated by these fees, which significantly alter the total cost of travel.'' [23] E.O. 13771 was later revoked.[24]

While the disclosure regulations promulgated in 2011 remain in place, consumer advocates continue to express concerns to the Department that there is a market failure in air transportation pricing because consumers are unable to determine the true cost of air travel prior to ticket purchase. They have also raised concerns that consumers often find the process of determining the baggage fees that apply to them to be a complicated and time-consuming process. Consumer advocates have asserted that a lack of passenger-specific information regarding fees for ancillary services at the time of ticket purchase is causing a market failure by limiting the ability of consumers to understand the true cost of the travel they are looking to purchase and compare pricing between carriers and travel options. Consumer advocates have also noted a significant increase in the number of ancillary service fees imposed by carriers.

Certain members of Congress have expressed support for full, more specific, disclosure of ancillary service fees. Members of Congress have also sponsored legislation on this topic.[25] Further, the Joint Explanatory Statement of the 2018 Consolidated Appropriations Act requested that the Department work in collaboration with industry, consumers, and other stakeholders to establish guidelines on

[14] Report of the Advisory Committee on Aviation Consumer Protection 7–8 (Oct. 22, 2012), *available at https://www.transportation.gov/airconsumer/ACACP/1st-ACACP-Report-22OCT2012.*

[15] *Id., see, e.g.,* Transcript—Advisory Committee on Aviation Consumer Protection, First Meeting, June 28, 2012, *available at https://www.regulations.gov/document/DOT-OST-2012-0087-0095.*

[16] Record of Meeting, Ninth Meeting of the Advisory Committee on Aviation Consumer Protection 3 (Sept. 1, 2015), *available at https://www.transportation.gov/airconsumer/ACACP/9th-meeting-Sept-1/record.*

[17] *See* Record of Meeting, Eighth Meeting of the Advisory Committee on Aviation Consumer Protection 3–5 (June 23, 2015), *available at https://www.transportation.gov/sites/dot.gov/files/docs/resources/individuals/aviation-consumer-protection/285976/acacp-record-8th-meeting-23june2015.pdf; see also* Record of Meeting, Ninth Meeting of the Advisory Committee on Aviation Consumer Protection (Sept. 1, 2015).

[18] *Id.*

[19] In 2016, the Department issued a final rule that promulgated regulations related to carrier reporting, disclosure of codeshare operations, and display bias, while separating out the ancillary fee disclosure and ticket agent definition issues into separate rulemaking efforts. 81 FR 76800 (Nov. 3, 2016). The ticket agent rulemaking remains pending. *See* Fall 2023 Unified Agenda for rulemaking titled ''Air Transportation Consumer Protection Requirements for Ticket Agents'' (RIN 2105–AE57) at *https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202310&RIN=2105-AE57.*

[20] 82 FR 7536 (Jan. 19, 2017).

[21] GAO 17–756, Commercial Aviation: Information on Airline Fees for Optional Services (September 2017), p. 33 at *https://www.gao.gov/assets/gao-17-756.pdf.*

[22] 82 FR 58778 (Dec. 14, 2017).

[23] Letter from attorneys general from 16 States and the District of Columbia to Secretary Elaine L. Chao (Dec. 20, 2017).

[24] On January 20, 2021, the President issued E.O. 13992, ''Revocation of Certain Executive Orders Concerning Federal Regulation,'' which revoked E.O. 13771 and certain other Executive orders.

[25] *See, e.g.,* Letter from Representative Nita M. Lowey to Secretary Elaine Chao (Dec. 8, 2017). *See also* section 203 of S. 3222, Airline Passengers' Bill of Rights (introduced by Senators Blumenthal, Markey, Whitehouse, Wyden, and Casey on November 17, 2021) at *https://www.congress.gov/bill/117th-congress/senate-bill/3222/text?r=7&s=1,* proposing to mandate that DOT require airlines, online travel agencies (OTAs), metasearch engines and other ticket agents that provide flight search tools disclose all applicable taxes and ancillary fees at any point in which the fare is shown and in telephone communication with a prospective consumer in the U.S. at any point in which the cost of the air transportation is disclosed. *See also* The Unfriendly Skies: Consumer Confusion Over Airline Fees, Staff Report of Minority Staff of Senate Commerce Committee (August 6, 2015) at *https://www.blumenthal.senate.gov/imo/media/doc/8%206%2015%20FINAL%20Airline%20Report.pdf,* finding that ancillary fees, such as change and cancellation penalties, are increasingly less transparent regarding the true cost of air travel and recommending more transparency from the airline industry.

transparency of airline ancillary fees.[26] Subsequently, the Department tasked the Aviation Consumer Protection Advisory Committee (ACPAC) with examining this issue again.[27]

In 2019, during a meeting of the ACPAC, two consumer organizations underscored the difficulties faced by consumers in determining the total cost of air travel.[28] Consumer advocates maintained that consumers were confused by the complex charts that carriers and ticket agents provide to consumers to determine their baggage fees. The ACPAC heard from several consumer advocacy groups, including Travelers United, the National Consumers League (NCL), and the Global Business Travel Association (GBTA) regarding this issue. Consumer organizations that presented to the ACPAC stressed the importance of ensuring consumers can accurately and easily compare travel costs, inclusive of ancillary fees, and they recommended that ancillary fee information should be clearly displayed early in consumer purchase decisions.[29]

In December 2020, the ACPAC submitted a report to the Department recommending that the Department remain vigilant to ensure compliance with the existing transparency requirements. The ACPAC was silent on whether the Department should issue a new rulemaking on transparency of airline ancillary fees.[30] In July 2021, E.O. 14036 directed the Department to consider initiating a rulemaking to ensure consumers have ancillary fee information at the time of ticket purchase.

Based on E.O. 14036 and the above-described history of concerns raised by consumer organizations and individual consumers, including the individual complaints the Department has received reflecting the confusion consumers experience regarding ancillary fees,[31] the Department determined that this rulemaking is necessary to address ongoing inadequacies in existing ancillary fee disclosure requirements. It appears that consumers are generally unaware of the amount of the ancillary fees that apply to them when they book tickets. Consumer advocates contend that the ancillary services and fees that airlines currently post on their websites are not sufficiently useful to consumers to determine the cost of travel because airlines generally provide a range of fees for ancillary services aside from baggage. Airlines acknowledge that the fees for ancillary services often vary based on various factors such as the type of aircraft used, the flight on which a passenger is booked, or the time at which a passenger pays for the service or product. Regarding baggage fees, consumer advocacy organizations have reported to the Department that consumers often find the process of determining the baggage fees that apply to them to be a complicated and time-consuming process. Consumer advocates also expressed the view that because most passengers travel once per year or less, they may not be aware of certain ancillary service fees.[32] Advocates further argued that the practice of drip pricing, a pricing technique in which firms advertise only part of the price and reveal other charges later as the customer goes through the buying process, tends to lock consumers into engaging with a given seller, and reduces competition, because the customer has invested time and energy into the purchasing process and thus is less likely to abandon the purchase entirely and re-institute a fuller search for options.[33]

Following the issuance of E.O. 14036, the ACPAC met again in June 2022 to address the issue of transparency of airline ancillary service fees.[34] During the meeting, DOT solicited comment on topics being considered for the NPRM on ancillary fee transparency. These topics included identifying ancillary service fees critical to consumers, the sharing of airline data regarding critical ancillary service fees with ticket agents, and how to best display this information to consumers. DOT also solicited comment on whether fees for certain ancillary services should be disclosed at the first point in a search process where a fare is listed. At the meeting, a consumer advocate stated that consumers still do not know the specific amounts of baggage and change and cancellation fees that apply during the ticket purchase process.[35] Another consumer advocate expressed concerns with drip pricing.[36] The advocate also stated that baggage fees vary by airline and can depend on the flight, the time, and the day. A representative of the American Antitrust Institute stated that cancellation fees were discontinued at the beginning of the pandemic and then returned, and that drip pricing practices lock consumers into higher costs and suppresses competition. The representative also urged the Department to set policies to provide full fee information up front so consumers can make informed purchasing decisions based on the total cost of their itineraries.[37]

The Department continues to receive hundreds of consumer complaints each year regarding ancillary fees.[38] Based on past experience, the Department understands that the number of consumer complaints it receives directly from consumers is a small fraction of the total complaints received each year by airlines and ticket agents.[39] The requirements to provide specific baggage fee information and a range of fees for other ancillary services have not been as helpful to consumers in

[26] *https://www.congress.gov/congressional-record/2018/03/22/house-section/article/H2697-1* at page H2872.

[27] *See https://www.regulations.gov/document/DOT-OST-2018-0190-0001.*

[28] *See* Summary of April 4, 2019 ACPAC Meeting 11–13, *available at https://www.regulations.gov/document/DOT-OST-2018-0190-0019.*

[29] *See* Summary of April 4, 2019 ACPAC Meeting 10–16, *available at https://www.regulations.gov/document/DOT-OST-2018-0190-0019; see also* Summary of September 24, 2020 ACPAC Meeting 19–20, *available at https://www.regulations.gov/document/DOT-OST-2018-0190-0025.*

[30] Report of the Aviation Consumer Protection Advisory Committee 5 (Dec. 31, 2020), *available at https://www.transportation.gov/individuals/aviation-consumer-protection/acpac-report-secretary-transportation-december-31-2020.*

[31] *See, e.g., https://www.regulations.gov/document/DOT-OST-2022-0109-0021, https://www.regulations.gov/document/DOT-OST-2022-0109-0022, https://www.regulations.gov/document/DOT-OST-2022-0109-0023.*

[32] Presentation of FlyersRights.org (FlyersRights), *available at https://www.regulations.gov/document/DOT-OST-2018-0190-0046.*

[33] *Id.; see also* Presentation of American Antitrust Institute, *available at https://www.transportation.gov/airconsumer/ACPAC/June2022Meeting/webcast* (Day 1 morning session), and Federal Trade Commission, ECONOMIC ANALYSIS OF HOTEL RESORT FEES, (Jan. 2017), *available at https://www.ftc.gov/system/files/documents/reports/economic-analysis-hotel-resort-fees/p115503_hotel_resort_fees_economic_issues_paper.pdf.*

[34] *See https://www.transportation.gov/airconsumer/ACPAC/June2022Meeting.* A webcast of the meeting is available to view on the ACPAC website. Speakers' materials have been posted to the ACPAC docket at *https://www.regulations.gov/docket/DOT-OST-2018-0190.* On the second day of the meeting, the ACPAC addressed the separate but related issue of availability of airline flight information.

[35] Aviation Consumer Protection Advisory Committee (ACPAC) June 28 and 29, 2022 Meeting Minutes 8, *available at https://www.regulations.gov/document/DOT-OST-2018-0190-0073.*

[36] *Id.* at 9.

[37] *Id.* at 10.

[38] As noted in the NPRM of the present rulemaking, the Office of Aviation Consumer Protection (OACP) received over 550 complaints regarding change and cancellation fees and over 140 complaints regarding seat fees in 2021. In 2022, OACP received over 750 complaints regarding change and cancellation fees. During the first 5 months of 2023, OACP received over 300 complaints regarding change and cancellation fees.

[39] Compare, *e.g.,* the 2,095 disability complaints filed with the Department in 2022 (available on page 66 of Air Travel Consumer Report issued February 2023, *https://www.transportation.gov/sites/dot.gov/files/2023-04/February%202023%20ATCR_Revised.pdf*), and the 42,306 disability complaints received by airlines in 2022 (available at *https://www.transportation.gov/resources/individuals/aviation-consumer-protection/2022-disability-related-complaints-received-all*).

determining the true cost of travel as the Department had anticipated when issuing its final rule in 2011.

C. Notice of Proposed Rulemaking

The Department published its NPRM on Enhancing Transparency of Airline Ancillary Service Fees on October 20, 2022.[40] The NPRM was initially open to public comment for a period of 60 days (until December 19, 2022). During this time, the ACPAC was informed about the NPRM's principal provisions and heard from stakeholders at its meeting on December 8, 2022. Following several commenters' request for an extension due to the complexity of the rulemaking, the comment period was extended for 35 days until January 23, 2023.[41] On January 12, 2023, the ACPAC met again to deliberate and make recommendations related to the NPRM. Then, on January 18, 2023, the Department received a request to further extend the comment period on the basis that the requestor was not able to view the January 12, 2023, ACPAC meeting, and that at the time the request for extension was submitted, the meeting materials had not been posted to the docket. On January 20, 2023, the Department declined to extend the comment period based on that request noting that a video recording of the full meeting was posted publicly.[42] The Department received another request for additional time to provide comments on the NPRM, based primarily on technological and interface issues identified by the petitioner. In response, the Department posted a notice to its website stating that it was considering whether to grant that request and provided a preliminary list of recommendations made by the ACPAC at its January 12 meeting.[43]

On January 23, 2023, three commenters petitioned the Department for a public hearing on the NPRM pursuant to the Department's regulation on rulemakings relating to unfair and deceptive practices, 14 CFR 399.75. By a notice on March 14, 2023, the Department scheduled the hearing for March 30, 2023, and reopened the rulemaking to public comment from March 14 through April 6, 2023 (seven days following the hearing).[44]

[40] 87 FR 63718 (Oct. 20, 2022).

[41] 87 FR 77765 (Dec. 20, 2022).

[42] *See https://www.transportation.gov/airconsumer/AncillaryFeeNPRM-Denial-Extension-Comment-Period. See also* 88 FR 4923 (Jan. 26, 2023).

[43] *See https://www.transportation.gov/airconsumer/AncillaryFeeNPRM-Procedural-Information-January23-2023.*

[44] 88 FR 15622 (Mar. 14, 2023).

(1) Overview of Proposals

In the NPRM, the Department proposed to require airlines and ticket agents to disclose on the first page displayed following an itinerary search the fees for a first and second checked bag, a carry-on bag, ticket change and cancellation, and seat assignments that would enable a child 13 or under to be seated adjacent to an accompanying adult (''family seating''). The fees would need to be disclosed on the first page displayed following an itinerary search in which fare and itinerary information is shown, and they would need to be adjusted based on passenger-specific information provided by the consumer. The NPRM also proposed that the disclosures be displayed on the screen without the use of links or pop-ups, and that the same disclosures also be made during in-person or phone transactions. To enable ticket agents to provide the disclosures, the NPRM proposed that airlines provide fee rule information to ticket agents that sell or display air transportation. The Department did not propose to require that airlines provide the information to GDSs, which facilitate the purchase of tickets between airlines and consumers, but do not display or sell airline tickets to consumers. The NPRM proposed that these data sharing and disclosure requirements would become effective within six months of the issuance of a final rule. Specific provisions of the NPRM are discussed in more detail in section E of this document.

(2) ACPAC Meetings on the Proposals

As noted above, after the NPRM was published, the ACPAC held two meetings to deliberate on the NPRM's provisions and to make recommendations. At its December 8, 2022, meeting, the ACPAC heard from Department staff regarding the proposed rule's provisions and from members of the public regarding their views.[45] The ACPAC's airline representative raised questions about the need for a rulemaking and asked about the Department's application of the unfair and deceptive practices standard. He questioned the Department's analysis of whether consumers were substantially injured. A member of the public representing the International Air Transport Association (IATA) also questioned whether consumers were unaware of the price imposed for baggage or seating before purchasing a ticket, and he indicated that it would be costly and time-consuming for systems to conduct complex calculations on a passenger- or itinerary-specific basis to produce the proposed fee disclosures. He expressed his view that the rule should make fee information clear to consumers before purchase rather than during the itinerary search stage. The ACPAC's consumer representative raised questions about the impact the proposed disclosures would have on the amount of information being presented to consumers on screen. A member of the public representing Travelers United expressed the view that regulation is needed on fee disclosures and that consumers are harmed if they go through the reservation process and find out at the end that extra fees exist. A member of the public representing the American Society of Travel Advisors (ASTA) expressed concern about the proposed rule's treatment of offline (*i.e.,* telephone or in person) disclosures, and he urged the Department to make such offline disclosures available upon request or at the agent's discretion. A member of the public representing the Computer & Communications Industry Association (CCIA) stated that aggregators such as metasearch entities should not be subject to the rule.

On the issue of data distribution to ticket agents, the IATA representative noted that his organization supports the Department's proposal not to mandate that airlines distribute fee information to ticket agents through GDSs, but that the costs of implementing the data sharing proposal within the six-month compliance period would be significant. Multiple members of the public representing ticket agents and GDSs expressed the view that the Department should require airlines to distribute fee information to GDSs and disagreed with what they saw as GDSs being excluded from the proposal. In their view, GDSs were the most efficient method to move data from airlines to ticket agents, and that without using GDSs, ticket agents would have to bear resource-intensive costs to enter into agreements with airlines and to make data visible to customers.

Speakers at the December 8 meeting expressed differing views on whether the proposed compliance period of six months would be feasible, with the ACPAC's consumer representative stating that six months was not unrealistic given that capabilities exist for GDSs to provide the data necessary for ticket agents to comply, while speakers representing airlines and ticket agents asserted that six months was insufficient time, although acknowledging that the use of GDSs to transfer data could enable the proposed

[45] Meeting minutes are available at *https://www.regulations.gov/document/DOT-OST-2018-0190-0110.*

requirements to be implemented more quickly than not using GDSs.

On January 12, 2023, the ACPAC publicly deliberated and voted on recommendations related to ancillary fees.[46] The ACPAC recommendations concerned the types of ancillary service fees that should be disclosed, the manner and form of the disclosures (*e.g.,* whether pop ups, roll overs, or links are acceptable), the timing of the disclosures, the application of fee disclosures to telephone or in-person inquiries, the ability for consumers to opt out of receiving the disclosures, the transactability of ancillary fees, the process for data sharing by airlines to ticket agents, the entities covered, and the appropriate compliance timeframes. On January 23, 2023, to facilitate the public's consideration of this NPRM, the Department publicly posted a written summary of the recommendations adopted by the ACPAC at its January 12 meeting.[47] The ACPAC's specific recommendations are discussed in section E, where the Department discusses these matters in substance.

(3) Public Hearing Regarding Proposals

Under 14 CFR 399.75, when the Department issues a proposed regulation declaring a practice in air transportation or the sale of air transportation to be unfair or deceptive to consumers under the authority of 49 U.S.C. 41712(a), any interested party may file a petition to hold a hearing on the proposed regulation. Section 399.75 further provides that the petition for a hearing shall be granted if the petitioner makes a clear and convincing showing that granting the petition is in the public interest. Factors in determining whether a petition is in the public interest include, but are not limited to: (i) Whether the proposed rule depends on conclusions concerning one or more specific scientific, technical, economic, or other factual issues that are genuinely in dispute or that may not satisfy the requirements of the Information Quality Act; (ii) Whether the ordinary public comment process is unlikely to provide an adequate examination of the issues to permit a fully informed judgment; (iii) Whether the resolution of the disputed factual issues would likely have a material effect on the costs and benefits of the proposed rule; (iv) Whether the requested hearing would advance the consideration of the proposed rule and the General Counsel's ability to make the rulemaking determinations required by this section; and (v) Whether the hearing would unreasonably delay completion of the rulemaking.

On January 23, 2023, three commenters petitioned the Department for a public hearing on the NPRM. Airlines for America (A4A) raised two questions in its petition: (1) whether consumers are or are likely to be substantially injured or are misled by airlines' current disclosures of ancillary service fees; and (2) whether disclosures of itinerary-specific ancillary fees at the time of first search will result in the display of incomplete or inapplicable ancillary fee information, cause consumer confusion, and distort the marketplace. The Travel Technology Association (Travel Tech) stated in its petition that there is a fundamental disputed factual issue as to whether the proposed display requirements would benefit or harm consumers. Travel Tech also expressed the belief that the proposed disclosures are technically infeasible and requested a hearing to discuss these concerns as well as the Department's proposed time frame for compliance. In its comment on the NPRM, Google LLC also requested a hearing based on its assertion that the Department's analysis was flawed and that it was deficient in providing complaint-based evidence justifying the rulemaking. In arguing that a hearing is in the public interest pursuant to 14 CFR 399.75, A4A and Travel Tech asserted that each of the criteria in 14 CFR 399.75 for determining whether a hearing was in the public interest and must therefore be granted had been met. The Department granted the public hearing to afford stakeholders an opportunity, in addition to the public comment process, to present factual issues that they believe are pertinent to the Department's decision on the rulemaking.[48] The hearing was held on March 30, 2023,[49] and a video recording of the full hearing was posted to the Department's website.[50]

Before the hearing, A4A raised objections about the designated Hearing Officer appointed by the Department.[51] The organization made a request for the appointment of a hearing officer that would be ''neutral,'' rather than the Department's designated Aviation Consumer Advocate. Under the Department's regulation, the designation of a hearing officer is left to the discretion of the General Counsel.[52] The duty of the hearing officer is to preside over the hearing and to place the hearing minutes in the docket. The General Counsel, not the hearing officer, determines the Department's actions following a hearing.[53] In addition, the Department stated in a **Federal Register** document [54] that the appointment was appropriate because: (1) the designated hearing officer is a career civil servant who will execute the role in a neutral, fair, and professional manner; (2) the designated hearing officer's responsibilities as an Aviation Consumer Advocate are the same responsibilities that this individual has as an Assistant General Counsel of the Office of Aviation Consumer Protection and such responsibilities do not result in bias; and (3) the Hearing Officer's role is to conduct the meeting using generally accepted meeting management techniques and to not serve as a decisionmaker. As such, the Department proceeded with its appointment of the Department's designated Aviation Consumer Advocate as the hearing officer for the March 30, 2023, hearing.

A4A also objected to the second subject discussed at the hearing, ''whether disclosures of itinerary-specific ancillary fees at the time of first search will result in the display of incomplete or inapplicable ancillary fee information, cause consumer confusion, and distort the marketplace.'' [55] A4A stated that, in advance of the hearing, the Department asked the public for information on current carrier and ticket agent practices, including how ancillary fee information is currently displayed, how many existing online booking systems do not display specific ancillary fees on itinerary search result pages but

[46] The committee voted in favor of moving forward with deliberation and issuing recommendations at the January 12, 2023, meeting, with the member representing airlines voting against moving forward while the NPRM's comment period remained open. The meeting minutes are available at *https://www.regulations.gov/document/DOT-OST-2018-0190-0111.*

[47] *See* Procedural Information Regarding Enhancing Transparency of Airline Ancillary Service Fees (January 23, 2023) at *https://www.transportation.gov/airconsumer/AncillaryFeeNPRM-Procedural-Information-January23-2023.*

[48] 88 FR 13389 (Mar. 3, 2023).

[49] 88 FR 15622 (Mar. 14, 2023). The Department granted a postponement to the hearing's originally scheduled date of March 16, 2023, due to concerns by A4A and Travel Tech that the original 15 days' notice was insufficient to identify speakers and to compile data responsive to the subjects presented in the March 3 notice. A4A also stated that it would have difficulty finding participants due to the hearing being scheduled during the Spring Break season.

[50] *https://www.transportation.gov/airconsumer/AirlineAncillaryFeeNPRM/March30_Public_Hearing_Recording.*

[51] *https://www.regulations.gov/document/DOT-OST-2022-0109-0718.*

[52] 14 CFR 399.75(b)(5)(ii).

[53] 14 CFR 399.75(b)(6).

[54] 88 FR 15622 (Mar. 14, 2023).

[55] This subject was offered by A4A in its petition for a public hearing. *See https://www.regulations.gov/comment/DOT-OST-2022-0109-0091.*

display ancillary fees on other pages of the booking process, whether the lack of ancillary fee information at the time of itinerary and fare selection for current systems results in higher total trip costs, and information from consumers on the time spent searching on current carrier or ticket agent websites. A4A asserted that these questions did not address A4A's intent in presenting the second subject of the hearing, which A4A explained was the impact of the Department's proposals on consumers. A4A stated that the failure to address this issue rendered the hearing ineffective. The Department disagrees with A4A's assertions that the public hearing failed to address the issue A4A posed for discussion and that the hearing was ineffective. In its notice announcing the public hearing,[56] the Department stated that it welcomed, for issue 2, ''data and information regarding any potential for consumer confusion from overcrowded displays or information overload that could result from the Department's proposal, particularly on mobile or other devices with smaller displays.'' The Department also solicited ''any other information that is pertinent to the Department's determination on this proposal.'' These requests for information are aligned with A4A's stated focus of the hearing's second subject and did not render the hearing ineffective.

As provided in 14 CFR 399.75, following the completion of the hearing process, the General Counsel shall consider the record of the hearing, and shall make a reasoned determination whether to terminate the rulemaking; to proceed with the rulemaking as proposed; or to modify the proposed rule. Based on the record in this rulemaking proceeding, including the comments submitted by members of the public, the recommendations of the ACPAC, and the information received during the public hearing, the Acting General Counsel has determined that the Department should proceed with the rulemaking. The Department has made several adjustments that reflect the public input received, as discussed in section E.

D. Statutory Authority

(1) Unfair and Deceptive Practices

The Department is implementing the revised regulatory requirements in this rule pursuant to its statutory authority in 49 U.S.C. 41712 to prohibit unfair and deceptive practices in air transportation and the sale of air transportation. Under section 41712, a practice is ''unfair'' to consumers if it causes or is likely to cause substantial injury, which is not reasonably avoidable, and the harm is not outweighed by benefits to consumers or competition.[57] A practice is ''deceptive'' to consumers if it is likely to mislead a consumer, acting reasonably under the circumstances, with respect to a material matter. A matter is material if it is likely to have affected the consumer's conduct or decision with respect to a product or service.[58] Proof of intent is not necessary to establish unfairness or deception.[59] The elements of unfair and deceptive are further elaborated by the Department in its guidance document.[60]

In the NPRM, the Department tentatively determined that several practices conducted by airlines and ticket agents were unfair and deceptive in air transportation or the sale of air transportation. Members of the public provided input on the Department's preliminary determinations, including through submission of written comments and statements made at public meetings (*i.e.,* ACPAC meetings and the March 30, 2023, public hearing). After fully considering the public input, the Department has concluded that the practices identified below are unfair and deceptive.

(a) Bag Fees and Policies

Pursuant to its authority under section 41712, the Department is requiring airlines and ticket agents to disclose the fees for a first and second checked bag and a carry-on bag whenever fare and schedule information is provided to a consumer in response to a passenger-specific or anonymous itinerary search. The Department is also requiring disclosure of the applicable weight and dimensions of the first checked bag, second checked bag, and a carry-on bag before ticket purchase on an online platform.

(i) Carriers

The Department has concluded that a carrier commits an unfair and deceptive practice in the sale of air transportation when it discloses an airfare in response to a consumer's itinerary search without providing accompanying information on applicable fees for a first and second checked bag and a carry-on bag and when it fails to disclose weight and dimension information for that baggage before ticket purchase on an online platform.

Regarding fees, the Department has heard from consumers and other stakeholders that such fees, which had once been included in the airfare but may now be broken out from the airfare depending on the airline, route, fare class, or other factors, are often difficult to ascertain during the itinerary search and ticket purchase process. We find that the practice of not disclosing first and second checked bag and carry-on bag fees with the quoted airfare at the time of an itinerary search during the ticket purchase process prevents consumers from knowing the true cost of their tickets, and that the practice may cause consumers to invest time pursuing a ticket purchase based on an appealing airfare that ends up resulting in less favorable overall costs to the consumer when baggage fees are added. Under this rule, the bag fees disclosed must be passenger-specific fees if a passenger affirmatively provides information such as the passenger's status in the airline's frequent flyer program, the passenger's military status, or the passenger's status as a holder of a particular credit card. If the passenger does not affirmatively provide passenger-specific information, then the carrier must provide itinerary-specific fees, which would apply to the anonymous shopper, taking into account geography, travel dates, cabin class, and ticketed fare class (*e.g.,* full fare ticket). The failure to disclose either passenger-specific or itinerary-specific bag fees with the quoted airfare at the time of an itinerary search is unfair because it causes or is likely to cause substantial injury, which is not reasonably avoidable, and the harm is not outweighed by benefits to consumers or competition.

The substantial injury this practice is likely to cause is the additional time spent searching to find the total cost of travel and any additional funds spent on air transportation that might have been avoided if the consumer had been able to determine the true cost of travel up front and readily select the best price. This harm is not reasonably avoidable even with the disclosures mandated in the 2011 rulemaking that improved consumer access to first and second checked bag and carry-on bag fee information by requiring those fees to be displayed on airlines' websites. Airlines often disclose bag fees in an untailored, static format or in complex charts that are confusing to consumers and not readily available when consumers need the information to consider whether an itinerary and price offering best suits their needs. The harm that consumers

[56] 88 FR 13389 (Mar. 3, 2023), *available at https://www.federalregister.gov/documents/2023/03/03/2023-04510/enhancing-transparency-of-airline-ancillary-service-fees.*

[57] 14 CFR 399.79(b)(1).

[58] 14 CFR 399.79(b)(2).

[59] 14 CFR 399.79(c).

[60] 87 FR 52677 (Aug. 28, 2022).

experience is not outweighed by benefits to consumers or competition because consumer confusion about applicable bag fees harms, rather than benefits, competition and creates less than optimal purchasing decisions by consumers. In addition, because existing disclosure requirements of baggage fees did not apply to online platforms other than websites, consumers who searched for air transportation on those platforms may not have received the baggage fee information that this final rule now requires. The Department has determined that the disclosure of passenger-specific or anonymous itinerary-specific fees whenever fare and schedule information is provided would promote informed buyers, enhance competition, and lower prices. The practice of not disclosing passenger-specific or anonymous itinerary-specific fees for first and second checked bags and carry-on bags when fare and schedule information is provided is also deceptive in that it misleads consumers into believing the total purchase price from one carrier for a particular itinerary or fare type is cheaper than that of another when that may not be the case. This belief is reasonable as carriers and agents often disclose only the airfare and not bag fees during an itinerary search. As carriers have different policies regarding the fees and limitations imposed to transport baggage, and because variation within each carrier depends on the fare category purchased or the status of the passenger, the current requirement that carriers inform consumers that fees for baggage may apply and where consumers can see these baggage fees during the booking process is not providing consumers sufficient notice of the total cost of the air transportation. Consumers are often diverted to complex charts that are confusing, prolong the consumer's process of evaluating itineraries and fares for purchase, and may ultimately not be instructive for many consumers in determining the bag fee that would apply to them. The cost of the first and second checked bag and carry-on bag is often material to consumers, as knowing such costs in conjunction with the ticket price is likely to affect the consumer's purchase decisions as well as whether to check or carry-on a bag.[61]

The Department has also determined that it is an unfair practice to not disclose on an online platform the applicable weight and dimension allowances of a first checked bag, a second checked bag, and a carry-on bag, adjusted based on passenger-specific information if information specific to the passenger has been affirmatively provided. However, the Department is of the view that, unlike fees, it is sufficient to provide weight and dimension allowances of a first checked bag, a second checked bag, and a carry-on bag before ticket purchase to avoid engaging in an unfair and deceptive practice. The Department agrees with the comments, which are discussed in section E (4)(b), that providing the policy information is less critical to consumers' decision making than the fees themselves; accordingly, the Department is allowing disclosure of these policies later in the ticket purchase process. Nevertheless, the practice of not disclosing applicable weight and dimension allowances is likely to also cause substantial injury to consumers if not disclosed prior to ticket purchase given airlines' policies on bag size vary and consumers who learn that the weight and dimensions allowances of the selected carrier are stricter than the common bag size may decide to select a different carrier. This harm is not reasonably avoidable because, even though existing regulations require the disclosure of this information on e-ticket confirmations, this disclosure is provided after ticket purchase, thereby depriving consumers of the ability to fully evaluate potentially better options for them prior to ticket purchase. There is no countervailing benefit to consumers or competition from the practice of not disclosing weight and dimension allowances of baggage before ticket purchase, as the lack of information to consumers reduces their ability to evaluate ticket purchases and harms competition.

(ii) Ticket Agents

The Department has concluded that a ticket agent commits an unfair and deceptive practice in the sale of air transportation when it discloses an airfare in response to a consumer's itinerary search without providing accompanying information on applicable fees for a first and second checked bag and a carry-on bag and when it fails to provide weight and dimension information for that baggage before ticket purchase on an online platform. As noted above, the Department has heard from consumers and other stakeholders that baggage fees are often difficult to ascertain during the itinerary search and ticket purchase process. This difficulty is exacerbated on ticket agent channels in many cases, given the numerous airline and itinerary options presented. We find that the practice of not disclosing baggage fees with the quoted airfare at the time of an itinerary search prevents consumers from knowing the true cost of their air tickets, and that the practice may cause consumers to invest time pursuing a ticket purchase based on an appealing airfare that ends up resulting in less favorable overall costs to the consumer when baggage fees are later added. The failure to disclose bag fees with the quoted airfare at the time of an itinerary search is unfair because it causes or is likely to cause substantial injury, which is not reasonably avoidable, and the harm is not outweighed by benefits to consumers or competition.

The substantial injury this practice is likely to cause is the additional time spent searching to find the total cost of travel and any additional funds spent on air transportation that might have been avoided if the consumer had been able to determine the true cost of travel up front and readily select the best price. This harm is not reasonably avoidable, as described regarding carriers in section D (1)(a)(i). In addition, ticket agents provide a means for consumers to evaluate different travel options, often on different airlines. The harm of increased time and costs involved in the ticket purchase process is not outweighed by benefits to consumers or competition because consumer confusion about applicable bag fees harms, rather than benefits, competition and creates less than optimal purchasing decisions by consumers. The Department has determined that the disclosure of passenger-specific fees whenever fare and schedule information is provided would promote informed buyers, enhance competition, and lower prices.

The practice of not disclosing passenger-specific fees for first and second checked bags and carry-on bags when fare and schedule information is provided is also deceptive in that it misleads consumers into believing the total purchase price from one carrier for a particular itinerary or fare type is cheaper than that of another when that may not be the case. This belief is reasonable as ticket agents often disclose only the airfare and not bag fees during an itinerary search. The current requirement that ticket agents provide a generic notice that ''fees for baggage

[61] As noted in the NPRM, the GAO found that since airlines first imposed checked baggage fees, the number of checked bags per passenger has declined. GAO also explains that checked baggage fees have led to greater amounts of carry-on baggage. GAO 10–785, Commercial Aviation: Consumers Could Benefit from Better Information about Airline-Imposed Fees and Refundability of Government-Imposed Taxes and Fees (July 14, 2010) at *https://www.gao.gov/assets/gao-10-785.pdf.*

may apply'' during the booking process is not providing consumers sufficient notice of the total cost of the air transportation. Although existing regulations require carriers and ticket agents to inform consumers during the booking process about where consumers can see baggage fees, ticket agents may refer consumers to the carrier's website to search for fees, which would necessitate the consumer leaving the ticket agent's website, prolonging the consumer's process of evaluating itineraries and fares for purchase. The cost of the first and second checked bag and carry-on bag is often material to consumers, as knowing such costs in conjunction with the ticket price is likely to affect the consumer's purchase decisions.

The failure to disclose the applicable weight and dimension allowances of a first checked bag, a second checked bag, and a carry-on bag, adjusted based on passenger-specific information affirmatively provided by the consumer, is also an unfair practice. The Department has decided to require disclosure of these weight and dimension allowances before ticket purchase, rather than during the itinerary search process like bag fees, because the Department has been persuaded by commenters that providing this information is less critical to consumers' decision making than the fees themselves. This practice is likely to cause substantial injury to consumers given airlines' policies on bag size vary and consumers may have to pay more to transport their bags because of high airline fees for oversized or overweight bags than would have been the case if they knew the weight and dimensions allowances prior to ticket purchase and selected a different carrier with a bag size and dimension allowance that suited their circumstances. This harm is not reasonably avoidable, because even though existing regulations require the disclosure of this information on e-ticket confirmations, the disclosure is provided after ticket purchase, thereby depriving consumers of the ability to fully evaluate the cost of their ticket before purchase. There is no countervailing benefit to consumers or competition from the practice of not disclosing weight and dimension allowances of baggage before ticket purchase, as the lack of information to consumers reduces their ability to evaluate ticket purchases and harms competition.

(b) Change and Cancellation Fees and Policies

Pursuant to its authority under section 41712, the Department is requiring airlines and ticket agents to disclose the fees to change and cancel a ticket in response to a passenger-specific or anonymous itinerary-specific search and to disclose ticket change and cancellation policies before a consumer's purchase of air transportation on an online platform.

(i) Carriers

The Department concludes that a carrier commits an unfair practice in the sale of air transportation when it discloses an airfare in response to a consumer's itinerary search without providing accompanying information on applicable change and cancellation fees and fails to provide change and cancellation policies before ticket purchase on an online platform. The practice is unfair because it causes or is likely to cause substantial injury, which is not reasonably avoidable, and the harm is not outweighed by benefits to consumers or competition.

The Department currently requires the disclosure of these fees on or with the ticket.[62] This requirement, however, means that consumers often receive information about these fees after the purchase of the ticket is already made (*i.e.,* upon receipt of the ticket confirmation), which the Department determines in this final rule is not sufficient disclosure. The practice of not disclosing these fees while consumers select an itinerary and fare causes substantial injury to consumers in that passengers may not be aware of the change and cancellation fees that apply to a particular fare being offered, and they may then select a fare without adequate notice that they could incur significant fees to change or cancel their tickets.

These harms are not reasonably avoidable if the carrier does not provide disclosures on its cancellation or change fees during the itinerary search process and policies before ticket purchase on an online platform. Although carriers are already required to have change and cancellation policy and fee information available on their websites, the existing rule allows carriers to provide the fee information in a range. Consumers are harmed when they do not know the specific change or cancellation fee that would apply to them during the itinerary search process, particularly when the ranges provided by some carriers are so wide as to be virtually useless.[63] Consumers may also find it difficult to ascertain the change, cancellation, and refund policies that apply to the specific ticket they are selecting if the airline does not disclose such information during the booking process. Moreover, change fees, even if not in a range, and change and cancellation policies may not be simple to understand, as fare categories, passenger status, ticket type (*e.g.,* award ticket purchases), and other factors may impact the applicable change and cancellation fees and policies. Further, because the cancellation and change fee information is not provided during the itinerary-search process, consumers would need to interrupt their booking process to search for the information and extend the time needed to complete a booking. The harm that consumers experience is not outweighed by benefits to consumers or competition because, like baggage fees and dimensions, consumer surprise or confusion about applicable change and cancellation fees and policies harms, rather than benefits, competition. The Department believes that the disclosure of passenger-specific or non-passenger-specific change and cancellation fees during the itinerary-search process would promote informed buyers, enhance competition, and lower prices.

In addition, consumers are substantially harmed if they are not provided the following additional disclosures about change and cancellation policies before purchase on an online platform: (1) any prohibitions or conditions that limit a consumer's ability to change or cancel a ticket; (2) whether the consumer's reservation can be cancelled within 24 hours of purchase without penalty or whether it can be held at the quoted fare for 24 hours without payment, provided the reservation is made one week or more prior to a flight's departure; [64] (3) the form of the refund or credit that would be provided; (4) that the consumer is responsible for any fare differential on a changed ticket, if applicable; and (5)

[62] *See* 14 CFR 253.7.

[63] *See, e.g.,* United Airlines, Upgrades and Optional Service Charges (original page accessed Feb. 29, 2024) (showing ''Other Flight Changes and Cancellations'' as ''$0 to $1,000 per traveler, based on applicable fare rules''); Delta Air Lines, Change or Cancel Overview (original page accessed Feb. 29, 2024) (showing potential change and cancellation fees of ''$0–400'' for non-refundable fares); American Airlines, Optional Service Fees (original page accessed Feb. 29, 2024) (showing change fees of ''up to $750''). Website screenshots available in docket at *https://www.regulations.gov/docket/DOT-OST-2022-0109.*

[64] This rule requires that the carrier disclose its 24-hour cancellation or hold policy on the last page of the booking process as this is the point in the purchase process at which this disclosure is most relevant to consumers.

whether the consumer will receive a refund of the difference in fare if the consumer changes their flight and selects a less costly replacement flight. Disclosure of change and cancellation policy terms, such as whether the consumer would be required to pay a fare differential for a ticket change and whether the consumer can receive a refund in the original form of payment, may impact the consumer's decision on whether to purchase the selected itinerary or wait until the consumer is more certain of their travel plans. While important, these disclosures of the details of the change and cancellation policies are less critical at the time of itinerary search than the change and cancellation fees themselves. Accordingly, the Department is of the view that, unlike fees, it is sufficient to disclose change and cancellation policies before ticket purchase to avoid engaging in an unfair practice.

The Department also concludes that the practice of not disclosing change and cancellation fees with an airfare in response to a consumer's itinerary search and change and cancellation policies before ticket purchase on an online platform is deceptive. Without proper notice, consumers acting reasonably would be misled with respect to the change and cancellation fees and policies that apply to their ticket and may believe that changes or cancellations are possible at no fee or at a reduced fee. As noted above, many carriers changed their ticket change policies during the COVID–19 public health emergency, and such changes were publicly promoted by the carriers. A reasonable consumer may believe that he or she can change a ticket free of charge when that might not be the case, or he or she may choose to purchase a fare type that does not allow changes, believing erroneously that a change is allowed. Comments by consumer advocates and individuals suggest that consumers do consider change and cancellation fees and policies when making purchasing decisions, particularly during emergency situations such as a pandemic or potential severe weather events such as hurricane seasons.[65] The change and cancellation fees and policies are therefore material because they could affect the consumer's decision on whether to purchase an airline ticket and if so, which airline to select. As such, the Department concludes that the failure to disclose change and cancellation fees during the itinerary-search process and change and cancellation policies before ticket purchase on an online platform is deceptive.

(ii) Ticket Agents

The Department concludes that a ticket agent commits an unfair practice in the sale of air transportation when it discloses an airfare in response to a consumer's itinerary search without providing accompanying information on applicable change and cancellation fees and fails to provide change and cancellation policies before ticket purchase on an online platform. The practice is unfair because it causes or is likely to cause substantial injury, which is not reasonably avoidable, and the harm is not outweighed by benefits to consumers or competition.

The Department currently requires that carriers disclose change and cancellation fees and policies on or with the ticket, but current regulations do not require ticket agents to disclose such fees and policies during the ticket purchase process. As such, consumers purchasing tickets from certain ticket agents may be unaware of the change and cancellation fees and policies that would apply to them if they were to proceed with the purchase of a ticket. The Department understands that a substantial number of consumers purchase their tickets through ticket agents.[66] The practice of not disclosing these fees while consumers select an itinerary and fare causes substantial injury in that consumers may not be aware of the change and cancellation fees that apply to a particular fare being offered, and they may then select a fare without adequate notice that they could incur significant fees to change or cancel their tickets. In addition, consumers incur substantial injury if they are not provided the following disclosures about change and cancellation policies before purchase on an online platform: (1) any prohibitions or conditions that limit a consumer's ability to change or cancel a ticket; (2) whether the consumer's reservation can be cancelled within 24 hours of purchase without penalty or whether it can be held at the quoted fare for 24 hours without payment, provided the reservation is made one week or more prior to a flight's departure; [67] (3) the form of the refund or credit that would be provided; (4) that the consumer is responsible for any fare differential, if applicable; and (5) whether the consumer will receive a refund of the difference in fare if the consumer changes their flight and selects a less costly replacement flight. Disclosure of change and cancellation policy terms, such as whether the consumer would be required to pay a fare differential for a ticket change and whether the consumer can receive a refund in the original form of payment, may impact the consumer's decision on whether to purchase the selected itinerary or wait until the consumer is more certain of their travel plans. While important, these disclosures of the details of the change and cancellation policies are less critical at the time of itinerary search than the change and cancellation fees themselves and any prohibitions on the ability to change and cancel a ticket, which must be disclosed at that point. Accordingly, the Department is of the view that, unlike fees, it is sufficient to disclose change and cancellation policies before ticket purchase to avoid engaging in an unfair and deceptive practice. These harms are not reasonably avoidable if the ticket agent does not provide disclosures on cancellation or change fees when it provides an airfare in response to a consumer's itinerary search and policy information before purchase on an online platform. Ticket agents often refer consumers to carrier web pages that contain fee information, but this information is allowed to be expressed as a range rather than a specific applicable number.[68] This means that many consumers cannot determine the change and cancellation fees that would apply to them. Also, it is disruptive and time-consuming for consumers purchasing from ticket agents to navigate away from the ticket agents' online platform to the carrier's website to search for the information. Change and cancellation policies and fees may be difficult to understand, as fare categories, passenger status, ticket type (*e.g.,* award ticket purchases), and other factors such as where the passenger is flying may impact the applicable change and cancellation fees and policies. The harm that consumers

[65] *See* comments submitted in the docket for the 2014 NPRM, which can be accessed at *https://www.regulations.gov/search?filter=DOT-OST-2014-0056. See also, e.g.,* Minutes or webcast (at 2:15:55) of the January 12, 2023, ACPAC meeting, *available at https://www.transportation.gov/resources/individuals/aviation-consumer-protection/aviation-consumer-protection-advisory-committee.*

[66] *See, e.g.,* remarks by a representative of ASTA at the ACPAC's June 28, 2022, meeting. The representative stated that 44% of air tickets were sold by travel agencies (excluding OTAs), 39% were sold on airline websites, 12% were sold by OTAs, and 5% are sold through offline direct channels. Meeting minutes can be found at *https://www.regulations.gov/document/DOT-OST-2018-0190-0073.*

[67] This rule requires that the ticket agent disclose whether it has a 24-hour cancellation or hold policy on the last page of the booking process as this is the point in the purchase process at which this disclosure is most relevant to consumers.

[68] *See, e.g.,* fn. 61, above.

experience is not outweighed by benefits to consumers or competition because, like baggage fees, consumer surprise or confusion about applicable change and cancellation fees after airfare purchase harms, rather than benefits, competition. The Department believes that the disclosure of passenger-specific or non-passenger-specific change and cancellation fees during the itinerary-search process and policies before ticket purchase on an online platform would promote informed buyers, enhance competition, and lower prices.

The Department also concludes that the practice of not disclosing change and cancellation fees with an airfare in response to a consumer's itinerary search and policies before ticket purchase on an online platform to be deceptive. Without the required notice, consumers acting reasonably would be misled with respect to the change and cancellation fees and policies that apply to their ticket and may believe that changes or cancellations are possible at no fee or at a reduced fee. As noted above, many carriers changed their ticket change policies during the COVID–19 public health emergency, and such changes were publicly promoted by the carriers. A reasonable consumer may believe that his or her ticket may be changeable free of charge when that might not be the case, or he or she may choose to purchase a fare type that does not allow changes, believing erroneously that a change is permitted. Comments by consumer advocates and individuals suggested that consumers do consider change and cancellation fees and policies when making purchasing decisions, particularly during emergency situations such as a pandemic or potential severe weather events such as hurricane seasons. The change and cancellation fees and policies are therefore material because they could affect the consumer's decision on whether to purchase an airline ticket and if so, which airline to select. As such, the Department concludes that the failure to disclose change and cancellation fees during the itinerary-search process and policies before ticket purchase on an online platform is deceptive.

(c) Percentage-Off Discounts

After careful consideration of the comments submitted in this rulemaking, the Department has concluded that, when the terms ''flight,'' ''ticket,'' or ''fare'' are used in a percentage-off advertisement, it is an unfair and deceptive practice for an airline or ticket agent to not apply the percentage off the total cost of the ticket. Additionally, the Department has concluded that, when the term ''base fare'' is used in a percentage-off advertisement, it is an unfair and deceptive practice for an airline or ticket agent to not apply the percentage off the full fare amount excluding all government taxes and charges.

These types of percentage-off advertisements are deceptive as they mislead reasonable consumers on a material matter. A reasonable consumer seeing an advertisement for a 25% discount off a flight, a ticket, or a fare would believe that he or she is receiving 25% of the entire ticket based on a common understanding of those terms as supported by comments discussed in section E. That reasonable consumer would be misled if he or she were to find out that the 25% off discount applied to only a portion of the ticket price. Similarly, a reasonable consumer seeing an advertisement for a 30% discount off a ''base fare'' would believe that he or she is receiving 30% off the full fare excluding all government taxes and fees based on a common understanding of that term as supported by comments discussed in section E. That individual would be misled if he or she received a 30% off only a portion of the carrier-imposed mandatory charges. The percentage discounts are a material matter because they affect the price that consumers pay for the air transportation.

These types of percentage-off advertisements are also unfair as they have potential to cause substantial harm to consumers that is not reasonably avoidable and not outweighed by countervailing benefits to consumers or competition. Consumers may be substantially harmed because they are likely to encounter higher charges than expected if a seller advertises an appealing offer by stating ''50% off a flight'' or ''50% off a base fare'' so consumers will click on the advertisements only to find out that it is 50% off only a small portion of the ticket, which can multiply if a consumer relies on the promotional discount for multiple passengers on an itinerary or for an individual passenger traveling on a higher cost itinerary. The harm is not easily avoided due to a lack of clarity in the advertising language that carriers use. The harm that consumers experience from this practice is not outweighed by benefits to consumers or competition because the lack of clarity about the offered fare harms, rather than promotes, competition.

(d) Data Sharing

This final rule requires U.S. and foreign air carriers to provide any entity required to disclose critical ancillary fee information directly to consumers useable, current, and accurate information of the fee rules for critical ancillary services if the carrier provides fare, schedule, and availability information to that entity. The information provided by carriers to these entities must be sufficient to ensure compliance with any applicable disclosure requirements. The failure of a carrier to provide critical ancillary fee information to entities required to disclose this information to consumers is an unfair practice. Approximately half of air travel tickets are sold by ticket agents.[69] There is likely substantial harm to consumers if an entity required to disclose accurate critical ancillary fee information to consumers is unable to do so due to the carrier's failure to provide such information to that entity. Consumers are substantially harmed under these circumstances because consumers must then spend additional time searching to find the total cost of travel and consumers may spend additional funds on air transportation that could have been avoided if the consumer had the critical ancillary fee disclosed to them. This harm is not reasonably avoidable, as consumers would have to leave the ticket purchase process to review fees provided in each carrier website. In addition, once at a carrier website, consumers will likely not be able to determine the fee for changing and canceling a reservation as carriers provide that information in a range.[70] Consumers will also likely have difficulty determining the fee for transporting a carry-on bag, a first checked bag, and second checked bag because baggage fee structures are often complex and require charts and calculators to show the cost of fees. This harm is not outweighed by benefits to consumers or competition as the sharing of critical ancillary service fee information enables consumers to access critical ancillary fee information from a larger variety of ticket purchase

[69] ACPAC Meeting Minutes (June 28, 2022), p. 13 at *https://www.regulations.gov/document/DOT-OST-2018-0190-0073.* In its written comment, ASTA stated that 48 percent of total sales and aggregate spending were sold by travel agencies in 2019. *https://www.regulations.gov/comment/DOT-OST-2022-0109-0083.*

[70] *See* fn. 61 (showing that some airlines provide a large range for change or cancellation fees, with United, for example, quoting ''$0 to $1,000 per traveler'').

vendors, which improves, rather than harms, competition.

(e) Additional Unfair or Deceptive Practices

Additional discussion of unfair and deceptive practices identified in this final rule is provided in sections E (1)(c) (failure of a carrier or ticket agent that sells air transportation to make critical ancillary fee disclosures at the first page of its website or other online platform to which a consumer is directed after searching for flights on a metasearch site where that information is not provided); E (3)(d) (failure of a carrier or ticket agent to disclose that the purchase of a seat is not required for travel particularly when consumers are provided seats to choose where many require a fee to reserve); E (10)(a) (failure of a ticket agent that sells air tour packages to disclose that additional baggage fees may apply when a passenger books an air tour package without an identifiable carrier and the failure to disclose the passenger-specific fees for a carry-on bag, first checked bag, and second checked bag when the carrier is known); and E (10)(c) (failure of a ticket agent to display baggage fees in text form on the e-ticket confirmation that has traditionally applied to carriers).

(f) Stakeholder Comments and DOT Responses

Comments: Airlines and airline associations disagreed with the Department's proposed determination that not providing fee disclosures at the beginning of the ticket purchase process was an unfair and deceptive practice. Several airline commenters asserted that the Department did not provide adequate justification that consumers experienced or would likely experience substantial injury, as required by the analysis of an unfair practice. Spirit Airlines asserted that it already displays ancillary fees during the booking process, and that 95% of its customers advance past baggage selection pages, showing that concerns about injury are unfounded. A4A stated, ''Every A4A passenger air carrier displays or makes available at first search results the ancillary fee information that DOT proposes for a consumer conducting an anonymous search in the direct channel via rollovers or links.'' [71] A4A also noted that the Department did not differentiate its unfair and deceptive practice analysis between airlines and ticket agents in the NPRM, and the organization asserted that the rulemaking should be withdrawn with respect to airlines because consumer harm was avoidable. A4A, IATA, the National Air Carrier Association (NACA), and others asserted that the number of ancillary fee consumer complaints cited by the Department was too small to conclude substantial harm, and that the complaints do not evidence a lack of transparency. IATA and other airline associations asserted that consumers already understand that ancillary services are available for a fee, and because they have information on fees before they purchase tickets, there is no substantial harm. Similar statements were made by airline representatives at the ACPAC meeting held on December 8, 2022. At that meeting, a representative of IATA stated that the Department did not provide evidence that consumers do not know the price imposed for baggage before purchasing a ticket.

Airlines also asserted that the proscribed practices were not likely to mislead a consumer acting reasonably under the circumstances, as required by the analysis of a deceptive practice. Multiple airlines noted, for example, that because ancillary fees are already on airline websites, it was not reasonable to conclude that the non-display of fees during the initial itinerary search was deceptive. A4A commented that the Department did not use the right standard for a consumer ''acting reasonably,'' as part of its deceptive practice analysis, and the organization asserted that the Department should instead use enforcement processes rather than rulemaking to address problematic fee disclosure practices.

Individual commenters and multiple State attorneys general asserted that airlines were treating consumers unfairly regarding fees and that consumers were likely to be misled by current disclosures. Some of these individual commenters expressed frustration about the ticket purchase process, noting that when they attempt to buy a ticket they view as being a particular cost, the total cost increases when fees are later added. One commenter noted that some consumers would realize they could not afford the total cost of a trip had they known about bag fees when they selected their ticket. One commenter noted that it would be extremely rare for a passenger to travel without any baggage at all. Another commenter self-identified as a frequent traveler and stated that understanding and paying for ancillary fees was confusing and frustrating, particularly on third-party applications. Multiple State attorneys general commented that they hear every day from consumers who are deceived by ''junk fees'' and have launched education campaigns to protect consumers from hidden fees, junk fees, and drip pricing. The State attorneys general also noted that their offices receive numerous complaints about airlines' lack of disclosures of baggage and change and cancellation fees. FlyersRights stated that because airlines have increased the number and cost of ancillary fees, consumers are misled into believing that the cost of air travel will be cheaper than it is. The organization added that ancillary fees are often necessary for travel and used to be included in the base fare.

The Department received mixed comments from ticket agent representatives on its assertion that it is an unfair and deceptive practice not to provide disclosure of critical ancillary service fees before ticket purchase. The United States Tour Operators Association (USTOA) commented that the Department did not adequately demonstrate consumer harm, adding that consumers are aware that there are baggage fees and that there were few consumer complaints. As a metasearch entity, Google expressed its view that the Department did not explain how consumers were harmed by not having fee disclosures until the ticket purchase stage of the booking process and that consumers are aware of fees. Google also noted that the Department's sampling of consumer complaints did not show that the fee was not disclosed, but that consumers were surprised by the amount of the fees or the applicability of fees. However, ASTA commented that consumers are confused from airlines' unbundling their ancillary services, and that ancillary service fees remain difficult for consumers to discover and are hard to understand when they are found. ASTA added that ancillary fees are revealed too late in the search process to permit effective comparison shopping. Skyscanner stated that it shared the goal of enhancing competition and avoiding the unfair and deceptive practice of failing to inform consumers of the full cost of travel.

Ticket agents also commented on ensuring that they had access to ancillary fee data from airlines. One ticket agent commenter noted that consumers using third-party websites to purchase tickets may not have access to fee data and that lack of data provisioning is an unfair and deceptive practice. One metasearch entity commented that requiring data sharing with metasearch companies would reduce the risk that the transportation

[71] Comment of A4A, pages 17–18, *available at https://www.regulations.gov/comment/DOT-OST-2022-0109-0090.*

will be sold to consumers in an unfair or deceptive manner. As for airlines' view on data sharing, at the ACPAC meeting held on December 8, 2022, the airline representative noted the Department did not provide an unfair and deceptive practice analysis for its proposal on the sharing of fee information to ticket agents.

DOT Response: The Department has carefully considered the public comments on this issue and has determined that the practices identified in this rulemaking meet the elements of an unfair and deceptive practice. Those entities opposing the Department's position generally asserted that the Department did not provide sufficient evidence of substantial injury, that the Department relied on a small number of consumer complaints, that the consumer harm is avoidable as the fees are presented on airline websites, and that consumers are aware that ancillary fees exist. Other comments opposing the Department's position stated that consumers are not interested in ancillary fees when booking tickets and that the Department did not conduct an unfair and deceptive practice analysis regarding its data-sharing proposal. The Department disagrees that there is insufficient evidence of substantial injury. Consumer complaints are only one metric that the Department uses to gauge whether an unfair or deceptive practice is occurring. The Department also relies on the statements of consumer advocates, all of which have consistently expressed concern about consumer confusion over ancillary fees throughout the years that rulemaking has been contemplated on this subject. The Department finds it reasonable to rely on the statements of the many consumer advocates, State attorneys general, and consumer organizations as representative of the views of consumers, and, when further confirmed by consumer complaints, to determine that substantial harm is occurring or is likely to occur. These positions by consumers were reaffirmed in their comments to the NPRM. Comments submitted by members of the public in this rulemaking also clearly evidence that consumers are surprised by the amount of ancillary fees charged when they purchase tickets.

The Department also disagrees that the consumer harm is reasonably avoidable. While the fees for baggage and other ancillary services are provided on airline websites, such fees are not disclosed on ticket agent websites and are difficult to ascertain prior to ticket purchase. Ancillary fees, except for baggage, may be expressed in a range, and baggage fee structures are often complex and require charts and calculators to show the cost of fees. Some fees may also not be applicable to passengers who purchase tickets on one airline's website for flights that will be operated by a different airline.

The Department also disagrees with the premise that consumers are well-informed about airline fees. While many consumers may be aware of the existence of fees, a large number of consumers do not know the amount of the fees that will apply to them, given the complexity of fee structures. Comments from consumers affirm this belief, and Google and others acknowledged this fact in their comments. Having fee disclosures up front during the booking process would mitigate the consumer surprise at the level of fees to be imposed. The Department disagrees with the assertion that consumers not purchasing baggage fees during ticket purchase (or otherwise skipping pages that disclose baggage information) is indicative that they are not interested in baggage fees. Consumer advocates and commenters have noted that baggage is a critical ancillary service, and the decision not to purchase baggage services during the ticket purchase process does not mean that the consumer will not purchase a bag later or that the amount of the fee is not important to the consumer.

Regarding the airline representative's statement at the December 8, 2022, ACPAC meeting that the Department did not conduct an unfair or deceptive analysis of the data sharing proposal in the NPRM, the Department has determined in this final rule that failure to disclose baggage and change and cancellation fees to consumers as specified in the rule is an unfair and deceptive practice. The Department has also determined that the failure for a carrier to provide critical ancillary fee information to any entity required to disclose this information to consumers that displays or sells the carrier's flights directly to consumers to be an unfair practice. The Department's analysis complies with its regulations, which require an analysis supporting a conclusion that a practice is unfair or deceptive to consumers pursuant to 14 CFR 399.75(c). At the ACPAC meeting, the Department responded to the airline representative by noting that data sharing is related to the disclosure of fees because, without data sharing, the disclosure of fees would not be possible for a large segment of consumers. The Department provides its analysis of how the failure to share critical ancillary fee information is an unfair practice in section D (1)(d).

Finally, the Department disagrees with the suggestion that it should pursue enforcement action under its unfair and deceptive practices authority, rather than conducting a rulemaking. As stated by the Department at the December 8, 2022, ACPAC meeting, the airline representative's suggestion that the Department take enforcement action instead of conducting rulemaking would be difficult if the current regulation permits or does not address the practices that are of concern. The Department issues this regulation to address the inadequacy in the current regulation.

(2) Other Authorities

In carrying out aviation economic programs, including issuing this final rule under 49 U.S.C. 41712, the Department is required to consider the factors identified in 49 U.S.C. 40101 as being in the public interest and consistent with public convenience and necessity. Under 49 U.S.C. 40101(a)(4), the Department is required to consider the availability of a variety of adequate, economic, efficient, and low-priced services without unreasonable discrimination or unfair or deceptive practices as being in the public interest. Under section 40101(a)(9), it is also in the public interest to prevent unfair, deceptive, predatory, or anticompetitive practices in air transportation. The Department is also required by section 40101(a)(12) to consider as being in the public interest encouraging, developing, and maintaining an air transportation system relying on actual and potential competition to provide efficiency, innovation, and low prices.

Except for Southwest Airlines, airline commenters generally asserted that the Department's rulemaking would harm competition by, in their view, making it more difficult for consumers to view travel options. Ultra low-cost carriers also believed that the rule would undermine their business model of unbundling ancillary services from the cost of airfare. Airlines expressed the view that the popularity of unbundled offerings showed that consumers preferred those models and not that they were being deceived. Southwest Airlines stated that the number and complexity of fees by airlines made comparison shopping more difficult, and it commented that it was appropriate for the Department to reduce the complexity of disclosures.

Some ticket agents such as USTOA and metasearch entities such as Google stated that the existing marketplace provided transparency and that the rule would diminish consumer choice and competition. In contrast, others such as

ASTA commented that ancillary service fees are not accessible in a timely manner and that identifying the total travel cost is complex, confusing, and needlessly time-consuming for consumers. Travel Tech noted that, because ticket agents do not universally receive information on critical ancillary service fees from airlines, some ticket agents are currently unable to display those fees at any point in the booking process. Skyscanner commented that it strongly supports the Department's goal of making critical ancillary fees more transparent for consumers. Some ticket agents also noted that a lack of transactability of ancillary fees on ticket agent websites would disincentivize consumers from purchasing air travel on those websites.

Consumers generally stated that the rule would facilitate price comparison, encourage competition, and prevent airlines from using hidden fees to gain an unfair advantage. Consumer advocacy groups asserted that market competition requires transparency and informed consumers, with consumers benefiting from the availability of reliable fee information from multiple sources. One individual stated that the rule would reduce options and make travel less affordable.

After considering the public comments, the Department has determined that this rule serves the public interest as articulated above. This rule improves the transparency of airline pricing through the increased disclosure of fees for critical ancillary services during the itinerary search process. As carriers vary on their policies for such fees and such information is often not provided during the purchase process, consumers of air transportation may have difficulty understanding the actual and potential costs of accessing the air transportation between different carriers. By improving this transparency, this rule allows for better understanding of airline ticket pricing, of which these fees are often a critical component, thereby encouraging price competition. The Department acknowledges concern about screen clutter and a potential reduction in travel options being displayed to consumers; as such, the Department has adjusted its disclosure requirements from those proposed in the NPRM to allow for more flexibility in the manner of display of information and to reduce the potential for the harms identified by the commenters.

To answer the concerns of carriers, the Department believes that this rule does not undermine the business model of unbundled offerings. The rule does not prohibit such a model, and by improving the disclosure of fees associated with ancillary services, the Department believes that the rule helps to improve the model by making it more transparent to consumers. We do note that the unbundled model has proliferated in the marketplace, but we do not agree with commenters' assertion that this is evidence that the model is preferred by consumers and not that they are being deceived by airlines' current disclosure practices. The Department has presented its analysis of how a failure of carriers or tickets agents to provide the disclosures required in this final rule represents an unfair or deceptive practice.

We are also not persuaded by ticket agents' concern that a lack of transactability of ancillary fees would disincentivize purchases on ticket agents' websites. As noted in sections E (3)(c) and E (7), this final rule does not require the disclosure or transactability of family seating fees. The Department is considering issues related to family seating in a separate rulemaking.[72] This rule also does not require ticket agents to make the fees for a first checked bag, second checked bag, and carry-on bag transactable on ticket agent websites. Due to the post purchase price increase prohibition in 14 CFR 399.88, airlines are currently prevented from increasing the baggage fees that apply to a consumer's booking after the time of the consumer's ticket purchase. We have seen little evidence that consumers are choosing to forgo using ticket agent websites as a direct result of not being able to purchase baggage fees on those websites. These circumstances have predated this rule, and the Department does not believe that the addition of new critical ancillary fee disclosures during the purchase process will change that behavior.

E. Comments and DOT Responses

(1) Covered Entities

The Department proposed to cover U.S. air carriers; foreign air carriers; ticket agents that sell airline tickets, whether traditional brick-and-mortar travel agencies, corporate travel agents, or OTAs; and metasearch sites that display airline flight search options directly to consumers. The Department proposed that GDSs would not be covered by the proposal as GDSs arrange for air transportation but do not sell or display a carrier's fare to consumers.

This final rule covers U.S. and foreign air carriers as proposed. It also covers ticket agents that sell or display airline tickets, except for corporate travel agents, which are excluded from coverage for the reasons explained later in this document. This rule does not make a determination on whether metasearch entities and aggregators that advertise, but do not sell, airline tickets, are ticket agents and would thus be covered by this rule. However, if the Department were to determine in a separate rulemaking[73] that metasearch entities and aggregators are ticket agents as defined in 49 U.S.C. 40102(a)(45), then they would be covered by this rule as well.[74] The Department's response to comments about which entities should be covered by this final rule and explanations for all modifications from the NPRM are described in the sections that follow. Discussion of which operations and online platforms of covered entities are covered by this final rule is provided in section E (2).

(a) U.S. and Foreign Air Carriers

Proposal: The Department proposed fee and policy disclosure of critical ancillary services by U.S. and foreign carriers during the booking process when fare and schedule information is provided. In addition, the Department proposed to require that the carriers provide the fee information for critical ancillary services to ticket agents that sell or display the airlines' fare and schedule information.

Comments: A4A stated that ''DOT data does not demonstrate the existence of any significant problems with airline ancillary-fee transparency, and therefore this NPRM as applied to airlines should be withdrawn.'' According to A4A, the regulation of airlines is unnecessary because airlines already disclose fees for critical ancillary services. A4A added that any unfair or deceptive practices occur on indirect channels (*e.g.,* OTAs, metasearch sites, ''traditional'' travel agencies, and travel management companies). An individual commenter stated that the rule appeared to be focused on problems with disclosures by large U.S. carriers, suggesting that the rule should not cover other entities like foreign carriers and small network carriers.

[72] *See https://www.transportation.gov/regulations/report-on-significant-rulemakings.*

[73] Air Transportation Consumer Protection Requirements for Ticket Agents (RIN 2015–AE57), (abstract explains that this rulemaking would address whether to codify in regulation a definition of ''ticket agent'' and whether to require large ticket agents to adopt minimum customer service standards), Fall 2023 Unified Agenda of Regulatory and Deregulatory Action at *https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202310&RIN=2105-AE57.*

[74] 49 U.S.C. 40102(a)(45) defines a ticket agent as ''a person (except an air carrier, a foreign air carrier, or an employee of an air carrier or foreign air carrier) that as a principal or agent sells, offers for sale, negotiates for, or holds itself out as selling, providing, or arranging for, air transportation.''

DOT Response: This final rule covers U.S. and foreign air carriers because the issue of lack of transparency of airline ancillary service fees is not limited to indirect channels as asserted by airline commenters or limited to large U.S. carriers as suggested by an individual commenter. The Department wants to ensure that consumers know, when fare and schedule information is provided during the booking process, the fees charged for transporting a first and second checked bag, transporting a carry-on bag, and canceling or changing a flight whether they are purchasing the ticket from an airline or a ticket agent. Approximately 45% of tickets are sold by airlines directly to consumers, and the remainder is sold through ticket agents,[75] so it is important to cover not only ticket agents but also carriers. Further, it is important to ensure that consumers purchasing air transportation from small carriers or foreign air carriers that fly to and from the U.S. are protected from unfair and deceptive practices equal to those purchasing tickets from U.S. carriers and ticket agents. Accordingly, as discussed in section D, the unfair and deceptive practices that the Department is addressing in this final rule relate to ticket agents and carriers regardless of the carrier's size or country affiliation for flights to, within, and from the U.S.

(b) Ticket Agents That Sell Air Transportation

Proposal: The Department proposed to require all ticket agents that sell air transportation, including corporate travel agents, to disclose to consumers the fees and policies for ancillary services that are critical to a consumer's purchasing decision. The Department solicited comments in the NPRM on whether it should exclude corporate travel agents from coverage of the final rule because the display content for such agents is typically negotiated by the business client involved.

Comments: The Department's proposal to apply the transparency requirements regarding critical ancillary services to ticket agents that sell air transportation was challenged only as it relates to corporate travel agents and small ticket agents. Consumer groups, including the U.S. PIRG Education Fund, generally supported covering ticket agents. An individual commenter asked the Department to clarify that OTAs have responsibility for the disclosure of ancillary fees provided on their websites because carriers lack control over the display of information on those sites. Some airlines and organizations, including Spirit Airlines and A4A, expressed concerns about the accuracy of disclosures on ticket agent websites, and Southwest Airlines supported extending disclosure requirements to ticket agents. Allied Tour & Travel, a small ticket agent, expressed concerns about the burden of compliance for small tour operators that include airfare in a travel package.

Regarding corporate travel agents, multiple ticket agent associations asked the Department to exclude them from the final rule's coverage. These commenters generally stated that the Department should exempt corporate travel agents from the final rule's requirements because ancillary fee disclosures by those agents are the subject of contractual agreement between a business client and the travel agent, with the relevant ancillary services and fees negotiated as part of the contract. The Travel Management Coalition (TMC) testified at the Department's March 30, 2023, public hearing that its customers are frequent travelers, often use the same routes, and are highly familiar with ancillary fee information. In addition, Travel Tech commented that certain ancillary fees, like family seating fees, are irrelevant for corporate clients, and others, including baggage fees and flight change fees, are not a significant consideration in corporate travelers' purchasing decisions. TMC agreed that its customers rarely check bags or travel with children. Further, ASTA noted that the corporate client, not the business traveler, generally pays the cost of transportation, including fees.

These commenters also cited various precedents for treating business travel differently under consumer protection laws. ASTA and Travel Tech stated that the exclusion for corporate travel agents would be consistent with the European Union's framework, and TMC testified that Congress recognized the distinction between corporate and public travel in the FAA Reauthorization Act of 2018 (2018 FAA Act) by creating an exemption from certain customer service requirements if the sale of an airfare was made pursuant to a corporate contract.

Travel Tech, ASTA, and TMC suggested that the Department define ''corporate travel agent'' for purposes of a regulatory exclusion as a travel agency ''engaged in the provision of travel services primarily to business entities pursuant to a written contract for the business travel of such business entities' employees.'' GBTA instead recommended that the Department exempt what it termed ''private'' and ''consortia/agency fares'' in the final rule. It asked that DOT consider private fares to be ''[d]iscounted or lane (fixed fares between two cities/airports) fares negotiated by travel managers that the airline 'files' with [the Airline Tariff Publishing Company (ATPCO)], to be made available to the organization's agencies of record, as documented in the airline contract, for their travelers to book online or offline.'' GBTA further suggested that the Department define ''consortia fares/agency fares'' as proprietary fares negotiated by mega agencies and consortia [76] offered to customers as an alternative to published fares.

In contrast, American Airlines urged the Department not to adopt an exception for corporate travel agents. The airline's comment stated that it is unreasonable and potentially infeasible to exempt corporate travel agents because few serve exclusively corporate travelers for corporate travel and consumers increasingly book travel that combines business and personal travel.

DOT Response: The Department continues to apply the requirements to disclose critical ancillary service fees and policies to ticket agents that sell air transportation; however, the Department is excluding corporate travel agents from these requirements. In excluding corporate travel agents from coverage of this final rule, the Department is agreeing with commenters that there is no need for DOT to apply transparency rules for corporate travel arrangements that are contractually entered into by sophisticated entities.

In this rule, the Department is adopting the definition of corporate travel agent as proposed by Travel Tech, ASTA, and TMC, with some modifications. This final rule defines corporate travel agent as a ticket agent that provides travel services to the employees of a business entity pursuant to a written contract with that entity for the business travel of its employees. The ''ticket agent'' need not be a single travel agent to meet the definition in this final rule, but could instead be a consortium of travel agents, as suggested in GBTA's comment.

While some commenters recommended that DOT exclude corporate travel agents if they are primarily engaged in such activity, the

[75] ACPAC Meeting Minutes (June 28, 2022), p. 13 at *https://www.regulations.gov/document/DOT-OST-2018-0190-0073.*

[76] A travel consortium is a collection of independent travel agencies that combine resources to increase their visibility, revenue, and marketing opportunities. The independent travel agencies that are part of a consortia are known as ''mega-agencies'' and can offer their customers a consortia rate, which is a preferred negotiated or partnership rate.

Department instead adopts a transaction-specific approach and is applying this rule to ticket agents that are not acting as corporate travel agents in the specific transaction at issue. Under the final rule, if a ticket agent acts entirely as a corporate travel agent with respect to a transaction or a corporate flight booking portal, for example, then the rule's ancillary fee disclosure requirements would not apply for that transaction or on that booking portal. Because ticket agents may act as a corporate travel agent with respect to certain clients and also have booking systems available to the general public, this rule does not exclude a ticket agent that sells air transportation from the requirement to display fees or policies for critical ancillary services due to that agent's ''primary'' activity as a corporate travel agent. This approach ensures information about critical ancillary services are not improperly excluded from leisure travelers who are not covered by a contractual agreement. A transaction-specific approach prevents consumer confusion from the presence of inconsistent information offered on different platforms.

This transaction-specific approach also addresses the concerns raised by American Airlines that few travel agents serve exclusively business clients. Those travel agents that provide airfare sales exclusively to business entities under a written contract for the business travel of the business entities' employees would be fully excluded from the rule's requirements. Those travel agents engaged in a mix of business and non-business sales would need to provide the ancillary fee disclosures required by this final rule to any traveler selecting flights who is not engaged in business travel covered by a written contract.

As for section 427 of 2018 FAA Act, which was cited by TMC in support of its request for an exclusion, it demonstrates that exclusion from consumer protection requirements for sales made pursuant to corporate contracts is not unusual. Section 427 provides protection from enforcement for noncompliance of any customer service standard or requirement in a DOT final rule that requires ticket agents to adopt customer service standards applicable to carriers to the extent ''the sale of air transportation is made . . . pursuant to a specific corporate or government fare management contract.'' While the Department is addressing the issue of whether to require ticket agents to adopt minimum customer service standards applicable to carriers in another rulemaking,[77] the Department agrees with TMC that section 427 differentiates between corporate and public travel.

Regarding Allied Tour & Travel's comment, the Department has determined that the disclosures required by this rule should apply to ticket agents, regardless of size. Creating different standards based on the ticket agent's size would add to consumer confusion, as noted earlier, due to the presence of inconsistent information on different platforms. In consideration of the potential for varying degrees of burden, however, this final rule provides those ticket agents that meet the SBA definition of a small entity with additional time to comply with the rule's requirements beyond the time permitted for other ticket agents, in recognition that it may take additional time for small ticket agents to comply with new disclosures (discussed in section F).

(c) Metasearch Sites

Proposal: The Department proposed to require entities that do not sell airline tickets but display airline flight search options directly to consumers (*i.e.,* metasearch sites) to display critical ancillary service fees when fare and schedule information is provided. The Department proposal treated metasearch entities as ticket agents.

Comments: Multiple metasearch entities, CCIA, and Travel Tech expressed their view that metasearch entities do not meet the statutory definition of ''ticket agent,'' and should not be subject to the rule because they do not sell air transportation. Booking Holdings also noted that many parts of the proposed rule, such as the transactability of family seating fees, were inapplicable to metasearch sites as they do not sell tickets. CCIA also raised privacy and security concerns about the possibility that such entities would need to handle personal or payment information, which they do not handle today. Google added that it does not currently collect passenger information and expressed concern that it would need to do so under the proposed rule to verify passenger identities.

Metasearch entities, as well as CCIA and Travel Tech, also overwhelmingly disagreed with the NPRM's proposal that metasearch entities be covered under the rule. CCIA, for example, stated in written comments and at public meetings that metasearch entities should be excluded from the rule's disclosure requirements because they do not have access to fee information and the rule's disclosure requirements would clutter and negatively impact displays, on which aggregators and metasearch entities compete. Booking Holdings added that a prescriptive approach to metasearch displays will reduce the number of routes offered as part of the initial itinerary search results and have a detrimental effect on competition. It stated that metasearch entities should be afforded flexibility in fee disclosures to ensure they provide innovative and interactive displays for consumers to quickly be able to understand available travel options.

From the airline perspective, Southwest Airlines expressed support for applying fee disclosure requirements to metasearch entities, noting that they are an important source of information and that the disclosure rules should apply to them to mitigate consumer confusion on fees. The airline added that section 427 of the 2018 FAA Act directed the Department to apply consistent consumer protection requirements to all large ticket agents to the extent feasible.

DOT Response: The Department recognizes the important role metasearch entities play in providing information to consumers and facilitating comparison shopping. As stated previously, the Department is undertaking this rulemaking pursuant to its authority to prohibit carriers and ticket agents from engaging in unfair or deceptive practices. Under 49 U.S.C. 40102(a)(45), a ticket agent is ''a person (except an air carrier, a foreign air carrier, or an employee of an air carrier or foreign air carrier) that as a principal or agent sells, offers for sale, negotiates for, or holds itself out as selling, providing, or arranging for, air transportation.'' Also as noted by Southwest Airlines in its comment, section 427 of the 2018 FAA Act[78] calls for a consistent level of consumer protection regardless of where consumers purchase airfares and related air transportation services. The Act uses section 40102(a)(45)'s existing definition of ''ticket agent'' and clarifies that the term includes ''a person who acts as an intermediary involved in the sale of air transportation directly or indirectly to consumers, including by operating an electronic airline information system, if the person—(i) holds the person out as a source of information about, or reservations for, the air transportation industry; and (ii) receives compensation in any way related to the sale of air transportation.''

[77] *See* Air Transportation Consumer Protection Requirements for Ticket Agents (RIN 2015–AE57) at *https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202310&RIN=2105-AE57.*

[78] Public Law 115–254 (Oct. 5, 2018).

Section 427 directs the Department to use this definition when issuing its final rule requiring ticket agents to adopt customer service standards.[79] The Department is deferring to that rulemaking its determination of whether metasearch sites that do not sell airline tickets but display airline flight search options directly to consumers are ticket agents that must disclose ancillary fee information required.

During the pendency of that separate rulemaking, although the Department's Office of Aviation Consumer Protection (OACP) has enforced the Department's aviation consumer protection rules against metasearch entities in the past based on its view that metasearch entities are ticket agents,[80] OACP will not enforce the disclosure requirements in this rulemaking against metasearch entities. This enforcement position notwithstanding, the Department encourages airlines and metasearch sites to enter into voluntary agreements to share critical ancillary fee information and for metasearch entities to voluntarily disclose this information to consumers with the fare and schedule information while further regulatory action is under consideration. The Department also notes that the Federal Trade Commission has concurrent jurisdiction over ticket agents and has the authority to both determine whether metasearch entities are ticket agents and take action against ticket agents as well as entities that are not ticket agents irrespective of DOT action.

To ensure consumers have access to critical ancillary service fee information upfront, while the Department considers the status of metasearch entities in a separate rulemaking, the Department is requiring that airlines and ticket agents that sell air transportation disclose critical ancillary service fees on the first page of their website or other online platforms to which consumers are directed after searching for flight options on a metasearch site unless the consumer was already provided accurate fee information on the metasearch site. In many cases, airlines and ticket agents that provide fare, schedule, and availability information to metasearch entities permit the metasearch entity to electronically direct consumers to a page on the airline or ticket agent's website that does not require the consumer to initiate a new itinerary search. Because consumers directed to an airline's or ticket agent's website or other online platform from a separate metasearch site may not have an opportunity to view the critical ancillary service fees that apply to them, this rule requires that airlines and ticket agents display the required critical ancillary service fee information on the landing page on the airline or ticket agent's online platform to which consumers are directed after using a metasearch site. The rule permits an exception in situations where the consumer was provided accurate critical ancillary service fee information on the referring entity's website.

The Department considers it to be an unfair and deceptive practice for a carrier or ticket agent that sells air transportation to fail to make critical ancillary fee disclosures at the first page of its website or other online platform to which a consumer is directed after searching for flights on a metasearch site where that information is not accurately provided. As discussed in section D (1), consumers are substantially harmed if critical ancillary fee information is not provided to them early in the search process, as ancillary fees such as baggage, change, and cancellation fees are critical to consumers' purchasing decisions and may make up a significant portion of the total cost of travel. The harm is not reasonably avoidable because consumers will likely not be able to determine the fee for critical ancillary services even if a consumer expends time and effort by leaving the booking system to try to determine the fees that apply to the itinerary. Typically, carriers provide change and cancellation fees as a range when viewed outside of the booking process. Consumer advocates have also shared with the Department that consumers have difficulty determining the fee for transporting a carry-on bag, a first checked bag, and second checked bag because baggage fee structures are often complex and require charts and calculators to figure out the fees. The lack of fee information is not outweighed by countervailing benefits to competition or consumers. In fact, the lack of information hinders consumers from being able to understand the true cost of their travel and harms competition, rather than benefiting it. The practice is also deceptive because a reasonable consumer would be misled to believing the cost of the travel is lower than what the true cost is if the fees for critical ancillary services are excluded. The disclosure of the fees is material because the fees could affect the consumer's decision on whether to purchase an airline ticket and if so, which airline to select.

If metasearch entities are ultimately deemed to be ticket agents subject to this rule, the Department believes that concerns about screen clutter and impacts on innovation have been adequately addressed by the changes the Department has made to the final rule after considering public comments. As noted in this preamble, the final rule provides increased flexibility on method of display of critical ancillary fees, and it does not require the disclosure or transactability of family seating fees.

Regarding concerns about privacy and security of consumer data by metasearch entities, while fee disclosures must be passenger-specific if the consumer affirmatively provides information regarding their status (*e.g.,* frequent flyer status, military status, credit card holder status), such consumer-supplied information is not required to be validated before fees are displayed. Entities covered by this rule are required to disclose passenger-specific fee information based on the status that a consumer purports to have when conducting an itinerary search, regardless of whether the consumer holds such status. The rule does not require entities to collect passenger name, frequent flyer number, or credit card information, and does not implicate the privacy or security concerns raised by metasearch entities. See discussion on passenger-specific information in section E (5).

(2) Covered Operations

Proposal: The Department proposed to require fee and policy disclosures of critical ancillary services by airlines and ticket agents on websites marketed to U.S. consumers where air transportation is advertised or sold. On whether a website is ''marketed to U.S. consumers,'' the Department noted in the NPRM that the determination would be based on a variety of factors—for example, whether the website is in English, whether the seller of air transportation displays prices in U.S. dollars, or whether the seller has an option on its website that differentiates sites or pages designed for the United States. In addition to the website disclosures, the Department proposed similar disclosures of critical ancillary services by U.S. and foreign carriers for tickets purchased by telephone or in-person for flights to, within, or from the United States. On fee information distribution, the Department proposed to require that airlines provide fee and policy information about critical ancillary services to ticket agents that sell or display airlines' fare or schedule information for air transportation to, from, or within the United States.

[79] *See* Air Transportation Consumer Protection Requirements for Ticket Agents (RIN 2015–AE57) at *https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202310&RIN=2105-AE57.*

[80] *See, e.g.,* DOT Order 2022–2–6 (FlightHub Group, Inc., et al.) (Feb. 9, 2022).

Comments: Air Canada commented that the scope of the rule was broad, and that covering websites marketed to U.S. consumers could result in small ticket agents in foreign jurisdictions leaving the U.S. market because they cannot afford the upfront costs. The airline also expressed concern regarding possible conflicts with foreign consumer protection laws such as those in the European Union.

Among ticket agent and metasearch stakeholders, Travel Tech and Skyscanner expressed agreement with the Department that the rule should apply only to those websites designed for use by U.S. consumers. Skyscanner also suggested that the rule's definition of a ''consumer'' should be limited to consumers physically located in the United States when searching for or purchasing tickets. Similar to Air Canada, Skyscanner argued that covering consumers not physically in the United States risks legal conflict with consumer protection regulations in other countries.

Booking Holdings said that the proposed disclosures can be required only when a passenger searches for air transportation and added that air transportation as defined by statute does not apply to flights wholly between two foreign points which it interprets as meaning that passengers in the United States who search for flights between two foreign points are not entitled to receive the disclosures set forth in this rule. Skyscanner called for clarification on whether the rule would apply to foreign carriers serving non-U.S. points on flights carrying a U.S. carrier code, expressing the view that foreign carrier flights between non-U.S. points should not be subject to this rule when not carrying a U.S. carrier code, even if the flight can be booked on a website marketed to U.S. consumers.

DOT Response: After carefully considering the public comments, the Department has decided to require fee and policy disclosures of critical ancillary services by airlines and ticket agents if they market to consumers in the United States. Under these circumstances, the final rule requires airlines and ticket agents to disclose the fees for critical ancillary services on airlines' or ticket agents' websites and other online platforms such as mobile applications (apps). It also requires airlines and ticket agents to disclose critical ancillary fees to consumers during an in-person or telephone discussion about an airline's fare and schedule if they market to U.S. consumers. The Department has used the phrase ''marketed to U.S. consumers'' and similar terminology in other aviation consumer protection and civil rights regulations applicable to websites.[81]

In one of these rulemakings, the Department explained that the characteristics of a ''website that markets air transportation to the general public inside the United States includes, but is not limited to, a site that: (1) contains an option to view content in English, (2) advertises or sells flights operating to, from, or within the United States, and (3) displays fares in U.S. dollars.'' [82] The Department further explained ''that non-English (*e.g.,* Spanish) websites targeting a U.S. market segment would also be covered; whereas websites that block sales to customers with U.S. addresses or telephone numbers, even if in English, would not.'' [83] Similarly, in this rulemaking, the Department stated that it would consider a variety of factors to determine whether a website is marketed to U.S. consumers, including whether the website is in English, whether the seller of air transportation displays prices in U.S. dollars, or whether the seller has an option on its website that differentiates sites or pages designed for the United States.[84] This final rule applies the same factors in determining whether tickets are marketed to U.S. consumers in-person and by phone. This final rule's applicability to online and offline platforms marketed to U.S. consumers is consistent with the Department's longstanding position.

We have also considered the comments on the scope of air transportation for tickets that include flight segments between two foreign points. Congress authorized the Department to prevent unfair or deceptive practices or unfair methods of competition in air transportation,[85] which includes interstate air transportation [86] and foreign air transportation.[87] The phrase ''when any part of the transportation is by aircraft'' is used in the definition of foreign air transportation, which evidences an understanding that foreign air transportation is not limited to a single flight segment between the United States and a foreign country, but that it can be composed of ''parts,'' including trips with stopover points and/or flights between two foreign points, provided that the passenger's overall journey is between a place in the United States and a place outside the United States. However, the Department agrees with commenters that flights between two foreign points with no connection to the United States are not foreign air transportation, and the requirements in this rule do not apply to such flights. The Department has determined that ''foreign air transportation'' includes journeys to or from the United States with brief and incidental stopover(s) at a foreign point without breaking the journey.

For purposes of this final rule, we define a break in journey to mean a deliberate interruption by a passenger of a journey between a point in the United States and a point in a foreign country where there is a stopover at a foreign point scheduled. The Department determines whether a stopover is a deliberate interruption depending on various factors such as whether the segment between two foreign points and the segment between a foreign point and the United States were purchased in a single transaction and as a single ticket/itinerary, whether the segment between two foreign points is operated or marketed by a carrier that has no codeshare or interline agreement with the carrier operating or marketing the segment to or from the United States, and whether the stopover at a foreign point involves the passenger picking up checked baggage, leaving the airport, and continuing the next segment after a substantial amount of time. For example, a passenger that is traveling on a single ticket that originates or terminates in the United States but also includes travel between two foreign points on a flight marketed with a U.S. carrier code would be considered traveling in foreign air transportation. We believe this approach fully

[81] *See, e.g.,* 14 CFR 259.6, 259.7, and 382.43(c), and existing regulation 14 CFR 399.85(d).

[82] 78 FR 67882, 67886 (Nov. 12, 2013).

[83] *Id.*

[84] 87 FR 63718, 63725 (Oct. 20, 2022).

[85] 49 U.S.C. 40102(a)(5) defines ''air transportation'' as foreign air transportation, interstate air transportation, or the transportation of mail by aircraft.

[86] 49 U.S.C. 40102(a)(25) defines ''interstate transportation'' as the transportation of passengers or property by aircraft as a common carrier for compensation, or the transportation of mail by aircraft between a place in a State, territory, or possession of the United States and (i) a place in the District of Columbia or another State, territory, or possession of the United States; (ii) Hawaii and another place in Hawaii through the airspace over a place outside Hawaii; (iii) the District of Columbia and another place in the District of Columbia; or (iv) a territory or possession of the United States and another place in the same territory or possession; and when any part of the transportation is by aircraft.

[87] 49 U.S.C. 40102(a)(23) defines ''foreign air transportation'' as the transportation of passengers or property by aircraft as a common carrier for compensation, or the transportation of mail by aircraft, between a place in the United States and a place outside of the United States when any part of the transportation is by aircraft.

addresses the extraterritoriality concerns raised by some commenters.

Regarding comments suggesting that the Department's requirements apply only to consumers residing in the United States, we disagree. The Department's authority to prevent unfair or deceptive practices or unfair methods of competition in air transportation is not limited to aviation consumers who are residents of the United States. The Department acknowledges Air Canada and Skyscanner's concern about the potential for conflict with international requirements. However, there has not been evidence provided that covering consumers not physically in the United States risks legal conflict with consumer protection regulations in other countries as the commenters assert. Further, although the protection of this rule is not limited to consumers who reside in the United States, this rule only applies to airlines and ticket agents if they market to consumers in the United States.

In response to Air Canada's concern that small ticket agents in foreign jurisdictions may leave the U.S. market, the Department is of the view that entities that participate in the U.S. market by marketing to U.S. consumers must comply with the same consumer protection requirements to ensure consumers know the fees charged for critical ancillary services upfront regardless of where consumers purchase air fares and related transportation services. This helps to mitigate the potential for surprise fees that can add up and quickly overcome what may, at first, look like a cheap ticket.

(3) Critical Ancillary Services

Proposal: The Department proposed to require carriers and ticket agents disclose upfront fee and policy information for all ancillary services critical to a consumer's air transportation purchasing decisions. The Department proposed to treat the following ancillary services as critical: transporting a first checked, second checked, and/or carry-on baggage, changing or canceling a reservation, and obtaining adjacent seating when traveling with a young child (*i.e.,* family seating), but it did not propose a definition of ''critical ancillary service.'' The Department solicited comment on whether its proposed list of critical ancillary fees should be expanded or limited, how to address future adoption by airlines of additional ancillary service fees, and how to ensure their disclosure to the extent that they are of critical importance to consumers.

General Comments: Several airlines and associations questioned the Department's basis for selecting those ancillary fees classified as ''critical'' in the NPRM and not others. For example, United Airlines stated that the list of ancillary fees that the Department proposed to consider critical was ''arbitrary and perplexing'' and added that it was unclear why DOT had proposed to treat the selected ancillary service fees as critical and not others, such as ''advanced seat assignments, preferential seating, charges for boarding passes, and charges for basic onboard refreshments like water, coffee, and sodas.'' Similarly, Air Canada listed ''advanced seat selection, access to in-flight entertainment, in-flight meals, and lounge access'' as other fees that could be disclosed and stated that ''to meet the goal of allowing consumers to have full cost information . . . all ancillary fees of every kind would have to be included on the first page,'' which it acknowledged would be ''impossible.'' Finally, IATA asked the Department ''to set forth in greater detail [its] determination that these [proposed] optional services are indeed 'critical.' ''

A few airline commenters also stated that the selection of fees would disadvantage ultra-low-cost carriers (ULCCs). For example, United Airlines stated, ''[w]hether intentional or not, the Department's choice of 'critical' ancillary fees seems to arbitrarily favor carriers who bundle those particular services and disfavors other airlines, particularly [ULCCs],'' adding that the ''rulemaking ultimately could cause a global increase in ticket prices by incentivizing all carriers to include those services in the cost of a ticket even though most passengers do not use the services.'' Frontier Airlines also expressed a similar view at the Department's March 30, 2023, public hearing and in its written comments. Frontier Airlines added that, in its view, unbundling is more transparent, economically efficient, and lower cost for consumers, who do not need to pay for ancillary services they will not use.

A comment from FlyersRights and a joint comment from multiple groups representing consumers recommended that, instead of requiring separate disclosure of ancillary fees, the Department require ticket sellers to allow consumers to select their desired ancillary services and then provide a single total fare inclusive of the selected ancillary services. The joint comment stated that its proposal would allow consumers to ''compare search results more immediately and accurately,'' avoiding clutter and unnecessary calculations by consumers. Consumer groups also suggested that the Department require disclosure of ancillary service fees that may in the future become more prevalent or may be of particular importance to consumers.

Comments regarding each of the ancillary services that the Department proposed to consider critical to consumers' purchasing decisions and comments on additional ancillary services are discussed in sections E (3)(a) through E (3)(d).

DOT Response: The Department has determined that it is appropriate to provide a definition of ''critical ancillary service'' in this final rule. This final rule defines critical ancillary service to mean ''any ancillary service that is critical to consumers' purchasing decisions'' and identifies transporting the first checked bag, second checked bag, and carry-on bag and changing and cancelling a reservation as critical ancillary services. In addition, the Department addresses the potential for future adoption by airlines of additional ancillary service fees that may be critical to consumers' purchasing decisions by including in the definition of critical ancillary service ''any other services determined, after notice and opportunity to comment, to be critical by the Secretary.''

Regarding the impact of this rule on ULCCs, the Department does not agree with some commenters' view that this rule will unfairly disadvantage ULCCs. Rather than placing ULCCs at a competitive disadvantage, the Department expects that this rule will promote competition by making fees for critical ancillary services more transparent for consumers. This will allow consumers to evaluate whether to purchase air transportation on a given carrier, including a ULCC, with the benefit of more complete up-front pricing information. Given the benefits of the ''unbundled'' ULCC model that Frontier and others touted in their comments, improved transparency should not cause ULCCs to fundamentally alter such a business model (*i.e.,* changing from an unbundled model to a bundled model). Moreover, nothing in this final rule requires them to do so.

The Department is not adopting in this final rule the recommendation of some consumer organizations to require airlines and ticket agents to display a total fare that is inclusive of all ancillary fees selected by the consumer. Currently, some airlines apply different baggage fees depending on when and where the ancillary service is purchased (*e.g.,* in advance, at the airport, etc.), which may make display of a single fare, inclusive of baggage fees, impracticable. In addition, requiring a ticket agent to display a total ''fare'' that

includes baggage that cannot be purchased with the ticket on its site could result in consumer confusion about the cost of the fare purchased and what it includes.[88] Further, change and cancellation fees, which also may vary based on the circumstances of the change or cancellation for any given ticket, may be less useful incorporated into the fare presented because the consumer is unlikely to know at the time of ticket purchase whether they will change or cancel their ticket, and the applicability of certain fees may be mutually exclusive (*e.g.,* a fee to cancel a ticket 30 days in advance and a fee to cancel a ticket on the day of travel cannot both be imposed).

(a) Transporting First Checked Bag, Second Checked Bag, and Carry-On Bag

Proposal: The Department proposed to treat fees for a first checked, second checked, and a carry-on bag as critical ancillary fees that airlines and ticket agents must disclose to consumers with fare and schedule information. This proposal was intended to replace the existing requirement for carriers and ticket agents to provide a generic notice during the booking process that baggage fees may apply and where the consumer can find these fees on the carrier's website.

In proposing to treat fees for a first checked bag, second checked bag, and carry-on bag as critical, the Department noted that consumer commenters to the Department's 2014 NPRM most commonly identified these baggage fees as critical, and such fees continue to serve as a leading source of consumer complaints regarding ancillary fees to the Department.[89] The Department further explained that the cost of baggage fees is often material to consumers and likely to affect their purchasing decisions. In addition, the Department noted that, although the 2011 final rule improved consumer access to baggage fee information by requiring airlines and ticket agents to display the fees for first checked, second checked, and carry-on bags on their websites, airlines and ticket agents often disclose those fees in static form in charts that are confusing to consumers and may be provided outside of the booking flow. The Department also noted that consumers continue to report confusion regarding the total cost of baggage fees in connection with complex itineraries, interline tickets, and codeshare flights.

Comments: Industry commenters were split on whether the fees for first checked bag, second checked bag, and carry-on bag are critical to consumer's purchasing decisions. Airlines and airline associations generally took the position that such fees were not critical. Some ticket agents agreed with the Department's preliminary conclusion that fees for first checked bag second checked bag, and carry-on bag are critical; other ticket agents disagreed.

Industry commenters who stated that fees for first checked bag, second checked bag, and carry-on bag are not critical to consumers' purchasing decisions asserted that such fees are already available under existing industry practices and regulatory requirements and that consumers are aware of the existence of baggage fees. For example, Air Canada stated that ''baggage fee information is already transparent and fully disclosed on a carrier's website where passengers have easy access to relevant information,'' citing to its own general baggage fee disclosures. Frontier Airlines noted that it discloses ancillary fee information to consumers during the booking process before purchase. Similarly, American Airlines commented that it currently provides itinerary- or passenger-specific baggage fees before purchase, and IATA stated at the Department's March 30, 2023, public hearing that one large international carrier found that 98 percent of the visits to that airline's websites exposed passengers to the pages with fees on baggage, seat selection, and refund policies, while the remaining two percent of consumers did not go far enough in the booking flow to see these fees. At that hearing, A4A added that many consumers are members of loyalty programs and are already aware of the ancillary structures of their preferred carriers. Further, Air Canada commented that the decrease in checked baggage and increase in carry-on baggage since the addition of checked baggage fees—documented in a GAO study that the Department cited in the NPRM—''supports a logical conclusion that consumers are evidently aware of checked-baggage fees.'' Air Canada also stated, however, that ''[c]alculation of baggage fees is a complex process and the display of this information on the first page where fares are shown cannot be calculated in certain instances until the carriers are chosen, such as on a multi-carrier itinerary.'' IATA raised similar concerns about the complexity of calculating these fees.

These commenters added that, in their view, the number of complaints related to baggage fee disclosures and the number of passengers who travel without baggage demonstrate that such fees are not critical. For example, Frontier Airlines asserted that the number of baggage fee complaints received by the Department was ''de minimis.'' Similarly, IATA testified at the Department's March 30, 2023, public hearing that in 2022, 3.64 percent of airline complaints related to baggage, with a vast majority pertaining to baggage fee refunds, and Booking Holdings reported that approximately 0.1 percent of the U.S. complaints received by Priceline in 2022 related to baggage fees. In addition, A4A testified at the Department's March 30, 2023, hearing that the lack of civil penalties against U.S. airlines demonstrated the absence of a market failure requiring additional regulation. Frontier Airlines further stated in its hearing testimony and in written comments that over 40 percent of Frontier's passengers do not pay any seating and baggage fees, fewer than 30 percent purchase a first checked bag, fewer than five percent purchase a second checked bag, and fewer than 20 percent purchase a carry-on bag. Further, American Airlines commented that ''the majority of travelers on American Airlines do not check *any* luggage, and less than a quarter of travelers on American [Airlines] actually have to pay for any checked bags.''

A lack of use by consumers of Google's baggage filter tool was also cited by A4A in its testimony at the Department's March 30, 2023, hearing as evidence that baggage fees are not critical to consumers' purchasing decisions. Google had commented that only 1.3 percent of the consumers conducting a search on Google Flights use a feature that enables consumers to integrate bag fees into the displayed costs for flights. Google provided this data to support its suggestion that the Department ''consider deferring the disclosure [of ancillary service fees] until after a specific itinerary has been selected.'' Google did not assert that transporting baggage is not a critical ancillary service. Further, in a supplemental response, Google presented the results of a 2018 survey it conducted of U.S. consumers which showed that 54% of people decide about baggage for travel prior to ticket purchase.

Similarly, other industry commenters who agreed with the Department's preliminary conclusion that fees for first

[88] This final rule does not require baggage fees to be transactable by ticket agents for the reasons discussed in section E (7).

[89] *See* Number of Consumer Complaints Received by the U.S. Department of Transportation Office of Aviation Consumer Protection Regarding Ancillary Fees, 2019–May 31, 2023, available in docket at *https://www.regulations.gov/docket/DOT-OST-2022-0109.*

checked, second checked, and carry-on baggage are critical to consumers' purchasing decisions generally stated that baggage was the most common type of ancillary service used by consumers. For example, Travel Tech stated that ''baggage fees are the most important ancillary fees'' for most passengers because ''[a]lmost all airline passengers travel with some amount of baggage, whether carry-on or checked, and baggage fees often constitute a practical limit on what consumers can carry with them on trips or what they can bring back from a destination.'' Though it agreed that baggage fees are important to consumers, Travel Tech testified at the Department's March 30, 2023, public hearing that, based on a survey it conducted, 90 percent of U.S. adults are aware of the possibility of paying additional fees for optional services beyond the cost of their airline ticket. But Travel Tech acknowledged that the study did not ask whether consumers were aware of the amount of such fees. Also supporting the importance of baggage fees, Skyscanner reported that its internal user research demonstrated that ''many users are much more concerned about baggage allowances and fees than any single other type of ancillary fee,'' with 84 percent of surveyed users stating it was important to know whether a ticket price includes checked baggage. Similarly, Google reported that in a survey it conducted of U.S. consumers in 2018, 71 percent planned to check one bag, six percent planned to check more than one bag, and 21 percent did not plan to check any baggage.

Groups representing consumers and some individual consumers also supported the Department's proposal to treat fees for a first checked bag, second checked bag, and carry-on bag as critical and to require improved disclosures of those fees. For example, at the Department's March 30, 2023, hearing, an American Economic Liberties Project (AELP) representative stated that at the nonprofit organizations where he worked including AELP, he heard from many air travelers who were unaware of fees charged by the ULCCs, including fees for carry-on baggage. This representative further testified that while awareness of checked bag fees has risen, carry-on baggage fees continuously confound travelers and that both consumer organizations where he recently worked receive many complaints from consumers about carry-on and checked baggage fees. This representative cited one instance in which a passenger on Spirit Airlines reported that he had to leave his carry-on bag in his car at the airport because he did not have enough money for the carry-on baggage fee and assumed that only checked bags incurred fees. The Department notes that in response, Spirit Airlines commented that AELP did not provide a date for this incident and stated that it did not appear to be consistent with current consumer knowledge about unbundled fares. The AELP representative added that many travelers fly less than once a year and do not understand the intricacies of flying and are confused by ancillary fees. In addition, FlyersRights testified that improved disclosure of the ancillary fees proposed in the NPRM would decrease consumer confusion and allow airlines to compete based on the total cost of a ticket.

Similarly, most individual consumers who commented on this aspect of the proposal requested improved baggage fee disclosures for reasons including that, in their view, it is rare for consumers to travel with no bags at all, baggage fees can significantly increase the total cost of air travel, and improved disclosures would enable comparison shopping. For example, one consumer expressed being surprised with fees for checked baggage and stated that requiring disclosure of baggage fees when airlines and ticket agents first provide itinerary search results ''would be immensely helpful in comparing prices via airfare website searches'' and cited his experience purchasing a flight on a ticket agent's website, only to discover after purchase that undisclosed baggage fees made the overall cost of travel higher than on another airline that the consumer had passed over during the search process.

Finally, AARP generally supported the Department's baggage fee disclosure proposal but also asked DOT to prohibit first checked bag fees entirely, and members of the Commissioned Officers Association of the U.S. Public Health Service (USPHS) asked DOT to encourage airlines to waive baggage fees for all members of the uniformed service, including the USPHS.

DOT Response: The Department has determined that fees for a first checked, second checked, and carry-on bag are critical to a consumer's purchasing decision. The Department disagrees with industry commenters' assertion that the first checked bag, second checked bag, and carry-on bag are not critical, and that their disclosure is unnecessary. Consumers have voiced concerns that the fees for these bags can significantly increase the total price of the airfare beyond what was offered at the time of itinerary search. While estimates of the percentage of consumers who travel with a first checked bag, second checked bag, or carry-on bag vary among commenters, most comments support the conclusion that many consumers travel with a first checked, second checked, and/or carry-on bag. Statements by Travel Tech and others that most consumers travel with at least one type of baggage are supported by Google's comment that its survey reflects that 71 percent of U.S. consumers plan to check a bag on an upcoming trip. Skyscanner's internal survey and comments from consumer advocates and individual consumers provide further support for the conclusion that these fees are critical to consumers' purchasing decisions. Given this information, the Department is not persuaded by airlines' arguments that fees for a first checked bag, second checked bag, and carry-on bag are unimportant to consumers based on the percentage of consumers conducting a search on Google Flights for baggage information and the number of passengers who travel without baggage.

In addition, as discussed in section B, GAO has documented that baggage fees have shifted consumers' purchasing behavior by encouraging consumers to bring only a carry-on bag to avoid checked bag fees. Air Canada cited this GAO study as support for its view that passengers are aware of the existence of baggage fees, and Travel Tech similarly reported that its own survey indicated that 90 percent of consumers were aware that ancillary fees may be charged. However, neither the GAO study nor any of the comments submitted provide evidence that consumers are aware of the amount of the fees for first checked, second checked, and carry-on baggage at various airlines. Indeed, the complexity that Air Canada and IATA observed that carriers face in calculating baggage fees is likely even more burdensome to consumers who try to calculate the fees applicable to their itineraries based often on static information provided by carriers and ticket agents.

In addition, some airlines now charge passengers for carry-on baggage. Indeed, on some carriers, the fees for a carry-on bag may be more costly than a first checked bag, which may surprise consumers who are accustomed to carrying on bags without charge.[90] These developments further demonstrate the need for carriers and ticket agents to disclose the fees for a

[90] *See* Comments of Spirit Airlines at 12; *see also* Enhancing Transparency of Airline Ancillary Service Fees Regulatory Impact Analysis RIN 2105–AF10, Table 1, *available at https://www.regulations.gov/document/DOT-OST-2022-0109-0002.*

first checked bag, a second checked bag, and a carry-on bag to consumers so that consumers understand how baggage fees may affect the total cost of their airfare and are able to determine which carrier's flight option best suits their circumstances.

The Department concludes that existing required disclosures do not adequately address the harm to consumers. Carriers and ticket agents are currently not required to provide fees for a first checked bag, a second checked bag, or a carry-on bag in a manner that is readily available when consumers are considering a given fare and itinerary. Instead, fees are often provided in static charts that confuse consumers and do not provide adequate information about the fees that apply based on the consumer's passenger-specific information. The fact that some carriers may voluntarily provide passenger-specific baggage fee information required by this new rule is not a reason for the Department not to require its disclosure by all ticket agents and airlines.

The Department rejects airline commenters' argument that the number of complaints related to baggage fee disclosures and lack of civil penalties for baggage fee violations demonstrate that such fees are not critical. As explained in section B, the number of complaints is only one consideration used to determine whether the Department should address an unfair or deceptive practice through regulation. Also, the Department does not view the lack of civil penalties against U.S. carriers under existing regulatory requirements to demonstrate that a regulation is not needed. The lack of civil penalties under existing rules could instead provide further support for the Department's conclusion that its concerns with existing ancillary fee disclosures are not adequately addressed by existing regulations.

The Department is not adopting recommendations by AARP to prohibit fees for a first checked bag and by the Officers Association of the USPHS to encourage airlines to waive fees for its members because those recommendations are beyond the scope of this rulemaking.

(b) Changing and Cancelling a Reservation

Proposal: In the NPRM, the Department identified fees for changing or canceling a reservation as being critical to consumers when they choose among air transportation options. The Department proposed to require carriers and ticket agents to disclose change and cancellation fees and policies to consumers during the booking process when fare and schedule information is provided.

In proposing to treat these services as critical, the Department shared its view that not disclosing to passengers upfront the significant fees that they would incur should they need to change or cancel the reservation is an unfair and deceptive practice. The Department explained that carriers are currently not required to provide consumers with change or cancellation fee information until after ticket purchase. In addition, the Department noted that although carriers may have separate web pages that list change and cancellation fees, this information is permitted to be provided in a range. The Department added that, even if not provided in a range, change and cancellation fees may not be simple to understand, as fare categories, passenger status, ticket type, and other factors may impact the applicable change and cancellation fees. Further, the Department explained that carriers are currently permitted to display change and cancellation fees outside the booking flow, which disrupts passengers' searches and costs them time. Finally, the Department reported that change and cancellation fees are among the top three types of ancillary service complaints it receives.

Comments: Groups representing consumers generally supported the Department's proposal to consider change and cancellation fees to be critical to the consumer's purchasing decision and to require airlines and ticket agents to display such fees to consumers. A joint comment from multiple groups representing consumers noted that improved disclosure of change and cancellation fees ''would benefit consumers, particularly because many travelers may not budget for such fees when booking flights.'' This comment further observed that, based on data from the Department's Bureau of Transportation Statistics (BTS), air carriers collected nearly $3 billion in revenue from these charges in 2019.[91] The commenter asserted that while some airlines had modified their change and cancellation policies due to COVID–19, the changes were limited, with many airlines still applying these fees to the lowest-tier fares. In addition, FlyersRights testified at the Department's March 30, 2023, public hearing that disclosure of the critical ancillary fees identified in the NPRM would decrease consumer confusion and improve competition in the market. AARP also supported the proposed requirement for carriers and ticket agents to display change and cancellation fees but asked the Department to work to reduce or eliminate change and cancellation fees.

In contrast, airlines and their associations generally opposed the Department's proposal to treat ticket changes and cancellations as critical ancillary services. These commenters asserted that such services are not critical because few passengers change or cancel flights, and complaints regarding change and cancellation fees represent a small percentage of the overall number of complaints submitted to the Department. In addition, airlines and their associations stated that airlines already provide disclosure of change and cancellation fees on their websites, consumers are already aware of the potential costs associated with changing or cancelling a flight, and many carriers have removed these fees since the emergency of the COVID–19 pandemic. Among these commenters, American Airlines noted that 15 percent of its passengers change or cancel flights, and Frontier testified at the Department's March 30, 2023, hearing that fewer than 10 percent of its passengers paid change or cancellation fees. A4A testified at the same hearing that the cancellation fee complaints to the Department included in the docket do not appear to be related to transparency and represent a small percentage of the overall number of passengers, and so, in its view, the mandatory display of those fees is unnecessary.

Ticket agents and their associations offered different views on whether change and cancellation fees are critical to consumers' purchasing decisions and should be displayed. Amadeus stated that change and cancellation fees are critical to consumers' purchasing decisions, and Travel Tech supported disclosure of these fees before purchase. However, the U.S. Travel Association stated that the fees identified by the Department ''are incidental and not 'critically important' to air transportation.'' In addition, at the Department's March 30, 2023, public hearing, Skyscanner expressed concern that disclosing only a fixed change fee without also disclosing the applicable fare difference, which would necessarily be unknown at the time of purchase, would provide incomplete information to consumers and cause confusion. Air Canada made a similar argument in its written comments.

Three of the four ACPAC members expressed the view that ticket change

[91] *Citing* ''Reservation Cancellation/Change Fees by Airline 2021,'' *Bureau of Transportation Statistics.* May 2, 2022, *https://www.bts.gov/newsroom/reservation-cancellationchange-fees-airline-2021.*

and cancellation fees were critical to consumers. The ACPAC Chair, who is also the member representing state governments, stated that the ability to change and cancel a ticket was more important to consumers now due to an increase in flight cancellations and the potential for an increase in infectious disease numbers. The ACPAC had several recommendations related to ticket change and cancellation, which are discussed in later sections.

DOT Response: The Department has determined that the fees imposed on a consumer to change or cancel a ticket (*i.e.,* passenger-initiated changes or cancellations) [92] are critical to a consumer's purchasing decision, and this final rule maintains the proposed requirement that airlines and ticket agents must disclose these fees to consumers. The Department is not persuaded by industry commenters who stated that change and cancellation fees are not critical, and disclosure is unnecessary. The Department agrees with the commenters who stated that change and cancellation fees can pose a significant, unexpected financial burden to consumers and that improved transparency will reduce consumer confusion and promote competition.

As noted in section B, the number of complaints is only one consideration used to determine whether the Department should address an unfair or deceptive practice through regulation. Nor do the calculations by some airlines that 10–15 percent of their passengers change or cancel flights suggest that change and cancellation fees are not critical given the significant financial cost that change and cancellation fees impose to those passengers who are subject to them. In addition, existing disclosure requirements do not address this issue. As the Department noted in the NPRM, existing regulations do not require airlines or ticket agents to disclose specific change and cancellation fees during the booking process before ticket purchase. There are no existing rules for ticket agents to provide change and cancellation fees, and the existing rules allow airlines to provide change and cancellation fees in ranges rather than specific amounts, making it difficult for consumers to determine the fee that would apply to their ticket.

The Department is not persuaded that it should defer regulation in this area because some carriers have eliminated change and cancellation fees. These carriers could re-impose such fees in the future. Further, some carriers that have eliminated change and cancellation fees have not done so for all their flights. For example, these carriers may charge change or cancellation fees for international flights that do not originate from designated locations. Also, many passengers who purchase tickets in the lowest fare categories continue to be subject to either change and cancellation fees or outright prohibitions on changing or cancelling their reservations.

The Department agrees with those commenters who noted that providing change fee information without information about the requirement to pay a fare difference may create consumer confusion. Because the amount of any fare difference cannot be calculated until a replacement flight is selected, the amount of the fare difference will necessarily be unknown at the time of initial ticket purchase. To reduce any potential for consumer confusion, this final rule requires airlines and ticket agents to disclose in the summary of its change policies that a fare difference may apply, if that is the case, and to make other related disclosures before ticket purchase. These requirements are discussed further in section E (4)(b).

(c) Obtaining Adjacent Seats for Families Traveling With Young Children

Proposal: The Department proposed that a fee for a child 13 or younger to be seated adjacent to an accompanying adult in the same class of service is a critical ancillary fee that airlines and ticket agents must disclose to consumers with the fare and schedule information. Under the proposal, if the carrier does not impose a fee for children 13 or under to be seated next to an accompanying adult, no seat fee disclosure would be required for the carrier's flights. If the carrier does impose a fee to make an advance seat assignment for a child 13 or under, the NPRM noted that the carrier could comply with the proposed rule by enabling consumers to indicate whether they were traveling with a child prior to initiating a search, or by displaying seat fees for all itinerary searches, regardless of whether a consumer indicated that he or she would be traveling with a child.

Comments: The overwhelming majority of commenters opposed the Department's family seating fee disclosure proposal in the NPRM. Hundreds of individuals and multiple consumer advocacy organizations, including the U.S. PIRG Education Fund, opposed the proposal on the basis that the Department should prohibit family seating fees for air travel instead of requiring fee disclosure. Individual commenters expressed concern with the safety of minors and the comfort of families and other passengers when children 13 or younger are seated away from an accompanying adult on an aircraft. Consumer advocates raised similar concerns. For example, AELP testified at the Department's March 30, 2023, public hearing that there are serious health and safety issues with seating young children alone and stated that the Department should not be guided by the quantity of complaints it receives on family seating. The few consumer advocates that supported the Department's proposal similarly recommended that the Department ultimately limit or prohibit family seating fees, with AARP noting that it viewed the proposed disclosures as ''an essential first step'' but also asking the Department to take further action to reduce or eliminate such fees in the future. A joint comment from multiple State attorneys general supported improved seat disclosures but asked DOT to modify its proposal to require that initial search results provide the lowest fee, if any, to book two adjacent seats, along with an additional disclosure if adjacent seats are unavailable.

Many industry commenters raised concerns about the expense and technical challenges of providing dynamic seat fees at the first page of search results and the cost of establishing direct, real-time connections between ticket agents and airlines necessary to facilitate such disclosures. IATA stated that the Department's family seating proposal would impose a greater burden on airlines than the proposals to require disclosure of baggage, change, and cancellation fees ''because the search [for adjacent seating] is twofold: the fees for each seat on each flight presented in an itinerary as well as a search to determine whether there are two or more seats together at the time of the initial search.'' ATPCO explained that ''a channel would need at or near real-time seat maps and seat pricing for every possible airline's flight for every itinerary evaluated at the time of the shopping request'' to provide seat fees at first search. Skyscanner explained that determining a family seating fee would require a complex search of highly dynamic seat fees of varying costs and a query of availability, suggesting that, as an alternative, the Department should require disclosure of the cost of a standard seat and not at the time of first

[92] When referring to change or cancellation fees or policies, this rule is referring to consumer- or passenger-initiated changes or cancellations of tickets. This rule does not address changes or cancellations initiated by carriers.

search. Among other commenters, Air Canada and IATA stated that GDSs are currently unable to support the distribution of dynamic seat fee information. Industry commenters also expressed concerns that providing family seating fees at the time of first search would overwhelm consumers and provide information that would be irrelevant to many passengers who are not traveling with children. Several industry commenters also stated that consumers rarely consider seats relevant at the beginning of their itinerary search, with Google citing a user survey it had conducted in support of that position.

Airlines and their representatives generally opposed all aspects of the Department's family seating proposal. Airlines stated that current airline policies generally already provide for family seating without fees; the display of a ''family seating fee'' may confuse passengers about the need to purchase a seat to guarantee seating next to a young child; and what these commenters characterized as the low number of family seating complaints and low number of passengers traveling with young children demonstrated no problem with existing disclosures. American Airlines asserted that it could not disclose family seating fees because ''they do not exist'' separate from advance seating fees for all other passengers and noted its efforts to seat young children with an accompanying adult.

Amadeus, Travelport, and Travel Tech asked that DOT expand its family seating proposal to require airlines to either share all seat fees or the fees for the cost of an adjacent seat generally, without regard to whether the passenger is traveling with a child 13 years old or younger. None of those commenters, however, supported displaying seat fees on the first page of search results.

At its January 12, 2023, meeting, the ACPAC recommended that the Department's proposal regarding the disclosure of family seat fee information should be retained in any final rule that may be adopted.

DOT Response: DOT has decided not to move forward with its proposal to require carriers and ticket agents to disclose applicable fees for passengers 13 or under to be seated next to an accompanying adult on an aircraft. Instead, the Department is pursuing a separate rulemaking to address the ability of a young child to sit adjacent to an accompanying adult at no additional cost beyond the fare.[93]

In addition to pursuing a new rulemaking, the Department has taken other steps to encourage airlines to ensure that children 13 or younger are seated adjacent to an accompanying adult at no additional cost subject to limited conditions. On July 8, 2022, the Department's OACP issued a notice urging airlines to do everything they can to allow young children to be seated next to an accompanying adult with no additional charge.[94] On March 6, 2023, the Department launched its Airline Family Seating Dashboard, that highlights whether airlines guarantee fee-free family seating,[95] and on March 10, 2023, the Department sent a proposal to Congress recommending legislation to require fee-free family seating subject to limited exceptions.[96]

Given these actions by the Department to enable parents to sit next to their young children without paying fees, the Department does not see value to requiring airlines and ticket agents to display dynamic family seating fees in this final rule. In addition, the Department does not expand disclosure requirements to seat fees or adjacent seat fees more generally, as requested by some commenters, for the reasons discussed in section E (3)(d).

(d) Consideration of Additional Ancillary Services

(i) Seat Selection

Proposal: The Department explained in the NPRM its tentative view that ''disclosure of an advance seat assignment fee at the beginning of a booking process is generally not needed because airlines are required to provide a seat with the cost of the air transportation.'' [97]

Comments: Comments from some ticket agents and groups representing consumers, along with a few individual consumers, requested that the Department consider all seating fees to be critical, not only the fees for family seating as proposed. Some of those commenters identified additional groups of passengers for whom adjacent seat assignments are, in their view, critical. For example, Amadeus stated that adjacent seating fees may be critical for caregivers or family members of individuals with disabilities or the elderly. Travel Tech similarly identified individuals traveling with the elderly as well as ''a newly-wed couple on a 17-hour honeymoon flight or business partners who need to sit together to work during the flight.'' The U.S. PIRG Education Fund expressed its support for ''up-front disclosure of adjacent seating fees involving adult relatives, friends or colleagues.''

In addition, some of these commenters identified reasons that consumers may wish to select their seats when traveling alone. Among those commenters, Travel Tech stated that this may include ''passengers who need to sit near the front of the plane to make a connecting flight or passengers who need to be near the restroom for health reasons.'' FlyersRights commented that consumers may want to select seats to have more legroom or to sit near the front of the plane or an emergency exit. GBTA stated that seat selection could be considered critical for business travelers.

On the other hand, AARP agreed with the Department's preliminary assessment in the NPRM that disclosure of general seat selection fees at the beginning of the booking process was not critical. Instead of requiring disclosure of seating fees, AARP requested that DOT require a clear disclosure ''wherever advance seat selections are made available, that consumers do not need to pay an additional fee unless they want to reserve a particular seat.'' AARP recommended this addition to reduce consumer confusion, explaining that ''customers are often provided with a limited range of seats to choose from, many or all of which require a fee to reserve'' and ''may believe that there are no 'free' seats available and may purchase an advance seat reservation out of concern that they will not be provided with a seat.''

As discussed above, airlines and other industry commenters raised concerns about the costs and technological challenges of displaying dynamic seat fees in the context of the Department's family seating proposal. These concerns would be equally applicable to required disclosure of adjacent seating fees or individual seating fess more generally. In addition, consistent with its comments on family seating fees, American Airlines specifically asked the Department not to expand its list of

[93] *See* Fall 2023 Unified Agenda for rulemaking titled ''Family Seating in Air Transportation'' (RIN 2105–AF15) at *https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202310&RIN=2105-AF15.*

[94] *See https://www.transportation.gov/individuals/aviation-consumer-protection/family-seating/June-2022-notice.* That notice was issued in response to section 2309 of the FAA Extension, Safety and Security Act of 2016, which required DOT to review U.S. airline family seating policies and, if appropriate, establish a policy directing air carriers to establish policies enabling a child 13 or under to be seated next to an accompany family member, subject to certain limitations.

[95] *See https://www.transportation.gov/airconsumer/airline-family-seating-dashboard.*

[96] *See https://www.transportation.gov/sites/dot.gov/files/2023-03/Bill_Family%20Seating%20Proposal_final.pdf.*

[97] 87 FR 63726.

covered critical ancillary fees to include seating fees more generally.

DOT Response: The Department has considered the comments stating that seating fees are critical to consumers purchasing decisions. Given that the cost of air transportation includes a seat and the lack of clarity about the importance of seat selection fees to consumers, the Department is not requiring carriers or ticket agents to disclose seating fees as required critical ancillary service fees in this final rule. In making this determination, the Department also took into account the concerns raised by industry commenters about the challenges of displaying dynamic seating fees discussed in section E (3)(c). The Department intends to monitor this issue for possible future action if warranted. Regarding passengers with disabilities, the Department notes that carriers are already required to provide seating accommodations that meet passengers' disability-related needs under the Air Carrier Access Act and its implementing regulation, 14 CFR part 382. These required accommodations include an adjoining seat for a personal care attendant who performs a function for a passenger with a disability that is not required to be performed by airline personnel, a reader for a passenger who is blind or has low vision, an interpreter for a passenger who is deaf or hard-of-hearing, or a safety assistant, if needed.

Finally, the Department agrees with AARP that the option to purchase seats could confuse consumers, who may think that a seat purchase is necessary. The Department has determined that it is a deceptive practice in violation of section 41712 for a carrier or ticket agent to fail to disclose that the purchase of a seat is not required for travel, particularly when consumers are provided seats from which to choose where many, if not all, of those seats require a fee to reserve. Without a clear disclosure, a reasonable consumer being offered seats to reserve where many of these seats must be purchased would be misled to believe that an advance seat assignment purchase is required to have a confirmed seat on the flight. The lack of disclosure that consumers will be assigned a seat without additional payment is material as this omission is likely to result in consumers unnecessarily paying a fee for a seat. Accordingly, this final rule requires airlines and ticket agents to make the following disclosure clearly and conspicuously when a consumer is offered a seat selection for a fee: ''A seat is included in your fare. You are not required to purchase a seat assignment to travel. If you decide to purchase a ticket and do not select a seat prior to purchase, a seat will be provided to you without additional charge when you travel.''

(ii) Other Ancillary Services

Proposal: The Department did not propose ancillary services, beyond transporting a first checked, second checked, and/or carry-on bag, changing or canceling a reservation, and obtaining adjacent seating when traveling with a young child, to be critical. However, the Department sought comment on whether the ancillary services proposed to be critical in the NPRM should be expanded or limited.

Comments: Airline commenters generally opposed expanding the ancillary services to be considered critical to a consumer's purchasing decision. The Department received only limited support for adding other specific ancillary fees to the list of ancillary services proposed to be covered as critical in the NPRM. A few individual commenters asked the Department to include fees for food and a drink as well as in-flight wi-fi as critical ancillary service fees. In addition, GBTA stated that wi-fi and priority boarding could be considered critical for business travelers. Finally, the Aircraft Owners and Pilots Association asked that the rule be expanded to cover all general aviation parking fees and the location of parking aprons at airports. Comments suggesting the Department limit the ancillary services proposed to be critical are discussed in section E (3)(d)(iii).

DOT Response: The Department declines to expand in this final rule the list of specific critical ancillary fees beyond those identified in its proposal as the record does not support considering fees for food, drinks, wi-fi, priority boarding, or parking fees as critical ancillary service fees as suggested by a few commenters. As discussed in the next section, the Department may determine that additional ancillary fees are critical after notice and an opportunity for comment. The Department maintains the existing requirement that airlines must disclose the fees for all ancillary services on their websites. Carriers and ticket agents are encouraged to provide consumers with a clear and conspicuous link to this existing website during the booking process before ticket purchase. Airlines will continue to be allowed to provide the fees for ancillary services, aside from baggage, in a range on this page. Consumers will be provided the specific fees that apply to them for all critical ancillary services when the fare and schedule information is provided following an itinerary search.

(iii) Future Ancillary Services

Proposal: The Department solicited comment on whether its proposed list of critical ancillary fees should, among other things, address future adoption by airlines of additional ancillary service fees. The Department also asked how to ensure their disclosure to the extent that they are of critical importance to consumers.

Comments: Multiple consumer groups asked the Department to require airlines and ticket agents to display additional ancillary service fees in the future to the extent that the fees become more prevalent or are of particular importance to consumers. FlyersRights suggested the Department require carriers and ticket agents to display any fee that comprises two percent of all reporting carriers' revenue or five percent of any single airline's revenue, stating that its proposal was intended to address its concern that ''airlines may innovate new ways to break up the base fare into additional ancillary fees.'' Similarly, a joint comment from multiple groups representing consumers asked the Department to require disclosure of fees that exceed two percent of a covered entity's revenue according to BTS reporting and to adopt a regular review schedule to periodically update the covered ancillary fees with feedback from consumer advocates. In addition, multiple State attorneys general requested that the Department adopt an open-ended provision requiring disclosure of ''fees associated with any products or services that a reasonable traveler might foreseeably consider necessary.''

On the other hand, American Airlines opposed any expansion of the list of critical ancillary fees from the NPRM. It stated that expanding the list would ''further complicate the search queries, slowing the return of search results and cluttering displays'' and provide minimal, if any, benefit to consumers. American Airlines asked the Department to rely on enforcement actions, rather than regulation, to address any innovations in ancillary fees that result in significant consumer complaints.

DOT Response: Based on the comments received, the Department has not identified any fees beyond fees for transporting a first checked bag, a second checked bag, and a carry-on bag and fees for changing and cancelling a ticket that are currently critical to consumers' purchasing decisions. The Department agrees with those commenters who stated that the Department should have a method for regulating fee transparency for any

ancillary services critical to consumers' purchasing decisions in the future. The Department disagrees, however, with those commenters who suggested that the Department should establish a fixed interval to reevaluate the fees for critical ancillary services. The Department receives regular feedback from stakeholders, including through the ACPAC, and monitors trends in consumer complaints filed with the Department. If these or other sources suggest that disclosure of additional ancillary services fees early in the purchasing process is needed based on evolving industry practices, the Department can provide notice and take comment at that time. The regularity with which the Department hears from stakeholder groups renders it unnecessary to establish a fixed time interval for re-evaluating ancillary fees.

The Department is also not persuaded by comments urging the Department to require disclosure of ancillary fees that reach a certain threshold of airline revenue because carriers could design their fee structures in a manner to avoid any pre-established threshold. In this final rule, the Department is not limiting ancillary services that are critical to those that meet a certain threshold but instead adopting a definition of critical ancillary service that includes ''any other services determined, after notice and opportunity to comment, to be critical by the Secretary.'' Multiple State attorneys general also recommended establishing an open-ended provision when defining critical ancillary fee. This final rule differs from their recommendation in that it provides the public an opportunity for comment before the Department delineates additional critical ancillary fees. The Department believes that effective and meaningful public engagement before determining additional ancillary services that are critical will lead to a better result.

(4) Methods for Disclosing Critical Ancillary Service Fees and Policies

(a) Website Disclosure of Fees

Proposal: The Department proposed to require that the fees for ancillary services that are critical to a consumer's purchasing decision be disclosed the first time that an airfare is displayed to consumers using airlines' or ticket agents' websites. More specifically, the Department proposed to require airlines and ticket agents disclose the first and second checked bag fees, the carry-on bag fee, the change and cancellation fees and the family seating fee at the first point in a search process where a fare and schedule is listed in connection with a specific flight itinerary. The Department further proposed to prohibit display of fees for critical ancillary services by links and rollovers but requested comment on whether to allow these methods.

The Department further proposed to require carriers and ticket agents to indicate that a particular fare category prohibits the checking of a bag or the carriage of a carry-on bag, if that is the case, and any applicable penalty to transport the item, whenever fare and schedule information is provided during the itinerary search process. The Department also proposed to require carriers and ticket agents to disclose whether ticket changes or cancellations are allowed, which could be provided via a pop-up or link adjacent to the pertinent change or cancellation fee.

Comments: Industry commenters expressed near-universal opposition to the requirement to display fees for critical ancillary services without the use of links or rollovers when an airline or ticket agent first provides schedule and fare information in response to an itinerary search. These commenters expressed concerns about the costs, technological feasibility, and impacts on website clarity and function if airlines and ticket agents are required to display all proposed critical ancillary fees (first checked bag, second checked bag, and carry-on bag, ticket changes and cancellations, and family seating) without the use of links or rollovers when airlines and ticket agents first provide schedule and fare information.

Many industry commenters stated that display of all critical ancillary fee information required under the proposal on a single page without the use links or rollovers would result in airlines and ticket agents displaying fewer itinerary results and would overcrowd web pages. For example, Frontier Airlines stated that under existing regulations, it could display four or five itinerary options on the first page of search results, but estimated that under the proposal, it would only be able to display one or two results per page. Frontier Airlines further expressed concern that crowded displays would block out or minimize information that it views as more relevant to consumers, including additional flight options and base fares. Similarly, United Airlines estimated that it would be able to display only half of the number of flight options to consumers under the proposal compared with its current website. Booking Holdings stated that a first-page display requirement for all ancillary fees proposed could reduce the number of itinerary results it could display on a single page from 12 under existing regulations to only one or two. Booking Holdings expressed concern that the NPRM's proposal to require carriers or ticket agents to display all critical ancillary fees when fare and schedule information is first provided would result in consumers spending additional time scrolling or ''giving up'' on their search and selecting a less optimal flight than they would under existing disclosures. Finally, the U.S. Travel Association stated that, under the proposal, customers would need to scroll through multiple pages of results, increasing the time needed to consider available ticket options.

Many industry commenters, including Frontier Airlines, Google, Booking Holdings, and others explained or provided visual displays of how search results would appear on their websites under the proposal in written comments or at the Department's March 30, 2023, public hearing. For example, Google provided an example where both vertical and horizontal scrolling was needed to show all ancillary fee information proposed at the first page of search results. Amadeus also testified at the hearing that providing all critical ancillary fees required by the proposal at the first point in the search process where schedule and fare information is provided would reduce the number of flight options that could be displayed and, correspondingly, reduce the inter-brand competition that the indirect channel provides.

In addition, industry commenters raised concerns that, in their view, displaying all required ancillary fees at the first page of search results would slow website loading times significantly and degrade the consumer experience, resulting in consumers abandoning carrier and ticket agent websites. For example, American Airlines estimated that its current search takes three to five seconds to process and load but believes displaying all proposed critical ancillary fees on the first page would take 45 seconds to process and load. In addition, Spirit Airlines stated that providing all proposed ancillary fees would take seven times as long to load as its current site and could require nine minutes of transaction time. Further, United Airlines expressed concern about the effect that slower loading times would have on sales, stating that half of consumers abandon websites that take more than six seconds to load and over 50 percent expect a website to load in three seconds or less. At the Department's March 30, 2023, hearing, IATA cited studies stating that for every second of loading performance, there is an equivalent drop in customer presence and sales. Booking Holdings

stated that ''the calls for data under the proposal could potentially be in the hundreds of thousands (especially for itinerary results that include multiple carriers or multiple passengers),'' and, while its current system runs similar queries, it does so only ''after a passenger selects a flight option, thus reducing the search queries to that one flight itinerary, instead of thousands of potential flight itineraries.'' In addition, Travel Tech commented that every second added to website load times results in a seven percent loss in sales and 11 percent fewer page views.

Further, industry commenters stated that the proposed rule would require airlines and ticket agents to provide ancillary fee information at a time that is not optimal for consumer decision making and that the timing and method for displaying ancillary fees is best left to industry expertise. Among those commenters, Spirit Airlines commented that it conducted a survey of consumers who abandoned booking and found that less than one percent abandoned the booking path because bag prices were not displayed at the beginning of search, which it stated demonstrates that ''[a]lmost all customers who decide not to fly Spirit are unbothered by ancillary fees being provided later in the booking path.'' Further, Spirit Airlines stated that it showed a sample web display complying with the NPRM to ''independent testers,'' who preferred Spirit's current site and stated that they preferred to select the flight first and then select from baggage and seating options. Air Canada stated that its current practice of providing consumers with a full price breakdown of all charges on a summary page before booking is ''more informative and useful for consumers'' than the Department's proposal because it lists all charges, not only those ancillary fees that the Department deems critical. In addition, Booking Holdings represented that its customers prefer concise information at the first page of search results and that ancillary fee information is more helpful after consumers select a specific itinerary. A4A testified that display of ancillary fees at the time of first search could confuse consumers that such fees are mandatory and cause consumers to abandon their travel due to the perceived expense or to purchase ancillary services that are unnecessary for their travel. Further, NACA stated that providing ancillary fee information at the time fare and schedule information is first provided would overwhelm ULCC consumers, adding that selecting one ancillary at a time makes the booking process easier and that the unbundled model ''inherently requires enhanced disclosure and education, which the ULCCs already provide.'' NACA also noted that E.O. 14036 instructed the Department to consider initiating a rulemaking to ensure disclosure of ancillary fee information, including change and cancellation fees, ''at the time of ticket purchase,'' but it did not require the Department to initiate a rulemaking or to require disclosure at the first point in a search process where a fare is listed in connection with a specific flight itinerary.

Google provided some statistical data related to its position that baggage fees are more relevant to consumers later in the booking process. Google reported that 1.3 percent of consumers conducting a search on Google Flights use a feature allowing them to integrate bag fees into the displayed costs for flights before a specific itinerary has been selected. At the Department's public hearing in March 2023, Google testified that this statistic supported its position that baggage information may be relevant to consumers later in the search process, rather than at the point of initial search. Google also provided the results of a study of U.S. consumers it conducted in 2018. It cited this study as evidence that consumers prefer to think about baggage fees later in the booking process, with 21 percent of consumers in the survey stating that they start thinking about baggage while searching for flights but 23 percent of consumers in the survey stating that do not start thinking about baggage until the time of flight booking. In addition, according to the results reported by Google, 19 percent of consumers ''decide about baggage'' at the time of flight search, but another 35 percent do not decide about baggage until the time of flight booking.

A4A provided testimony on the costs of the proposal at the Department's March 30, 2023, public hearing, stating that the proposal to require display of all critical ancillary fees on the first page of search results would require an overhaul of the entire air fare ''ecosystem.'' A4A further testified that the costs would be exorbitant and exceed the technical capacity of airline systems, which it added are not currently built to retrieve and display the amount of fee information required. Many other industry commenters provided similar testimony or written comments. Additional discussion of the economic impacts of the final rule is provided in the Regulatory Notices section of this document.

Some industry commenters also raised specific concerns with the technical ability to calculate and display fees for a first checked bag, a second checked bag, and a carry-on bag at the first page where airlines or ticket agents provide fare and schedule information in response to a search without the use of rollovers or links. IATA stated that this proposed requirement is ''unreasonable'' and added that the calculation of baggage fees is ''not trivial, particularly with multi-carrier itineraries, and neither airlines nor agents today are capable of undertaking the calculation on what could be more than 100 itineraries presented on an initial search page.'' IATA added that, in its view, the costs of the requirement would outweigh any benefits. Similarly, Air Canada stated that the calculation of baggage fees ''is a complex process,'' particularly for multi-carrier itineraries, and that the development of ''ancillary service packages or subscriptions that allow passengers to, among other services, have unlimited checked baggage after paying an annual fee or the bundling of baggage fees with those of meals or Wi-Fi'' would make displaying baggage fees on the first page of search results more challenging.

A few industry commenters recommended that, if the Department decides to require airlines and ticket agents to display any ancillary fees when fare and schedule information is first provided, it should do so only for the fees for first checked, second checked, and carry-on baggage. For example, Travel Tech stated that if the Department chose to adopt ''any prescriptive rules,'' those requirements ''should be limited to requiring that only critical baggage fees . . . be displayed on the first search results page.'' Travel Tech added that ''[b]y so limiting the amount of information required to be displayed on the first search results page, DOT can largely avoid the information overload and page clutter problems'' identified in its comments. Skyscanner made similar comments, stating that it recommended ''that no display requirement mandating a specific location for the display of ancillary fee information should be imposed,'' but continuing that ''if such a rule is imposed, it should require that only baggage fees be displayed on the first page of ticket search results.'' Skyscanner added that its recommendation was based on its internal user research indicating ''that many users are much more concerned about baggage allowances and fees than any single other type of ancillary fee,'' with 84 percent indicating ''it was important to know whether a ticket price includes checked bags.''

Industry commenters, including IATA, also stated that the complexity of calculating multiple change and cancellation fees for multiple itineraries would be technologically infeasible (particularly for multi-carrier itineraries), result in significantly slow website loading, and be extremely costly to implement. For example, IATA commented that the cost of calculating multiple change and cancellation fees ''for every itinerary at the initial search cannot be justified in terms of search time saved by passengers.''

Instead of first page display of fees for critical ancillary services in text form, industry commenters generally requested more flexible display of these fees. Alternatives recommended by these commenters included the Department allowing the display of fee information later in the booking process; the use of links, pop-ups, rollovers, and other methods; and the display of fee information outside of the booking process. For example, individual airlines also recommended that the Department allow links and rollovers. United Airlines suggested that the Department permit disclosures through links, pop-ups, banners, landing pages, and acknowledgements. American Airlines explained that links and rollovers ''would allow consumers to access the fee information as needed on an individual basis and avoid overwhelming consumers by flooding them with information at the first shopping point.''

Similarly, ticket agent representatives such as Travel Tech recommended allowing critical ancillary fee information to be displayed using pop-ups and links. Booking Holdings recommended that the Department allow airlines and ticket agents to display fees by hovering over or clicking a link or allowing disclosures on the second page of the booking process after a flight is selected. Further, Google stated that more flexibility in display would better serve consumers, and expounded that rollovers, hyperlinks, and pop-ups would give disclosures to consumers in a readable and customizable format. Hopper and other commenters advocated for display at any time before ticket purchase. At the Department's March 2023 public hearing, Amadeus advocated for allowing more flexible displays such as hyperlinks, mouseovers, pop-ups, expandable text, and other shortcuts to facilitate faster and cost-efficient implementation across the industry. According to Amadeus, those methods help avoid performance issues and reduce the number of transactions, extending computing resources and improving the time necessary to provide search results. In addition, Air Canada asked the Department to clarify when ''fare and schedule information is first provided'' if it chose to finalize the proposal. The carrier also asked the Department to allow carriers to display required ancillary fee disclosures ''external to the booking process.''

Specific to change and cancellation fee disclosures, Amadeus asked the Department to allow display of minimum and maximum change and cancellation fees, rather than all potentially applicable change and cancellation fees. IATA suggested that carriers could include a link on the initial search page to clear language on whether the carrier imposes change or cancellation fees and what factors are considered in setting that fee. Skyscanner recommended that DOT require display of one change fee and not on the first page of search results.

In their comments and public hearing testimony, multiple groups representing consumers expressed support for the Department's proposal to require airlines and ticket agents to display critical ancillary service fees when fare and schedule information are first displayed in response to a consumer search. FlyersRights commented that the proposal would achieve better price transparency for consumers. In addition, at the Department's March 30, 2023, public hearing, FlyersRights testified that current market conditions reward those airlines that hide the ball at the expense of more transparent airlines and asserted that one airline's website requires many clicks from the first page where schedule and fare information is displayed before a consumer reaches the web page where static baggage fees are disclosed. Further, a joint comment from multiple groups representing consumers supported the Department's proposal to prohibit the use of links and rollovers to display fees for critical ancillary services. The U.S. PIRG Education Fund added that in its view, fee information should be provided before beginning the booking process, not once it has begun, and expressed concerns about drip pricing. Finally, the ACPAC Chair, representing state and local governments, stated at the January 12, 2023, ACPAC meeting that the Department's proposal was ''fair'' in permitting airlines and ticket agents to display baggage policies, but not baggage fees, in links and pop-ups based on her belief that the average flyer better understands what constitutes an oversized bag than the actual bag fee amounts.

A few organizations representing consumers, however, expressed concern about the potential for consumer confusion under this aspect of the Department's proposal. AARP was generally supportive of the Department's proposal, noting that not providing critical ancillary fee information when a fare is provided would inhibit the ability of consumers ''to make an informed decision about which price and itinerary combination best suits their need,'' and adding that if fees are disclosed at the end of the booking process ''that consumer is much less likely to re-start the process of comparison shopping, leading to a less than optimal outcome.'' But AARP further recommended that any ''disclosures must be made in such a way as to minimize visual clutter and confusion and be easy to read and comprehend.'' In addition, Travelers United testified at the Department's March 30, 2023, public hearing that more disclosure was preferrable but also expressed concern in its written comment that ''DOT is seriously underestimating the technology needed for this NPRM as it stands now. Perhaps limiting it to only baggage may provide enough information to deal with today's competition and prepare for the coming age of AI [artificial intelligence].''

Individuals also expressed differing views. For example, one individual stated that how and when airlines display the elements of a total fare should be left to airlines and suggested that consumers could purchase from a different airline should a particular airline provide a confusing display. However, another took the position that baggage fees are the most important charges to consumers and displays with this information would not confuse consumers or be excessive. This commenter noted that airlines already provide first and business class fares that many consumers will never use.

The ACPAC solicited information on the appropriate timing of disclosure for critical ancillary service fees at its December 2022 meeting. At that meeting, the ACPAC member representing consumers observed that to minimize problems with drip pricing, consumers should have information on critical ancillary service fees early in the process. However, he also noted that providing early information on all ancillary fees could lead to consumers being overwhelmed. Specifically, he opined that baggage fees, change/cancellation fees, and seat reservation fees were the biggest ''pain points'' for consumers that should be disclosed early. Similarly, a consumer advocacy organization suggested that fees for carry-on and checked bags, as well as change/cancellation fees and on-time/

cancellation statistics, should be displayed on the first page where a price is quoted.[98]

At its January 12, 2023, meeting, the ACPAC recommended that the Department adopt its proposal to require change and cancellation fee information be displayed during the itinerary search process and not just before ticket purchase. The ACPAC member representing consumers noted that change and cancellation fees impact consumers' buying decisions when shopping for an airline ticket, and that if the disclosures are not made early in the purchase process, consumers would not have change and cancellation fee information on all the options available to them when making a purchasing decision. The ACPAC member representing airlines expressed his concern that disclosure of the baggage and change and cancellation fees during the itinerary search process would present too much information to consumers and advocated for links or pop-ups to be permitted for the display of baggage and change and cancellation fee information if there is a requirement to display such fee information.

The ACPAC also recommended at its January 12, 2023, meeting that the Department require ticket agents and metasearch entities to display airlines' change and cancellation fee information in a consistent manner to avoid creating confusion for consumers. The ACPAC member representing airports explained that a ticket agent should not be allowed to display an itinerary for one airline that shows the total change or cancellation fees for a group of travelers, while the itinerary for another airline shows the change or cancellation fees on a per passenger basis. Travel Tech commented that the ACPAC recommendation goes beyond the proposals of the NPRM and fails to recognize that ticket agents do not receive data from airlines consistently and lack the resources to implement this recommendation.

Regarding the Department's proposal that consumers be informed when fare and schedule information is provided if the fare category does not permit traveling with a first checked bag, a second checked bag, or a carry-on bag or permit changing or cancelling a reservation, various commenters expressed support for it and stated that clear disclosure upfront of these prohibitions is necessary to avoid consumer harm. Southwest Airlines explained that basic economy fares are increasingly common and likely to appeal to occasional, less savvy budget travelers, making early disclosure that these tickets cannot be changed or canceled and that passengers cannot travel with a carry-on bag or checked bag if that is the case especially necessary. Southwest Airlines added that because the least expensive basic economy tickets often are at the top of search results, it is particularly important to provide complete and timely notice of such restrictions on all distribution channels. FlyersRights and Travelers United recommended that the Department require a clear disclosure for fares that prohibit ticket changes or cancellations, similar to the disclosure proposed for fares that prohibit baggage.

DOT Response: This final rule requires airlines and ticket agents to clearly and conspicuously disclose accurate fees for all critical ancillary services (*i.e.,* a first checked bag, a second checked bag, a carry-on bag, ticket change, and ticket cancellation) on the airline's or ticket agent's website at the time fare and schedule information is initially provided when a consumer conducts a search for air transportation. The Department acknowledges the concern of airline commenters that ancillary packages or subscriptions that allow passengers to have unlimited checked baggage for an annual fee or bundle baggage fees with other ancillary services such as wi-fi or food would make displaying baggage fees on the first page of search results more challenging. The Department is clarifying that, while airlines and ticket agents must disclose the standalone fees for critical ancillary services required under this rule, they are not required to disclose the ancillary service packages or bundles that include one or more critical ancillary services but may do so if they choose.

The Department disagrees with those commenters who stated that the Department should allow fee information for critical ancillary services to be displayed later in the booking process, after consumers have already spent time selecting an itinerary based on incomplete fee information. The challenges cited by Air Canada and IATA that industry faces in calculating baggage fees favors requiring airlines and ticket agents to disclose these fees to consumers, rather than placing the burden on consumers to make complex calculations. Regarding Air Canada's request for clarification of the meaning of ''when fare and schedule information is first provided,'' that phrase means the first point at which a fare is quoted for a particular flight itinerary. This first point will typically be the first page of search results provided in response to a consumer's itinerary search. The Department disagrees with A4A that displaying baggage fee information when schedule and fare information is first provided will confuse consumers that payment of such fees is mandatory. Many industry commenters touted their ability to design innovative and clear web displays, and the Department expects that the industry will use those skills to meet the disclosure requirements of this rule in a manner that mitigates the potential for consumer confusion. The Department acknowledges NACA's statement that E.O. 14036 does not require the Department to mandate disclosure of critical ancillary fees at the first point in the search process where a fare is listed in connection with a specific flight itinerary. For the reasons discussed in this preamble, however, the Department has determined that disclosure of critical ancillary fees at that point is necessary to mitigate unfair and deceptive practices and that the requirements in this final rule are consistent with the E.O.

The Department does not adopt the alternatives to providing itinerary- and passenger-specific change and cancellation fees recommended by some industry commenters, such as requiring airlines and ticket agents to display the factors used by the airline to set the relevant change and cancellation fees (rather than the fees themselves), a single change or cancellation fee (rather than all change and cancellation fees), or minimum and maximum change and cancellation fees. Each of those recommended alternatives would result in disclosure that is insufficiently precise to advise consumers of the true cost of selecting a particular itinerary.

In response to the ACPAC recommendation, the Department notes that this final rule does not mandate change and cancellation fee disclosures to be displayed in a consistent manner or use standardized definitions. The Department is of the view that, so long as the required information is presented in a clear and conspicuous manner, there is no identified consumer harm from ticket agents developing their own displays. The Department believes that the requirement in this rule to disclose a summary of the applicable change and cancellation policies will be sufficient to clarify any potential inconsistencies in the presentation of such fees. Should the Department determine in the future that a problem regarding the consistency of critical ancillary service fee disclosures exist, the Department may revisit this issue. The requests by AARP and others that the Department work to

[98] Presentation of FlyersRights, *available at https://www.regulations.gov/document/DOT-OST-2018-0190-0046.*

eliminate change and cancellation fees are beyond the scope of this rulemaking.

The Department acknowledges concerns raised by commenters about the cost and technological feasibility of providing all critical ancillary fee information in text form where an airline or ticket agent first provides fare and schedule information in response to a consumer's itinerary search. To address these concerns, the Department is providing additional flexibility for ticket agents and airlines in how they disclose the required fees. This final rule requires that fees be ''clearly and conspicuously'' disclosed but does not limit the display of critical ancillary fees to only static text next to the fare. While the final rule continues to prohibit display of fees for critical ancillary services by links, the Department is not prohibiting the use of pop-ups or other methods to avoid the page clutter problems that commenters identified. To further explain this requirement, the final rule defines ''clear and conspicuous'' to mean that a disclosure is difficult to miss (*i.e.,* easily noticeable), easily understandable by ordinary consumers, and presented in a manner that allows ordinary consumers to determine the true cost of travel. In other words, it should be readily apparent to a consumer that fee information is available, the process for calling up such information should be uncomplicated, and the fee information should be understandably presented. Also, the fees themselves and how to access them should not be hidden or involve significant effort to ascertain by the consumer. Further, the consumer's booking process should not be disrupted in such a way that causes the consumer to have to start over their search process from the beginning or to lose their location on the page being viewed. The rule prohibits airlines and ticket agents from displaying critical ancillary fees by hyperlink because displaying fees in that manner would disrupt the consumer's search.

To evaluate whether a disclosure is clear and conspicuous, the Department intends to consider the clarity of the fee disclosure (whether in text or through a pop-up, in expandable text, or by other means); the font size used for the disclosure compared with other text on the page; and the placement of the disclosure on the page, among other information. Provided that the fees for critical ancillary services are disclosed in a manner that meets the regulatory criteria of clear and conspicuous and not provided by hyperlink, airlines and ticket agents have the flexibility to display or disclose these fees through various methods, including in text form on the page with the fare, through a pop-up, or other method that does not navigate the consumer away from the page and place on the page being viewed at the time the user action is taken, or through expandable text on the page where the fare is displayed. The Department concludes that these modifications from the proposal will better enable industry to use innovative web design to display fees in a manner that is technologically feasible while still ensuring that consumers are provided with critical information about the true cost of travel at the time of itinerary search. Given the increased flexibility afforded by this final rule compared to the initial proposal, as sought by many commenters, the Department concludes that compliance should be feasible and reduce the potential for slow loading times or cluttered or confusing displays for consumers.

Also, as proposed, the Department is requiring that airlines and ticket agents disclose to consumers if a particular fare category prohibits the checking of a first or second checked bag or the carriage of a carry-on bag and display the penalty, if applicable, for carrying on or checking the item. The Department is also adopting its proposal to require carriers and ticket agents to disclose upfront whether ticket changes or cancellations are allowed. The Department agrees with commenters who stated that it is particularly important for airlines and ticket agents to disclose that a given fare prohibits changes and cancellations if that is the case. Under this final rule, airlines and ticket agents are required to disclose that a particular fare category prohibits a first checked bag, a second checked bag, a carry-on bag, ticket change, or ticket cancellation, if that is the case, when fare and schedule information is provided during an itinerary search. The disclosures must be clear and not mislead consumers into believing that the fee for a particular fare category is zero, when in fact a bag or ticket change or cancellation is simply prohibited.

Finally, we note that this rule's disclosure requirements for critical ancillary fees and policies must also be reflected in carriers' customer service plans. By adding an assurance in their plans, carriers commit to consumers that they will meet the minimum standards set forth in this rule regarding the disclosure of critical ancillary fees and policies. This customer service commitment is merely reinforcing new requirements imposed elsewhere in this final rule.

(b) Website Disclosure of Policies

DOT Proposal: The Department proposed to require airlines and ticket agents disclose, along with the fare and schedule information, the policies applicable to transporting a first checked bag, a second checked bag, and a carry-on as well as changing and cancelling a reservation, taking into account the consumer's passenger-specific information, if provided. For baggage, the Department proposed that carriers and ticket agents must display the weight and dimension limitations that a carrier imposes for each checked and carry-on bag, with passenger-specific adjustments if applicable. For ticket changes and cancellations, the Department proposed to require carriers and ticket agents provide a summary of the ticket change and cancellation policies applicable to the consumer's chosen itinerary and fare category, considering the consumer's passenger-specific information, if provided. The Department proposed to allow carriers and ticket agents to display policy information for baggage, ticket changes, and ticket cancellations using links or pop-ups adjacent to the display of the pertinent fee.

In the NPRM, the Department explained that these brief policy summaries should include clear, adequate notice of the rules applicable to the chosen itinerary and fare category, including whether ticket changes or cancellations are allowed (as well as when and in what circumstances they are allowed), the form that refunds or airline credits may be provided (*e.g.,* travel voucher or a credit to the original form of payment), any prohibitions or conditions that may limit the ability to change or cancel a ticket, and other information. The Department did not propose specific requirements for how carriers and ticket agents should address the need for passengers to pay a fare difference between the old and new ticket prices in the event of a change but requested comment on that issue. The Department also asked about consumer confusion from the material change in fare that occurs with many ticket changes being a larger component of the overall price relative to the change fee itself.

Comments: Air Canada asked for additional clarification, including ''whether baggage fees that must be displayed also include additional costs associated with those bags. For example, is it an obligation to display excess baggage and overweight fees or is it appropriate that these fees are charged at the airport when the baggage is dropped off?''

On the method of displaying baggage policy information, the ACPAC recommended that the Department retain its proposal that pop-ups and links are acceptable for specific information about size and dimension allowances for baggage in any final rule. At the January 12, 2023, ACPAC meeting, the ACPAC Chair, who is the member representing state and local governments, stated that it should be acceptable to provide baggage size policies by link because the average flyer has an understanding of what constitutes an oversized bag. The member representing airports agreed, adding that much baggage comes in standard sizes. Travel Tech also supported this proposal.

For policies applicable to changes and cancellations, among industry commenters, IATA objected to the requirement for air carriers and ticket agents to provide a brief summary of the applicable change and cancellation policy, stating that ''[a]irlines are under no obligation to provide passengers explanations as to why they are imposing fees on passengers who decide on their own not to use a particular ticket.'' Representing consumers, FlyersRights asked the Department to require that airlines and ticket agents display information on whether any refund provided would be as a cash or a cash equivalent, non-expiring travel credits or vouchers, or expiring travel credits or vouchers, and whether those amounts would be for the entire ticket price less the change or cancellation fee or discounted.

The Department received a few responses to its request for comment on the issue of fare differentials. Air Canada noted that most of the cost to change a flight would be due to the fare differential. Other commenters noted that, given that fare differentials may be a part of the cost to change tickets, it was not possible to disclose the full cost of a ticket change at the time of ticket purchase, since the full cost may not be known until the consumer changes their ticket. In addition, Travelport stated that ''fare differentials due to dynamic pricing are common knowledge,'' and deemed a requirement to disclose that a fare differential may apply ''unnecessary.'' In contrast, FlyersRights requested that the Department require disclosure that a fare differential may apply and whether the airline or ticket agent would refund the fare difference if the replacement flight was less costly than the originally purchased flight.

Regarding the method of displaying policy information on ticket changes and cancellations, the ACPAC recommended that the Department retain its proposal that change or cancellation policy information may be displayed by links or pop-ups in any final rule. The ACPAC also recommended that the Department provide greater clarification on the specific location rollovers or pop-ups should be placed for consumers to view additional change or cancellation policy information. Travel Tech commented that the Department should permit disclosure of change and cancellation policies by links or pop-ups as proposed. In addition, Travel Tech opposed the ACPAC recommendation regarding the specific location rollovers or pop-ups should be placed and asserted that the Department should allow flexibility instead.

DOT Response: The Department largely maintains the proposed requirements for the disclosure of baggage and ticket change and cancellation policies applicable to the itinerary, taking into account the consumer's passenger-specific information, if affirmatively provided.[99]

The Department is adopting its proposal requiring that the weight and dimension limitations that the carrier imposes for first and second checked bags and carry-on bags be disclosed, with passenger-specific adjustments, if applicable. The Department has determined that the failure to provide weight and dimension information before ticket purchase is an unfair practice, as discussed in section D (1)(a). The Department is not requiring that airlines and ticket agents disclose the fees for excess and overweight baggage as part of the required disclosure on weight and dimension limitations.

The Department makes clear in this final rule that the disclosure of baggage, change, and cancellation policies must be accurate as well as clear and conspicuous. Unlike the fees themselves, however, the Department allows as proposed the use of links for these policies. Allowing the option for airlines and ticket agents to provide these disclosures by hyperlink was recommended by the ACPAC and supported by public comment. Further, to reduce screen clutter, the Department is allowing summaries of applicable baggage, change, and cancellation policies to be disclosed any time before ticket purchase, rather than requiring them to be disclosed contemporaneously with the fees as proposed. The Department is persuaded by commenters that providing the policy information later in the purchasing process will not harm consumers. The Department concludes that the requirement to provide these policies in a clear and conspicuous manner, as defined in this final rule and further explained in section E (4)(a) of this preamble, provides adequate information regarding where and how baggage and change and cancellation policies must be disclosed, while maintaining flexibility for airlines and ticket agents to develop their own consumer-friendly displays.

Regarding change and cancellation policy summaries, the Department disagrees with IATA's interpretation of the NPRM proposal. The Department did not propose to require carriers to disclose ''why they are imposing'' change and cancellation fees, but instead proposed that carriers and ticket agents should disclose, among other information, whether ticket changes and cancellations are permitted, the conditions under which change and cancellation fees would apply, and the form of any refund provided. The Department is adopting this proposal in this final rule.

More specifically, given that the Department's conclusion that change and cancellation fees are critical to a consumer's purchasing decision, the Department is identifying in this final rule the types of information that must be included in the summaries of change and cancellation policies. First, the Department agrees with those commenters who stated that it is particularly important for airlines and ticket agents to disclose that a given fare prohibits change and cancellations if that is the case (as discussed in section E 4(a)), and so this final rule requires any prohibitions or conditions that may limit a consumer's ability to change or cancel a ticket to be clearly and conspicuously provided in the summary of the change or cancellation policy. In addition, the final rule requires, as suggested by FlyersRights, that airlines and ticket agents disclose the form of the refund or credit that would be provided in the event a change or cancellation is permitted. Finally, the change and cancellation summary must include notice that the consumer is responsible for any fare differential if that is the case. As noted by Air Canada, a large portion of the cost for a passenger to change their flight in many cases could be the fare differential. Given the potentially significant cost of fare differentials, the Department concludes that it would be deceptive to disclose a change fee without also disclosing that the passenger may also be required to pay the difference in fare. As such, the Department does not believe that this disclosure is

[99] Passenger-specific requirements are discussed in section E (5).

unnecessary, as urged by Travelport, and, accordingly, the final rule requires this additional disclosure. Further, the Department agrees with FlyersRights that the airline or ticket agent must disclose whether it will refund the difference in fare if the consumer changes their flight and selects a less costly replacement flight. This disclosure must be provided in the change policy. The Department has determined that the failure to provide the change and cancellation policy information required by this rule before ticket purchase is an unfair and deceptive practice, as discussed in section D (1)(b).

(c) Mobile Site and App Disclosure of Fees and Policies

Proposal: The Department proposed to require disclosure of fees and policies for ancillary services critical to a consumer's purchasing decision at the first point in a search process where a fare is listed in connection with a specific flight itinerary on airlines' and ticket agents' websites, including mobile websites. In the NPRM, the Department noted that consumers increasingly use mobile devices to book travel, and so it is important that the same disclosures provided on airlines' and ticket agents' desktop websites are also provided on mobile websites. While the Department did not propose to require critical ancillary fee and policy disclosures on airlines' and ticket agents' mobile apps, it sought comment on whether to extend the proposal to mobile apps and whether there are any practical distinctions between information accessed on mobile websites and mobile apps.

Comments: Multiple commenters provided data through their written comments and at the Department's March 30, 2023, public hearing regarding the frequency with which consumers book air travel on mobile websites and apps. AELP testified that 70 percent of consumers research travel on mobile devices. IATA provided the same statistic in its comments and further noted that 44 percent of online bookings were completed on mobile devices, citing a 2022 report. Priceline testified that more than half of its business is from mobile customers, Google stated that 68 percent of its users browse on mobile devices, and Hopper reported that its entire business is conducted ''exclusively through the Hopper mobile app.'' A joint comment from multiple consumer groups noted that the top five free travel apps that sell airline tickets through the Apple operating system, iOS, have a combined 13.6 million user ratings, demonstrating that such apps have reached millions of consumers.

Industry commenters opposed both the proposed requirement that airlines and ticket agents disclose all critical ancillary fees at the first page of search results on mobile websites and the extension of that proposal to cover mobile apps. These commenters noted that challenges with screen clutter are particularly acute on mobile devices and apps, which have limited screen space, and stated that the proposed requirement would likely limit the number of search results provided or require excessive scrolling on mobile apps and websites. In addition, Air Canada asserted that ATPCO was never designed to work in conjunction with mobile apps and therefore there is an inherent level of disconnect in the transferability of information between ATPCO and mobile apps. Further, Travel Tech stated that accommodating screen readers for individuals with disabilities on mobile devices would be more difficult given the volume of information required at the first page of search results under the proposal.

Some industry commenters, including Frontier Airlines, Campbell-Hill Aviation Group (on behalf of A4A), Sprit Airlines, and Google, provided visual illustrations to demonstrate the challenges of displaying first checked, second checked, and carry-on bag fees, change and cancellation fees, and family seating fees on the first page of mobile search results. For example, in Google's presentation at the Department's March 30, 2023, public hearing, it provided a sample mobile display it had created which it stated would require both horizontal and vertical scrolling for a consumer to see all ancillary fees required by the NPRM at the first page of search results.

A few commenters stated that challenges in displaying information on mobile devices would only continue to grow with continued technological evolution. For example, Amadeus testified that in the future more consumers will book air travel through mobile devices or other devices, such as wearables, with very small screens that might provide search results in the form of a voice message. Similarly, IATA noted that consumers are ''increasingly conducting ticket searches via voice recognition, with the only major impediment being too much information to sort through.'' IATA stated that a requirement that all ancillary fee data be provided on the initial search page would inhibit consumer-friendly innovation. Travelers United expressed concern about the Department's ability to adapt its rule to future technology such as artificial intelligence. This comment observed that by the time the rule takes effect, ''new technology will be leading us in a different direction.''

American Airlines and Hopper submitted comments addressing how the functionality of mobile devices differs from traditional desktop websites. American Airlines stated that carriers provide similar functionalities for mobile devices as for desktop websites and that those mobile functionalities ''allow the consumer to view or hide information at the consumer's choosing, even if a mobile device does not have a cursor.'' This comment further explained: ''in lieu of 'hovering,' [for mobile devices] American [Airlines] will provide a dropdown arrow which the consumer can click to display or hide the relevant information. These dropdown arrows are familiar and intuitive to consumers and provide the same benefits as rollovers.'' Hopper commented that rollovers, hyperlinks, and non-adjacent disclosures are ineffective on mobile websites and apps, but other comparable methods can be implemented by travel agencies for mobile websites and apps if the final rule ''is not overly proscriptive.'' Hopper stated that ''using expandable native results boxes'' is ''an effective approach'' for mobile devices.

Industry commenters suggested different approaches for whether and how the final rule's requirements should apply to mobile apps and websites. American Airlines favored applying the same requirements to desktop and mobile displays, noting that different disclosures would be costly to develop and ''far more confusing for the consumers who would receive different disclosures depending on the portal they use.'' Other industry commenters asked the Department to either exclude mobile apps from the final rule entirely or to allow more flexibility or more limited disclosures on mobile devices. For example, NACA recommended permitting links to critical ancillary fee information on mobile apps given limited screen space. Air Canada asked that DOT not extend the rule's requirements to mobile apps, other than a possible disclosure that ''additional fees may apply'' or directing the passenger to the carrier's website. Observing that ''mobile apps are not scaled-down versions of desktop websites but rather use display formats that are uniquely designed to make information more accessible,'' Travel Tech asked DOT to exclude mobile apps from the final rule to allow engineers to develop innovative displays for apps.

Like Travel Tech, Hopper requested ''flexibility for agents to design new and innovative methods for serving their customers on mobile devices.'' Hopper asked that both mobile websites and apps be excluded from any requirement to provide disclosure at the first page of search results and that disclosure instead be required prior to the time of purchase for mobile devices and apps.

Among groups representing consumers, AARP and a joint comment from multiple consumer groups supported covering mobile apps in the final rule. However, Travelers United expressed concern about the possibility of screen clutter on mobile devices. The joint comment from multiple consumer groups urged the Department to cover mobile apps to avoid excluding from fee disclosures the millions of consumers who book flights via mobile apps. That comment further noted that ''mobile apps are just as capable of disseminating airlines' unfair and deceptive commercial practices'' as mobile websites or desktop websites and have expanded reach due to push notifications. Finally, this comment explained that many consumers, especially those who are younger or low income, are likely to rely on smartphones as their primary internet connection, and so the final rule should cover mobile applications to avoid ''disproportionately exclud[ing] these populations.'' AARP suggested that DOT could allow opt-outs or links and rollovers for mobile devices.

The few individual commenters who addressed coverage of mobile apps recommended different approaches. Individuals recommending that the Department cover mobile apps stated that covering mobile apps was necessary given increased use of those apps by consumers, to avoid misleading and confusing consumers by providing different information on various platforms, and because mobile apps provide a more ''accessible'' interface for users than mobile websites. One individual commenter, however, expressed concern about screen clutter on mobile apps due to the proposed requirement to display all critical ancillary fee data at the first page of search results.

DOT Response: Under this final rule, airlines and ticket agents must provide the same disclosures for critical ancillary service fees and policies on all online platforms. As commenters explained, consumers now widely use mobile websites and apps to shop for and purchase air transportation. The Department agrees with commenters who stated that it would be confusing to have different critical ancillary fee requirements for mobile apps than for mobile and desktop websites. Further, the Department concludes that excluding airline and ticket agent apps from this rule's requirement to disclose ancillary fee data that the Department has determined is critical to consumers' purchasing decisions would not sufficiently protect consumers who use mobile apps to purchase air transportation.

Several commenters noted that methods of consumer search are evolving to include wearable devices, artificial intelligence, and voice recognition technology. To adequately cover desktop websites, mobile websites, mobile apps, and other technologies in this final rule, the Department uses the term ''online platform'' This term is defined as ''any interactive electronic medium, including, but not limited to, websites and mobile applications, that allow the consumer to search for or purchase air transportation from a U.S. carrier, foreign carrier, or ticket agent.''

The Department makes modifications from the proposal in this final rule that mitigate the concerns raised by commenters about the volume of information required to be disclosed at the first point in the search process where a fare is listed in connection with a specific flight itinerary. This final rule does not require airlines and ticket agents that sell air transportation to display family seating fees, which the Department had proposed. In addition, while fees for critical ancillary services must still be disclosed at the first point in the search process where a fare is provided in connection with a specific flight itinerary, this final rule provides significant flexibility to airlines and ticket agents regarding the method of displaying that information so long as it is displayed in a clear and conspicuous manner and not by hyperlinks. This allowance includes the option to use expandable native results boxes or dropdown arrows on mobile websites and apps, which as described in comments from American Airlines and Hopper, is the type of flexibility that would permit airlines and ticket agents to produce innovative, consumer-friendly ancillary fee displays without overwhelming consumers, unduly cluttering search results, or limiting the number of search results. These same flexibilities apply to desktops, mobile apps, and other online platforms. Further, to reduce screen clutter, the Department is allowing summaries of baggage, change, and cancellation policies to be disclosed any time before ticket purchase, rather than requiring them to be disclosed contemporaneously with the fees as proposed.

(d) In-Person and Telephone Disclosure of Fees

Proposal: The Department proposed disclosure of critical ancillary service fees for tickets purchased by telephone or in-person like those proposed for online purchases. Under the proposal, ticket agents and airlines would be required to disclose to consumers shopping in-person or by phone the fees for first checked, second checked, and carry-on bags, ticket changes and cancellations, and family seating that apply to an itinerary for which a fare is quoted to the consumer. The Department proposed to require ticket agents and carriers to provide this ancillary fee information for offline transactions when schedule information is provided during the ''information'' and ''decision making'' portion of the transaction. The Department explained its proposal would not allow ticket agents and carriers to wait to provide this information until after the consumer has decided to make a reservation or purchase a ticket. The Department solicited comment on alternative options for providing fee information on the phone or in person (*e.g.,* explaining that fees may apply and referring the consumer to the carrier or ticket agent's website, provided that the website is accessible to consumers with disabilities).

Comments: The ACPAC recommended that the Department retain its proposal to require disclosure of fees for a first checked bag, a second checked bag, and a carry-on bag when a fare is quoted to a consumer during an in-person or telephone inquiry. The ACPAC did not adopt as a recommendation a suggestion from ticket agents that DOT modify its proposal to require bag fees and ticket change and cancellation fees to be provided ''upon request'' for offline transactions. At the January 12, 2023, ACPAC meeting, the member representing consumers expressed concern that the suggestion by ticket agents to provide baggage fees only upon request could lead to consumers having an incorrect understanding of the cost of the itinerary selected, and the member representing airport operators noted that the ticket agent suggestion regarding baggage fees appeared to conflict with the proposed requirement that ticket agents must refund baggage fees not disclosed during the ticket purchase process. Regarding change and cancellation fees, the ACPAC member representing consumers stated that consumers in offline transactions

should not have less information than those who transact online, and the member representing state and local governments noted that seniors and low-income individuals may not have access to or knowledge of online booking tools and stated that those individuals were no less deserving of or interested in fee information than those searching online.

Similarly, AARP supported DOT's proposal to require airlines and ticket agents to provide critical ancillary fee information at the time that schedule information is provided to the consumer for offline transactions. AARP stated that ''due to disability, lack of access, or simply preference, some consumers will seek fare information by phone or in person'' and noted that these same factors ''would likely inhibit [those consumers] from looking for the fee disclosures online.'' An individual commenter similarly requested that the Department require disclosure of critical ancillary fee information during phone bookings, stating that disclosure is necessary for accessibility and equal access to information for consumers using offline booking channels. This commenter stated that the alternative of referring offline consumers to a website for ancillary fee information improperly places the burden on consumers to obtain fees when the burden should rest with sellers of air transportation.

Industry commenters generally opposed the proposal to require affirmative disclosure of first checked, second checked, and carry-on bag fees, change and cancellation fees, and family seating fees at the time that fare and schedule information is provided during offline transactions. These commenters expressed concerns about the effect that the proposed offline disclosures would have on the ability to maintain reasonable wait times and assist passengers in a timely manner, with IATA noting that such concerns would be particularly acute when serving travelers at the ticket counter. Airlines further stated that the requirement to provide potentially dozens of critical ancillary fees would confuse and overwhelm passengers, and Air Canada asserted that it is likely that consumers preferring phone or in-person services are not looking to compare prices. ASTA estimated that the proposed disclosures would add at least 20 seconds to each offline transaction by ticket agents at an estimated cost of $21.3 million per year in ''talk time'' for agents.

Industry commenters recommended alternatives to the Department's proposal for offline disclosures. Ticket agents and their associations generally suggested that DOT should require airlines and ticket agents to provide ancillary fee disclosures ''upon request,'' rather than affirmatively. For example, ASTA stated that requiring ancillary fee disclosures for offline transactions only upon request ''would allow ticket agents to use their professional judgement as to the fee-related information their clients need when such information is not specifically requested,'' with different levels of information appropriate for seasoned and infrequent travelers. TMC suggested that the Department allow airlines and ticket agents to direct consumers to an online source for fee information, such as ''an airline's website, a corporate travel booking tool, or other available reference.'' Similarly, some airlines and their associations asked the Department to allow carriers to advise passengers that additional fees may apply and direct passengers to an airline website for detailed ancillary fee disclosures. IATA asked that DOT allow disclosure that additional fees may apply ''either to begin the call or during the time the customer is holding for an agent.'' GBTA recommended that the Department consider requiring disclosure of a ''total likely price'' after the agent obtains information on whether the consumer plans to check a bag.

DOT Response: After carefully considering the comments, the Department is modifying its proposal for offline transactions in this final rule to require airlines and ticket agents to disclose critical ancillary fees to consumers who request them following disclosure that such fees apply to the searched itinerary. Specifically, the airline or ticket agent must disclose in an offline transaction that baggage fees, change fees, and cancellation fees apply when a fare is quoted with an itinerary if that is the case, and ask the consumer if they wish to hear the specific baggage fees, change or cancellation fees, and any other critical ancillary service fees that apply. If the consumer requests information about a single or multiple critical ancillary fees, then the airline or ticket agent must disclose the requested information that applies to the fare and itinerary quoted, adjusted based on any passenger-specific information provided by the consumer.

The Department agrees with comments stating that requiring disclosure of critical ancillary fee information for all possible flight options to all offline consumers at the time that schedule information is provided might significantly increase hold times and delay airlines and ticket agents in assisting consumers. Therefore, the Department is permitting such offline disclosures to be made upon the consumer's request, provided that affirmative notice is given that a fee applies to the quoted itinerary. The Department disagrees with comments asking that it authorize airlines and ticket agents to refer passengers who seek booking assistance offline to critical ancillary fee information in online sources or that it should allow ticket sellers to provide this information only upon request without any affirmative disclosure required. While carrier websites must be accessible for passengers with disabilities,[100] the Department agrees with AARP that the same factors that lead some consumers to seek offline information about schedules and fares may also inhibit those consumers seeking critical ancillary fee information online, and so the recommendation to refer consumers to online sources would not appropriately address the needs of passengers. In addition, because fees for change and cancellation are often provided as a range on airline websites, finding the specific applicable change or cancellation fee for an itinerary quoted offline would be impracticable.

The Department's requirement that sellers of air transportation inform consumers in offline transactions that bag fees and change and cancellation fees apply to a particular itinerary is intended to provide consumers notice that a specific itinerary being quoted to them carries additional fees for these ancillary services. It is not sufficient to provide a generic disclosure that ''additional fees may apply,'' as recommended by IATA. Such a statement provides little useful information to consumers searching for the total cost of an itinerary and does not indicate what fees apply or the amount of those fees. The Department found that a similar notice in online search tools, as required by existing regulation, was equally insufficient. As provided in this final rule, the requirement is to provide a statement that bag fees, change fees, and cancellation fees apply to a specific itinerary being quoted, *if that is the case.* If, for the quoted itinerary, there is no additional charge for the consumer to check one or two bags or to bring on-board a carry-on bag, or to change or cancel the ticket, then no statement about these fees need be made in association with the quoted itinerary. If, however, a fee for one or more critical ancillary services applies to the quoted itinerary, then, under the requirement in this rule, the airline or ticket agent must

[100] 14 CFR 382.43(c).

notify the consumer that an additional fee applies for baggage or change or cancellation and permit the consumer to request the fee information. If the consumer requests fee information for any critical ancillary service, the airline or ticket agent must disclose it.

The requirement in this rule strikes the appropriate balance between minimizing delays in assisting passengers at the ticket counter or by phone and ensuring that consumers receive critical ancillary fee information. The Department does not adopt GBTA's proposal to permit airlines and ticket agents to quote a ''total likely price'' based on whether a consumer plans to check a bag because that proposal does not address all critical ancillary fee information nor would the allowance for a ''likely'' price quote allow a passenger to assess the true cost of air travel.

(5) Passenger-Specific and Anonymous Search Fee Disclosures

Proposal: The Department proposed to require passenger-specific or anonymous itinerary search disclosure of critical ancillary service fees, based on the consumer's choice, whenever fare and schedule information is provided. For searches where the passenger elects to provide passenger-specific information to the carrier or ticket agent, such as frequent flyer status, payment method, or military status, the Department proposed to require carriers and ticket agents display the fees for critical ancillary services in the form of passenger-specific charges for the itinerary. The Department proposed to treat a search as passenger-specific if a user provided passenger-specific information to the airline or ticket agent before conducting the search ''including when conducting previous searches if the information is cached, or if the user conducts a search while logged into the search website and the operating entity of that website has passenger-specific information as part of the user's profile.'' [101] If the consumer conducting a search elects not to provide passenger-specific information to the carrier or ticket agent (*i.e.,* the consumer conducts an ''anonymous itinerary search''), then the Department proposed to require carriers and ticket agents to display the fees for critical ancillary services as itinerary-specific charges.

Comments: The ACPAC recommended that the Department maintain its proposal to require airlines and ticket agents to display passenger-specific baggage and change and cancellation fees in any final rule. At the January 12, 2023, meeting, the ACPAC member representing airlines stated that providing passenger-specific fees increases the complexity of the search process. He urged ACPAC members to consider the amount of information required to be presented to consumers under the NPRM and the impact these disclosures could have on the speed of providing search results to consumers given the number of ancillary fees required to be displayed at the time schedule and fare information is first provided.

In their written comments and hearing testimony, other industry commenters also opposed the requirement to provide passenger-specific fees for critical ancillary services. These commenters stated that passengers who have status with an airline already know about the benefits associated with their status, and so the disclosure would have little benefit for those consumers. The commenters added that it was impractical for consumers to provide ticket agents with all possible loyalty numbers before conducting a search. They further added that it was technologically infeasible to comply with the passenger-specific requirement, particularly on the first page of search results, with many citing concerns about technology for ticket agents to validate the passenger's status before displaying passenger-specific fees. For example, Booking Holdings stated that ''to enable passenger-specific displays that would need validation from airlines (*e.g.,* frequent flyer account status and credit card affinity status) or third parties (*e.g.,* military status), would be technically prohibitive.'' Booking Holdings added that, without validation of information provided by the consumer, there is a risk that online travel agents would provide incorrect information to consumers about applicable fees.

Similarly, American Airlines testified at the Department's March 30, 2023, public hearing about challenges with validating passenger status using the EDIFACT platform and stated that querying and displaying passenger-specific fees at the first page of search results would affect the reliability and speed of search results. American Airlines further acknowledged in its comments, however, that it currently provides passenger-specific information ''to the extent technologically feasible,'' including seat and bag fees for passengers with status logged in to the airline's website and military personnel who access the American Airlines site through a military booking channel. Echoing concerns raised by other commenters, American Airlines stated that other passenger-specific fee information is impracticable to provide at the first page of search results because it cannot be validated at that time, citing the example of military status for individuals booking travel outside of an official military booking channel. In addition, Google expressed concern about consumer privacy if metasearch entities were required to collect and share customer data with airlines and ticket agents to comply with the passenger-specific search requirement.

Ticket agents uniformly expressed concerns about the volume of queries they would need to conduct to provide passenger-specific information. For example, USTOA commented that ''the volume of data transmission necessary to provide for the level of specificity [for passenger-specific fees] contemplated under the proposed rule is unmanageably large and complex,'' noting that there are currently 47 different co-branded credit cards for ''major'' U.S. airlines, with various policies across airlines regarding when the airline waives the passenger's bag fee (*e.g.,* some credit cards entitle a passenger's travel companion to a free bag, while others do not). Similarly, Sabre commented that the proposed rule required passenger-specific information for too many passenger characteristics and added that it was unclear that the list of passenger-specific criteria in the NPRM was exhaustive. In addition, Sabre expressed concern that the requirement to provide passenger-specific ancillary fee information could lead to providing inapplicable fee information if only one passenger in a travel party has status or if status is lost between the time of booking and travel. Further, Travel Tech stated that ''ticket agents would need to receive a huge volume of data from airlines for this proposal to work, but systems to exchange vast amounts of passenger-specific status information between airlines, agents and GDSs do not currently exist.'' Given the concerns raised by ticket agents, Booking Holdings requested that DOT not require passenger-specific disclosures, at least until new systems could be developed, and asked the Department to modify the proposal to require airlines and ticket agents to inform passengers how fees may differ based on frequent flyer privileges, military status, and other factors, instead of providing specific fees.

A joint comment from multiple consumer groups stated that the options for anonymous and passenger-specific searches ''will be beneficial to consumers, allowing them to customize

[101] 87 FR 63736.

their purchasing process.'' This comment further stated that any additional time necessary to implement passenger-specific requirements should not be used to delay the implementation timeline for the rest of the NPRM's requirements. Travelers United stated that passenger-specific characteristics can make a significant difference in determining the total price of an airfare but noted that the complexity of ancillary fee structures makes providing that information on a single page ''difficult, if not impossible with current technology.''

DOT Response: This final rule maintains, with modifications, the requirement for airlines and ticket agents to provide passenger-specific fees for critical ancillary services if the consumer elects to provide passenger-specific information, and to provide itinerary-specific fees for critical ancillary services if the consumer does not do so. The Department clarifies that the list of information specific to the passenger provided in the rule text—frequent flyer status, military status, and credit card status—is illustrative and not exhaustive. Because variation in fees within each carrier depends on the status of the passenger, fares provided without additional disclosure of the critical ancillary fees specific to the passenger fail to provide consumers with adequate notice of the total cost of the air transportation. Disclosure of the passenger-specific fees will promote informed buyers, enhance competition, and lower prices.

The Department disagrees with comments stating that the complexity of airline policies for assessing passenger-specific fees or the number of queries that must be conducted to produce passenger-specific fees counsels against adopting a passenger-specific fee requirement. Ancillary fee structures that ticket agents or airlines find complex to administer are likely to lead to consumer confusion regarding fees. The costly and time-consuming burdens of determining passenger-specific fees are currently borne by consumers, a key harm that the Department seeks to remedy in this final rule, and makes disclosure of such fees necessary, even for experienced travelers with airline status. In addition, this final rule allows additional flexibility for industry beyond what was proposed, which will reduce the burdens to airlines and ticket agents in disclosing passenger-specific fees for critical ancillary services.

Further, many of the commenters who opposed the requirement to provide passenger-specific fees appear to believe that the proposal would require airlines and ticket agents to validate the passenger-specific information provided by the consumer before displaying itinerary search results. Those comments misunderstood the Department's proposal. Neither the NPRM nor this final rule would require an airline or ticket agent to verify passenger-provided information before disclosing critical ancillary fees when schedule and fare information is provided. To address this misunderstanding, in this final rule, the Department clarifies that the disclosure of critical ancillary fees to consumers may be based on information provided by consumers. If a consumer elects to provide passenger-specific information to the carrier or ticket agent, that consumer has a responsibility for ensuring the information provided is accurate. An airline or ticket agent that relies on the information provided by a consumer when disclosing the critical ancillary service fees applicable to that consumer would not be in violation of the requirement for the fee information to be accurate should the consumer provide inaccurate information (*e.g.,* incorrect frequent flyer account status or credit card affinity status). An airline or ticket agent may elect to verify passenger-provided information at the point that the critical ancillary service is purchased rather than at the time of itinerary search. While this may result in the passenger later being charged a different fee than what was disclosed during the initial search (*e.g.,* if the passenger entered erroneous passenger-specific information), such harm is reasonably avoidable by the consumer providing the airline or ticket agent with accurate passenger-specific information.

The Department concludes that it is feasible for airlines and ticket agents to provide passenger-specific information as required by this final rule. American Airlines' comment suggests that it already provides much of the passenger-specific ancillary fee information required by the rule, providing strong evidence that the proposal can be implemented. In addition, many consumers, including those with a beneficial status, may choose to conduct an anonymous itinerary search, limiting the potential burden on carriers and ticket agents to conduct passenger-specific adjustments in the aggregate. The barrier that American Airlines identified to passenger-specific fees (*i.e.,* the need for validation of passenger data before the display of fees) is not required for compliance, and the Department expects this fact to further mitigate the concerns of regulated entities regarding potential burdens. In addition, the Department has made several changes and clarifications from the NPRM that address concerns commenters raised about the feasibility of the proposed passenger-specific fee requirement. First, the Department has extended the period for compliance with the final rule's requirements, as discussed in section F, to allow additional time for data sharing and implementation of the final rule's requirements. In addition, this final rule does not require airlines and ticket agents to disclose or transact family seating fees, a key area of technical concern for many industry commenters. Further, this final rule provides flexibility in how fee information is displayed so long as the information is accurate, clear, and conspicuous, rather than limiting these disclosures to a display in static text as proposed. The Department expects that these changes will greatly reduce the technological burdens of disclosing passenger-specific fee information when schedule and fare information is provided in response to a consumer's search.

Because this final rule does not require ticket agents to validate passenger-specific data, the privacy concerns raised by Google do not apply. The Department nonetheless concludes that privacy concerns could be implicated if an airline or ticket agent treats an itinerary search as ''passenger-specific'' based on information not affirmatively provided by the passenger for that search, such as a search based on cached information. Under this rule, a consumer is entitled the option to conduct an anonymous itinerary search, which does not consider any passenger-specific information. A consumer should not see a specific fee or ticket price tailored to the consumer if the consumer elects to conduct an anonymous itinerary search. If such a search did, in fact, take into account passenger-specific information not affirmatively provided by the passenger for that search, the Department may take the view that the consumer was not afforded an anonymous itinerary search, which would be a violation of this regulation. Accordingly, this final rule defines a search as passenger-specific only when the search is based on information affirmatively provided by the passenger to the airline or ticket agent for purposes of that search.

(6) Opt-Out Provisions

Proposal: The Department did not propose to permit airlines and ticket agents to enable consumers to opt out of receiving fee information for any critical ancillary services during the search process. Instead, the Department sought comment on whether to allow carriers

and ticket agents to provide consumers an opt-out option from receiving ancillary service fee information that would otherwise be required. The Department explained that opt-out options could potentially include the choice to opt out of seeing all baggage fee information that would otherwise be required to be displayed (first and second checked bag and carry-on bag), to opt out of seeing fee information related to changing or canceling a reservation, to opt out of seeing seat fee information for a child traveling with an adult, or to opt out of seeing some of those fees.

Comments: Industry commenters generally supported permitting consumers to opt out of critical ancillary fee disclosures. These commenters stated that experienced travelers aware of airline ancillary fees may want to opt out of disclosures and that allowing consumers to opt out would provide a more efficient search with customized results for consumers. Spirit Airlines commented that a binary choice of whether a consumer wishes to view ancillary fee information provided at the start of the search process avoids any concern about ''click wrap'' tactics that do not represent a meaningful choice for consumers. Among industry commenters who recommended variations on this general approach, Booking Holdings recommended that consumers be required to affirmatively opt in to receive critical ancillary fee disclosures, stating that its recommendation was based on studies that demonstrate that schedule and fare are the most important factors in a consumer's decision. Google supported either an opt-out or opt-in provision for metasearch sites.

Groups representing consumers and individual commenters recommended different approaches. AARP recommended allowing opt outs in limited circumstances, stating, for example, it may be acceptable to allow ''a traveler to opt out of certain disclosures (such as a single traveler opting out of adjacent seating fee disclosures)'' on a mobile app where screen space is limited, but it added that any circumstance in which opt outs are permitted ''should be the exception rather than the rule.'' One individual supported allowing consumers to opt out of ancillary fee disclosures based on concern about information overload from disclosure of all critical ancillary fees at the first page of search results. Another opposed opt outs with the view that opt outs improperly empower airlines and ticket agents to frame the question to the user about whether to forgo the otherwise-required information. That individual instead recommended that fees be ''zeroed out'' when both the airline and consumer have reason to believe based on information from the initial fare search or customer profile that the consumer does not need a particular ancillary service.

For first checked, second checked, and carry-on baggage, the ACPAC recommended that consumers should be given the opportunity to indicate how many bags they will be traveling with early in the itinerary search process, and the fees applicable to the consumers' selections should then be displayed. This recommendation was proposed by the ACPAC Chair who stated that she did not believe that her recommendation was an opt-in or an opt-out. The ACPAC member representing airlines viewed this proposal as an opt in by consumers and stated that the recommendation was contrary to the Department's proposal. This member expressed concern about how regulating the search landing page could impact efficient search options currently available to consumers.

At the Department's March 30, 2023, public hearing, NCL supported the same approach recommended by the ACPAC, and FlyersRights made a similar recommendation in its written comments. Travel Tech objected to the ACPAC recommendation on the basis that, in its view, the recommendation was outside the scope of the NPRM. Travel Tech further commented that the ACPAC recommendation would require ticket agents to redesign their websites to include a bag inquiry, which would require significant resources. Travel Tech asked that ticket agents be provided with flexibility to adopt this method at their option.

Regarding change and cancellation fees, the ACPAC recommended that the Department should not provide the option for consumers to opt out of receiving change and cancellation fee information. The ACPAC member representing airport operators stated that because change and cancellation fees are not an *a la carte* item that consumers select but instead operate as penalties, the Department should require their display with no opt-out allowance.

DOT Response: The Department agrees with AARP that enabling opt outs from disclosure of ancillary fees that DOT has determined are critical to consumers' purchasing decisions ''should be the exception rather than the rule.'' Accordingly, this final rule requires airlines and ticket agents to disclose change and cancellation fees to all consumers before ticket purchase without any opt-out allowance. It also prohibits airlines and ticket agents from enabling consumers to opt out of receiving fee information for a first checked bag, a second checked bag, or a carry-on bag during the search process with one exception. In response to the recommendation by the ACPAC, the Department is allowing an exception to the requirement to disclose fees for transporting a first checked bag, second checked bag, and carry-on bag on online platforms in circumstances where a consumer affirmatively indicates that no one in their booking party plans to travel with a first checked bag, a second checked bag, or a carry-on bag.

More specifically, under the final rule, a carrier or ticket agent is excepted from the requirement to disclose bag fees with the fare and schedule information if (1) an airline or ticket agent asks its consumers if they intend to travel with a carry-on bag or checked bags; and (2) consumers affirmatively indicate that no one in the booking party intends to travel with a carry-on bag or first or second checked bags. The Department notes that if consumers affirm that they are not traveling with any bags, then the carrier or ticket agent does not have to disclose any of the bag fees. If consumers affirm that they are not traveling with a checked bag, then the carrier or agent is not required to disclose the fees for first or second checking bags. If consumers fail to provide an affirmation, then the carrier and ticket agent must display all the required bag fees. The Department is making this exception available to carriers and ticket agents should they prefer it to providing fees for a first checked bag, a second checked bag, and a carry-on bag in all instances when fare and schedule information is provided. A carrier or ticket agent that elects to use this exception must still provide the baggage weight and dimension information discussed in section E (4)(b) before ticket purchase so that a consumer has access to information about whether their travel plans are consistent with a particular carrier's weight and dimension limitations.

In contrast to baggage fees, consumers are unlikely to know at the time of booking that they would later need to cancel or change a flight and are unable to opt-out of these fees on an informed basis. As explained in the NPRM, change and cancellation fees can be significant and, in some cases, higher than the original fare paid by the consumer. Accordingly, this final rule does not allow airlines and ticket agents to enable consumers to opt out of disclosure of change and cancellation fees.

(7) Transactability

Proposal: The Department proposed to require airlines and ticket agents that impose a fee for children 13 or under to be seated next to an accompanying adult to enable the purchase of family seating at the point of ticket purchase (*i.e.,* transactability). The Department explained that transactability is necessary because consumers are not able to save the seat or lock in the price for adjacent seating at the time of ticket purchase. The Department did not prescribe a particular way for the regulated entities to comply. It noted that, to ensure that a consumer receives family seating information as part of the itinerary search results and accompanying fare quotations, a carrier or ticket agent could decide to enable consumers to disclose that a passenger 13 or under will be traveling prior to initiating an itinerary search. The Department also stated that a carrier or ticket agent could alternatively decide to display seating fees for all itinerary searches, regardless of whether a consumer disclosed that a passenger was 13 or under.

In contrast, the Department did not propose to require fees for a first checked, second checked, or carry-on bag or a ticket change or cancellation to be transactable at the point of purchase. The Department explained that it has not identified evidence of consumer harm resulting from a lack of transactability of baggage, change, or cancellation fees because these fees cannot increase after ticket purchase. In addition, the Department observed that there is no change or cancellation fee to transact at the point of ticket purchase because the consumer would not know at that time that they will cancel or change the ticket.

Comments: Ticket agents, including GDSs, and their associations generally requested that the Department require transactability of all critical ancillary fees, not only fees for children 13 or younger to be seated adjacent to an accompanying adult. Representatives of the travel technology industry also made this recommendation at the June 2022 ACPAC meeting.[102] Among the concerns expressed by Amadeus, Travelport, Travel Tech, and others were that the inability to purchase ancillary services from ticket agents would drive consumers away from ticket agents, harm the ability of consumers to comparison shop, and result in consumers spending additional time to purchase ancillary services on airline websites after purchasing fares from ticket agents. These commenters stated that consumers might pay more to purchase ancillary services at a later time if the Department elects not to require transactability of all critical ancillary fees. For example, Travel Tech stated that, if airlines are able to quote different baggage fee amounts depending on when the passenger pays for the bag (*e.g.,* a higher fee applies if paid closer to the flight date or at the airport instead of at the time of booking), then the lack of transactability for a first checked, second checked, and carry-on bag could still result in a passenger paying more than they would at the point of ticket purchase.

Some ticket agents, including GDSs, and associations also asked the Department to expand the proposed requirement for transactable family seating fees to include all seat fees. For example, Booking Holdings asked DOT to require transactability of all seat fees if DOT maintained the proposed requirement that family seating fees be transactable because the ''significant expense of building the required technology would be offset by greater functionality for most consumers'' if the proposal were expanded. Amadeus asserted that there was a particularly strong argument for transactability of all seat fees due to availability and price changes. However, the U.S. Tour Operators Association (USTOA) and others stated that ticket agents currently lack the technology to make seat fees transactable.

Airlines and metasearch providers urged the Department not to require transactability of any critical ancillary service fee including family seating fees. For example, IATA and Southwest submitted comments opposing transactability requirements for any ancillary fees. These commenters expressed concern that airlines and ticket agents operate through contractual arrangements and stated that airlines should not be required to contract with third parties to sell airlines services. IATA testified at the Department's March 30, 2023, public hearing that travel agent websites would require new digital connections to airlines to display transactable seat fees, which would require years of information technology development. Metasearch providers Skyscanner and Google expressed concern that the proposed rule's transactability requirement would alter the nature of their business by requiring metasearch sites to sell seating.

DOT Response: The Department has decided not to impose any requirement in this final rule that ancillary fees be transactable at the point of ticket purchase. As discussed in section E (3)(c), the Department is not moving forward with its proposal to require carriers and ticket agents disclose fees for young children to be seated next to an accompanying adult on an aircraft and is instead pursuing a separate rulemaking to prohibit these fees.[103] Additionally, as discussed in section E (3)(d), given that the cost of air transportation includes a seat and the lack of clarity about the importance of seat selection fees to consumers, the Department is not requiring carriers or ticket agents to disclose seating fees as required critical ancillary service fees in this final rule. Further, the Department continues to be of the view that the lack of transactability of baggage, change, or cancellation fees does not harm consumers.

The Department is not persuaded by comments asserting that consumers might pay more to purchase ancillary services if the Department elects not to require transactability of all critical ancillary service fees. The Department has identified transporting a first checked, second checked, and/or carry-on bag and changing or canceling a reservation as critical ancillary services. The fee rules for these critical ancillary services do not change after a consumer has purchased a ticket. The fees that are disclosed to the consumer during the booking process will be those fees that apply to the ticket. Because the fee schedules for critical ancillary services are effectively frozen at the time of ticket purchase—which may include disclosing that fees will be higher if paid at the airport rather than at time of booking so long as that is disclosed up front—requiring transactability of critical ancillary service fees at the point of ticket purchase would provide little value, as consumers would be able to pay for critical ancillary services in the time and manner of their choosing. Through the fee disclosures required by this rule, consumers should be aware, for example, that a bag fee may be higher on the day of travel, if that is the case, so they can plan accordingly.

Also, as noted in the NPRM, because consumers would not know that they will cancel or change a flight at the time of ticket purchase, there is nothing to transact for those fees at the time of purchase. As with baggage fees,

[102] *See* presentations of ASTA, Travel Tech, and Amadeus, and Skyscanner, *available at https://www.transportation.gov/airconsumer/ACPAC/June2022Meeting/webcast* (June 2022, Day 1 afternoon session).

[103] *See* Fall 2023 Unified Agenda for rulemaking titled ''Family Seating in Air Transportation'' (RIN 2105–AF15) at *https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202310&RIN=2105-AF15.*

increases beyond the fees that were disclosed at the time of ticket purchase are prohibited for change or cancellation fees, and so there is no consumer harm from not requiring change or cancellation fees to be transactable at the point of ticket purchase.

The Department disagrees with commenters that the lack of a requirement to make critical ancillary fees transactable on ticket agent websites will drive consumers away from ticket agents. This rule maintains the status quo on the transactability of ancillary fees. A significant percentage of airline ticket sales are handled by ticket agents today, even in the absence of a regulatory requirement that ancillary fees be transactable on ticket agent websites, and ticket agents will continue to have the option under this final rule to enter into contractual agreements with carriers to sell ancillary services.

(8) Data Sharing

Proposal: The Department proposed to require airlines that provide fare, schedule, and availability information to ticket agents to sell or display the carrier's flights directly to consumers, to provide such ticket agents useable, current, and accurate information of the fee rules for a first checked bag, a second checked bag, one carry-on bag, canceling a reservation, and changing a reservation. The Department also proposed that such airlines provide family seating fee rules to ticket agents and enable these fees to be transactable by ticket agents. The intention of the proposal was for ticket agents to have access to critical ancillary service fee information sufficient to enable the ticket agents to disclose such fees to consumers.

Under the proposal, carriers would not be required to distribute ancillary service fee information to any ticket agent to whom the carrier does not choose to distribute its fare, schedule, and availability information. If a carrier did not share fare information with a ticket agent, then this proposal would not require that carrier to share ancillary service fee information with that ticket agent. The proposal left open the method by which carriers could choose to distribute fee information to ticket agents. The Department did not propose to require carriers use GDSs to distribute fee information to ticket agents. Each carrier would determine for itself whether to distribute critical ancillary service fee information through GDSs as most carriers already use GDSs to distribute fare and schedule information.[104]

Comments: Industry comments on this issue were extensive. While airlines generally agreed that the rule should not require that they use GDSs to distribute fee information to ticket agents that sell or display directly to consumers, some airlines also expressed concern regarding the proposed requirement to distribute information. Ticket agents, on the other hand, expressed the view that airlines should be required to distribute information to any entity to which the airlines distribute fare and schedule information, including GDSs.

The ACPAC deliberated on the subject of data sharing, and although it did not make a recommendation on whether or how the data should be shared, the ACPAC member representing consumers commented that he did not see how ticket agents could display fees if the fee information was not provided to them.[105] The ACPAC members representing airlines and airports supported the Department's proposal on not requiring airlines to share fee information with GDSs, with the member representing airlines expressing agreement with the Department's rationale to not interfere with contractual relationships.[106] During deliberations, the member representing airlines commented that airline contractual relationships are the result of bargained-for terms, and he cautioned the committee from weighing into those relationships and giving one party veto power over the other in negotiations. The member representing airports noted that the sharing of data is the foundation for all other disclosure recommendations regarding ticket agents. The ACPAC's recommendation on data sharing was for the Department to clarify and refine what is meant by ''useable, current, and accessible in real-time'' and ''non-static dynamic fashion'' when describing how data is to be shared by airlines to ticket agents.

In written comments, IATA, A4A, the National Airlines Council of Canada, and several other airlines supported the proposal's lack of a mandate on providing fee information to GDSs. IATA also commented that airlines should not be required to share data with metasearch companies that are not authorized agents of the airline. IATA noted two available options for establishing agent-airline connections sufficient to present dynamic bag fee information: direct connect, where the agent or agency enters into a direct connection with an airline, or IATA's New Distribution Capability (NDC), essentially an XML-based technical standard for use in airline distribution where an airline shares its NDC application programming interface with the ticket agent or the agent's technology provider. On NDC, American Airlines added that NDC provides more information and better customization than GDSs. IATA stated that some online ticket agents contract directly with ATPCO for fee information rather than relying on GDSs. IATA expressed concern about the capabilities of GDSs, stating that GDSs would need to divert IT resources away from improving the passenger booking experience to instead deliver ancillary fee information. It noted that GDSs had trouble implementing the requirements of the 2011 final rule, due to its outdated system EDIFACT, and that GDSs have not met their commitments to support the NDC. IATA also stated that a requirement to use GDSs would give the three major GDS companies the ability to extract exorbitant fees from airlines and artificially extend the use of an outdated network. A4A added its view that GDSs generally resist carrier innovation in product offerings, and American Airlines agreed that GDSs lack technological capabilities.

Some individual airlines and an individual commenter opposed any requirement to distribute ancillary fee information to ticket agents. Air Canada stated that the rule would force carriers to manage GDSs and how their information would be displayed on other channels, and the individual commenter asserted that airlines would be put in the position of being called to task for problems caused and errors made by third parties. Frontier Airlines stated that it uses proprietary technology and algorithms incompatible with GDSs, and any requirement that it provide data to ticket agents would require rebuilding the airline's distribution capabilities. Southwest Airlines stated that it does not generally contract with ticket agents and that the decision on whether to contract with a ticket agent should be left to the airline. The individual commenter also stated that the proposal was contrary to the

[104] The Department has also discussed the airline distribution system in prior rulemakings. *See, e.g.,* 79 FR 29970, 29975 (May 23, 2014), *available at https://www.govinfo.gov/content/pkg/FR-2014-05-23/pdf/2014-11993.pdf* and 82 FR 7536 (Jan. 19, 2017), *available at https://www.govinfo.gov/content/pkg/FR-2017-01-19/pdf/2017-00904.pdf.*

[105] *See* Aviation Consumer Protection Advisory Committee—January 12, 2023, Meeting Minutes, *available at https://www.regulations.gov/document/DOT-OST-2018-0190-0111.*

[106] No recommendations were made on this specific question, as two of the four ACPAC members were prepared to abstain from voting on this issue.

Airline Deregulation Act by forcing airlines to conduct business with OTAs and GDSs, even though the carrier's own business plan and IT system may be designed only for direct sales to the customer.

Ticket agents, including GDSs, generally asserted that the rule should require airlines to distribute fee information to GDSs. Travel Tech, for example, stated that the rule should include GDSs as ticket agents, and it added that it would support requiring fee information to be provided to all intermediaries to which an airline provides fares for distribution, including ATPCO and GDSs. Travel Tech noted that airlines already provide fare data to GDSs, and it disagreed with airlines' expressed concern that GDSs were wedded to old technology and will abuse market power. According to Travel Tech, the requirement to display passenger-specific baggage fees is infeasible for ticket agents, and not requiring the use of GDSs will add to development time and costs. Travel Tech and others noted that significant resources would be required for travel agencies to negotiate separately with each airline, with Travelport noting that this may cause agencies to shut down. Travel Tech added that GDSs are the only entities capable of distributing ancillary fee data in the short-term. The organization asserted that NDC is not an adequate replacement for GDSs. Amadeus expressed disagreement with IATA's assertion that its technology was outdated or that GDSs would need to divert resources away from making technological improvements to meet the requirements in the rule. Amadeus added that requiring that airlines share data with GDSs would not delay implementation of the NDC, and that the NDC and EDIFACT would need to coexist for some time, with NDC still in its infancy. Other ticket agent associations and individual ticket agents, such as ASTA and Hopper, as well as GDSs, agreed with the viewpoint that airlines should be required to distribute fee information to GDSs.

Metasearch entities supported the objective of having access to airline fee information, but they noted several concerns. Skyscanner stated that it supported the sharing of ancillary fee information with metasearch entities, noting that the requirement would address a longstanding lack of fee disclosure by airlines and ensure that metasearch sites can display fee information. Skyscanner also stated that it depends on direct connect arrangements and ATPCO and GDSs as the primary source of its data, and that the information sharing requirements should be extended to include those latter entities. Google agreed that fee information should be provided to all intermediaries and distribution channels that may be relied upon by consumer-facing entities. Skyscanner also urged the Department not to permit airlines to impose restrictions on the way their fee information is used by the recipients of the information.

Several commenters expressed viewpoints on the terms ''useable, current, and accessible in real-time'' and ''non-static, dynamic fashion,'' as referenced in the NPRM. Travel Tech expressed agreement with the ACPAC recommendation to clarify the meaning of these terms, and it believed that these changes should not require expensive or costly manipulation for the display of fees. Travel Tech also expressed the view that airlines should be encouraged to work toward data uniformity or standardization, with Travelport adding that airlines can more efficiently bear the cost of standardizing their own data rather than individual ticket agents. Sabre stated that airlines should be made to distribute ancillary fee information in a standardized machine-readable format across all channels they already use to distribute fares, including GDSs. USTOA expressed concern that terms like ''useable'' would be susceptible to differing interpretations, and it agreed that a lack of industry standards for furnishing information to ticket agents would impose increased compliance costs and practical burdens. Skyscanner stated that fee data is not ''useable'' if it requires costly processing or other manipulation before it can be displayed.

Multiple commenters, including Travel Tech, Bookings Holdings, and Skyscanner, expressed concern about being held responsible for inaccurate or incomplete fee data provided by airlines. Travel Tech noted, for example, that ticket agents should not be responsible for failing to display information not provided by airlines and should not be barred from providing flight information because airlines have not provided accurate fee data. Skyscanner urged the Department to clarify that metasearch sites and other entities will not be held responsible if airlines fail to provide covered fee information, which would prevent these entities from displaying the information to consumers, and it also believes that it should be allowed to display fare, schedule, and availability information even if it has not received accompanying ancillary fee information from the airline.

DOT Response: After carefully considering the comments on this issue, the Department is requiring airlines to share critical ancillary fee information with any entity that is required by law to disclose critical ancillary service fee and policy information directly to consumers.[107] The Department agrees with commenters, including members of the ACPAC, regarding the need for airlines to share fee information with ticket agents for those ticket agents to make the required fee disclosures. In the Department's view, the requirement for fee data sharing is necessary to enable ticket agents to disclose fees to consumers when providing fare and schedule information. The Department provides its analysis of how the failure to share critical ancillary fee information is an unfair practice in section D (1)(d). In this final rule, as discussed in section E (1), the Department is requiring ticket agents to disclose critical ancillary service fees and policies to consumers. The Department is excluding corporate travel agents from these requirements and deferring to another rulemaking its determination on whether metasearch sites that do not sell airline tickets but display airline flight search options directly to consumers are ticket agents that must disclose ancillary fee information required. Accordingly, this final rule does not require airlines to share critical ancillary service fees with corporate travel agents. It also does not require sharing of information with metasearch entities unless and until metasearch entities are required to disclose that information to consumers. Despite the absence of a regulatory requirement, the Department recognizes that it benefits consumers, metasearch sites, and airlines if all critical ancillary fee information is available through all sources that consumers use to shop for air transportation. As a result, the Department encourages airlines and metasearch sites to enter into voluntary agreements to share critical ancillary fee information while further regulatory action is under consideration.

The Department continues to hold the view that it is not appropriate to require carriers to use GDSs to distribute fee information to ticket agents. The Department's interest is in ensuring that ticket agents disclose critical ancillary service fees to consumers whenever fare and schedule information is provided. Whether carriers share the required data through GDSs or by direct connect or by NDC are business decisions, and the Department seeks to minimize

[107] As noted in sections E (3)(c) and E (7), the Department has decided not to move forward with its data sharing and transactability proposals related to family seating fees at this time.

government interference with the business relationships between airlines, GDSs, and others. The Department notes that changes appear to be ongoing in the marketplace for information distribution, including the adoption and use of NDC. Further, the comments illustrate that there continue to be disagreements between airlines and GDSs on whether GDSs have the modern technology airlines need to merchandise and sell their products the way the airlines choose. The Department is unwilling to impose a prescriptive requirement on this issue while the situation is evolving and while the dynamic between airlines and GDSs remains highly complex. We believe that these airline-GDS relationships are best left to the marketplace. Nothing in this rule precludes or requires airlines to use GDSs to distribute critical ancillary fee information to consumer-facing ticket agents. As noted in the NPRM, GDSs may provide the lowest cost and most efficient way of distributing this information to ticket agents that sell the carrier's ancillary services. This may lead airlines to conclude that they need or want to use GDSs to distribute fee information to meet the implementation deadlines imposed by this rule. The Department notes that these circumstances may change in the future and an overly prescriptive requirement may become too rigid and may ultimately hurt, rather than improve, the consumer experience.

Also, the Department is adopting its proposal requiring the sharing of critical ancillary fee information only with the entities that a carrier chooses to distribute its fare, schedule, and availability information. Under this final rule, airlines are required to share critical ancillary fee information only with those entities with whom they provide fare, schedule, and availability information and who are required to disclose this information directly to consumers. Airlines are not required to share ancillary service fee information with entities with whom they have no existing relationship for sharing airline schedule and fare information.

On the terms ''current, useable, and accessible in real-time'' (or ''useable, current, and accurate,'' as this phrase appears in this final rule) and ''dynamic, non-static fashion,'' the Department does not define these terms in the regulation. The Department recognizes commenters' concerns about the lack of standardization in the data sharing process; however, as with other aspects of the data sharing requirement in the regulation, the Department believes that the requirement is better suited to a performance-based, rather than prescriptive, standard. A more performance-based framework could enable the marketplace to coalesce around several functioning models of data transfer that will work to meet the regulation's objectives—namely, for ticket agents to have access to ancillary fee information sufficient to meet the fee disclosure requirements under this rule. We do note that, to meet the fee disclosure requirements of this final rule, ticket agents would need to be able to access fee rules and/or specific fee information such that each consumer itinerary search will result in the provision of accurate and applicable critical ancillary fee information that this rule requires. The Department expects that this will mean automated data transfers rather than manual. We also note that the requirement is for airlines to provide information ''sufficient to ensure compliance by such entities'' with the disclosure requirement. If airlines transfer the data in a way that is generally inaccessible to ticket agents despite reasonable efforts by the ticket agents to incorporate the data into their systems, then the information provided by the airlines is not considered sufficient. We expect both airlines and ticket agents to work in good faith to ensure that the data is useable to the recipient. Understanding that smaller ticket agents may require additional time to modify their systems to receive data and to disclose fee information in accordance with the regulation, this rule provides for additional time for small ticket agents to come into compliance. See section F.

The Department has considered ticket agents' concern that they could be held liable for missing or inaccurate data provided by the airlines. After considering these comments, the Department has determined that this concern is best addressed through OACP's investigatory process since OACP would be able to determine whether ticket agents' failure to properly disclose fees is a result of receiving incomplete or inaccurate data from an airline, based on the specific facts and circumstances of each case. The disclosures required by this rulemaking apply to both airlines and ticket agents. Under the regulation, if OACP were to investigate and find that missing or erroneous fee information displayed on a ticket agent's website was entirely the result of airline action or inaction, then OACP would pursue action against the airline and not the ticket agent. This rule affords airlines flexibility on how fee information is transmitted to ticket agents (*i.e.,* whether the airline decides to use direct connect, GDS, or another method of delivery) but also requires airlines to ensure that information is accurately, timely, and effectively transmitted.

(9) Remedies for Noncompliance

Proposal: The Department proposed to treat as an unfair and deceptive practice within the meaning of 49 U.S.C. 41712: (1) the failure by a carrier or ticket agent to provide the critical ancillary fee disclosures required by the proposed rule, and (2) the collection of a fee for critical ancillary services if that fee was not disclosed when fare and schedule information was provided. In addition, the Department proposed to require a seller of air transportation to refund any fee charged for a critical ancillary service if the fee was not disclosed at the time the consumer searched for and purchased air transportation.

Comments: The Department received only a few comments directly addressing these proposed provisions, all from industry commenters who opposed the requirement for a ticket agent to refund fees charged by an airline. USTOA stated that the proposed requirement for ticket agents to provide refunds for services actually provided, in contrast to refunds for services not provided, exceeds the Department's statutory authority. This comment asserted that the Department is authorized to issue civil penalties for violations of 49 U.S.C. 41712, but not equitable relief like disgorgement, and the comment urged the Department to rely on investigations and civil penalties to incentivize compliance. USTOA also raised concerns about the burdens of retaining information to demonstrate what critical ancillary fee information was provided to the consumer at the time of search. Similarly, ASTA raised concerns with the purported challenges of demonstrating what was disclosed by the ticket agent to a consumer in an offline transaction and the burden of providing refunds for funds collected by the airline, not the ticket agent. Finally, Google stated that an entity that displays and relies on ancillary fee information provided by an airline should not be liable for a later overcharge by the airline and expressed concern that the proposal was likely to impose ''a severe financial burden on ticket agents.'' Google added that metasearch entities would need to collect and retain personal information for purposes of issuing a refund and would not be able to validate data provided by a consumer, such as frequent flier status, that may result in

an airline charging a higher fee than was originally displayed.[108]

DOT Response: After carefully considering the comments, the Department is maintaining its proposal to treat as an unfair and deceptive practice the failure by a carrier or ticket agent to provide and adhere to the critical ancillary fee disclosures required by this rule but is not moving forward with its proposal to require a seller of air transportation to refund a fee for any critical ancillary service charged if the fee was not disclosed at the time the consumer searched for and purchased air transportation. While the Department disagrees with USTOA's comment that the proposed remedy exceeds DOT's authority, the Department has determined that any violations of the disclosure requirements can be adequately addressed through its existing enforcement process, which can be initiated by a consumer's filing of a complaint through OACP's website. The Department notes that, as an enforcement policy, OACP ensures that the violating entity has corrected the problematic issue and made whole any consumer that was negatively impacted. This includes the Department seeking monetary relief for consumers in negotiated settlement agreements addressing violations of 49 U.S.C. 41712, where appropriate. The Department has obtained monetary relief for consumers in previous enforcement matters in addition to assessing civil monetary penalties. *See* 49 U.S.C. 46301.

(10) Other Proposals

(a) Air Tour Packages

Proposal: The Department proposed that the fee disclosures for a carry-on bag, a first checked bag, and a second checked bag under the NPRM would not apply to air-tour packages advertised or sold online by ticket agents if the air transportation component is not finalized and the carrier providing air transportation is not known at the time of booking. Instead, the Department proposed to require ticket agents in such situations to disclose that additional airline fees for baggage may apply and that those fees may be reduced or waived based on the passenger's frequent flyer status, method of payment, or other information specific to the consumer. The Department further proposed that, once the identity of the carrier providing the air transportation becomes known, the ticket agent must provide passenger-specific fee information for a first checked, second checked, and carry-on bag to prospective passengers and those passengers who booked the air-tour package before the identity of the carrier was known. The Department requested comment on whether this exception for certain air tour packages adequately addresses concerns of air-tour package sellers and whether such an exception adequately protects consumers.

Comments: American Airlines opposed the Department's proposal to require sellers of air tour packages to state ''baggage fees may apply'' if the carrier is unknown at the time of booking. Asserting that the Department is essentially exempting air tour package sellers from the requirement to disclose baggage fees, American recommended that sellers of air tour packages instead be required to provide a range of baggage fees when a carrier's identity is unknown. American Airlines argued that the Department's proposal would expand a technology gap to the detriment of consumers, adding that ''packagers are capable of providing reasonable estimates or ranges for potential expenses for travelers. These requirements would increase transparency and cost certainty for travelers.'' USTOA supported the Department's proposal but noted that the NPRM did not specify the timeframe within which a ticket agent must provide the required baggage fee disclosures to consumers after the identity of the air carrier becomes known.

DOT Response: The Department disagrees with American Airlines' assertion that the Department is exempting air tour package sellers from baggage fee disclosure requirements. The Department is adopting the proposal requiring that air tour package sellers provide the relevant fee information once the identity of the carrier is known. The rule does not require that air tour package sellers disclose specific bag fees at the time of sale when the identity of the airline is not known, as identifying specific bag fees without knowing the operating airline could lead to guessing and inaccurate information, thereby confusing consumers. The Department has long required carriers and ticket agents to provide specific fees for first checked, second checked, and carry-on baggage, even under existing regulations that permit other ancillary fees to be expressed as a range. Baggage fees across carriers vary significantly and so requiring air tour package sellers to provide a range of baggage fees, as American Airlines recommends, would not assist consumers to assess the costs of transportation as the range of baggage fees for multiple carriers would be so wide as to render the information useless.

Under this final rule, if the airline for an air-tour package is unknown when a passenger books the package, then the ticket agent must disclose in a clear and conspicuous manner at the time that the ticket agent first offers a package fare quotation that additional airline fees for baggage may apply and that those fees may be reduced based on the passenger's frequent flyer status, method of payment, or other consumer information. In addition, in response to the comment from USTOA, this final rule clarifies that, once the identity of the airline for a tour package is known, the ticket agent must provide the baggage fee disclosures otherwise required by this final rule at the same time that the ticket agent discloses the name of the carrier to the passenger.

The failure to disclose that additional baggage fees may apply when a passenger books an air tour package without an identifiable carrier and the failure to disclose the passenger-specific fees for a carry-on bag, first checked bag, and second checked bag when the carrier is known is unfair because it causes or is likely to cause substantial injury, which is not reasonably avoidable, and the harm is not outweighed by benefits to consumers or competition. This practice is likely to cause substantial injury because of the additional funds spent to transport bags that might have been avoided if the consumer had been able to determine the true cost of travel up front. This harm is not reasonably avoidable because consumers likely will not know that the bag fees are not included without the disclosure that there may be additional bag fees. Also, consumers would not know the cost of the bag fee without the ticket agent sharing that information with the passenger when the carrier is identified. Further, the harm is not outweighed by benefits to consumers or competition as the disclosures would ensure consumers are making informed decisions and would enhance competition. It is also deceptive to fail to disclose that bag fees may apply when the carrier is not known and to fail to disclose the passenger-specific fees when the carrier is known. Without these disclosures, a reasonable consumer is likely to be misled to believe that baggage fees were included in the price and also misled about the total purchase price. This

[108] Google noted that the proposed rule's preamble stated that the refund would be owed by the ''seller of air transportation,'' but the draft regulatory text did not use this term and instead referred to a refund by a ''ticket agent,'' which the Department has previously asserted includes metasearch entities.

matter is material as it impacts consumers' funds.

Air tour package sellers should provide consumers the opportunity to modify their air tour package at no cost or to cancel their air tour package for a refund, if the consumer chooses, once the applicable bag fees are disclosed to the consumer.

(b) 24-Hour Rule Disclosure

Proposal: The Department proposed to require carriers and ticket agents with websites marketed to U.S. consumers to display on the last page of the booking process a brief statement on whether the carrier or ticket agent permits the consumer's booking to be cancelled without penalty within 24 hours, or whether the carrier or ticket agent permits the consumer to hold the reservation without payment for 24 hours, provided that the reservation was made at least one week before the flight's departure. Carriers are already required to either permit consumers to cancel their tickets within 24 hours without penalty or hold their reservations at the quoted fare for 24 hours without payment if the reservation is made more than a week before the flight's departure. Similar requirements currently do not exist for ticket agents though agents may do so voluntarily. This proposal is that the carrier's and ticket agent's chosen policy be disclosed on the last page of the booking process, which is distinct from the existing requirement that the carrier's chosen policy (*i.e.,* 24-hour hold or cancel within 24 hours with no penalty) be disclosed in that carrier's customer service plan pursuant to 14 CFR 259.5.

Comments: The Department received few comments on this issue and those comments either supported the Department's proposal or were neutral. For example, IdeaWorks, a consulting firm, agreed that ''[a]wareness of this benefit should be reinforced.'' In addition, IATA noted that it had no objection to the requirement for carriers to display the 24-hour cancellation policy on their websites, while USTOA stated that it did not object to the new requirement provided that the final rule was clear that ticket agents are not required to allow passengers to cancel a booking within 24 hours or to hold the ticket for 24 hours at the quoted price.

DOT Response: The Department adopts this proposal with three clarifying edits. As proposed, this final rule requires carriers to disclose on the last page of the booking process whether the consumer's booking can be cancelled within 24 hours of purchase without penalty or whether it can be held at the quoted fare for 24 hours without payment. The Department clarifies that this disclosure must be made only if the reservation is made at least one week before the flight's departure, consistent with the existing regulatory requirement for carriers in 14 CFR 259.5(b)(4). Ticket agents are required to provide the same disclosure of their policy on allowing a passenger to hold a reservation for 24 hours or cancel a reservation within 24 hours without a penalty, for flights departing one week or more after the reservation. Ticket agents that do not offer either the 24-hour free cancellation or 24-hour reservation hold options without charge must disclose before ticket purchase that the consumer will not be able to cancel his or her booking after it is executed, consistent with this rule. The Department has an open rulemaking that would address, among other things, requiring travel agents to adopt minimum customer standards such as the 24-hour rule similar to those imposed on carriers.[109] The Department clarifies in this rule that airlines and ticket agents must make the required disclosure in a clear and conspicuous manner. In addition, the Department is amending the requirement for carriers to include an assurance in their customer service plan that they will offer either a 24-hour free cancellation or 24-hour reservation hold option at no cost to also include an assurance to disclose their chosen 24-hour policy on the last page of the booking process before ticket purchase as required in this rule. The Department has determined that the failure to make the required disclosure before ticket purchase is an unfair and deceptive practice, as discussed in section D (1)(b).

(c) E-Ticket Confirmations

Proposal: Section 399.85(c) currently requires air carriers and ticket agents to include information regarding the passenger's free baggage allowance and the specific fee information for first and second checked bags and a carry-on item on all e-ticket confirmations for air transportation, taking into account factors such as frequent flyer status that affect those charges. This regulation currently provides that carriers must provide this information in text form on the e-ticket confirmation. Agents may provide this information either in text form on the e-ticket confirmations or through a hyperlink to the specific location on an airline website or their own website where this information is displayed. In the NPRM, the Department requested comment on whether there is a benefit in retaining these requirements.

Comments: Few commenters addressed this issue. A4A urged DOT to remove the e-ticket disclosure because, in its view, existing disclosures are ''redundant, unnecessary, and burdensome'' and because consumers would have already received the information required in the e-ticket confirmation during the search process.[110] On the other hand, AARP called the e-ticket confirmation ''an essential element of consumer protection.'' AARP further noted that ''the dates of travel may be weeks or months after the tickets were booked, and many consumers will have forgotten the specific fee amounts presented to them at the time of booking,'' making the e-ticket confirmation ''an important record for consumers to have at the time of travel.'' FlyersRights asked the Department to require additional disclosure after ticket purchase of the size limitations for personal items, carry-on bags, checked bags, instruments, and sporting equipment.

DOT Response: The Department maintains in this final rule, with modifications, the requirements that carriers and ticket agents must include specific fee information for first and second checked bags and a carry-on item on all e-ticket confirmations for air transportation and that the fee information provided must take into account the passenger-specific factors that affect those charges. The Department agrees with AARP that the e-ticket confirmation serves as a valuable record for consumers concerning the fee information provided at the time of booking and disagrees with A4A that listing this information on the e-ticket is redundant or burdensome. To ensure that the e-ticket provides an accurate record of the fees disclosed to consumers at the time of purchase, the Department is removing

[109] Information on the rulemaking titled ''Air Transportation Consumer Protection Requirements for Ticket Agents'' (RIN 2015–AE57) is available in the Fall 2023 Unified Agenda of Regulatory and Deregulatory Action at *https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202310&RIN=2105-AE57*.

[110] In its comment, A4A also asked DOT to eliminate the existing requirement at 14 CFR 399.85(b) that U.S. carriers, foreign air carriers, agents of either, and ticket agents provide a prominent disclosure that ''additional bag fees may apply'' and where consumers can see these baggage fees. The Department proposed to replace that existing requirement with the requirement to disclose itinerary-specific or passenger-specific fees, depending upon the consumer's search type, for a first checked bag, second checked bag, and carry-on bag. The final rule removes the existing requirement as proposed. Requirements for the display of baggage fees under this final rule are discussed in section E (4).

the allowance for ticket agents to provide a link to baggage fees as an alternative to providing the information in text form.

The Department has determined that it is an unfair practice to provide links to bag fees in the e-ticket confirmation instead of providing the information in text form. Links to bag fees that lead to complex charts are confusing to consumers and may ultimately not be instructive for many consumers in determining the bag fee that would apply to them. Further, the lack of an e-ticket confirmation with the bag fee in text form is likely to cause substantial injury for consumers who are charged a bag fee that is higher than the one disclosed during the search process because consumers would lack a valuable record to demonstrate the fee information provided at the time of booking. This harm is not reasonably avoidable because consumers are not able to generate the confirmation on their own. Also, the harm that these consumers experience is not outweighed by benefits to consumers or competition because lack of clarity about applicable bag fees harms, rather than benefits, consumers, and competition. As such, the Department is imposing in this final rule the same requirement for ticket agents to display baggage fees in text form on the e-ticket confirmation that has traditionally applied to carriers. In response to the comment from FlyersRights, the Department also clarifies that the information about the passenger's free baggage allowance currently required to be included in the e-ticket confirmation must include information about a personal item. This is not a substantive change to existing requirements.

(d) Bag Policy Change Disclosures

Proposal: The existing regulation at 14 CFR 399.85(a) requires carriers to disclose any increase in applicable fees for carry-on or first or second checked bags promptly and prominently, along with any change in baggage allowances, on the homepages of their websites for at least three months after the change becomes effective. In the NPRM, the Department proposed language changes to clarify the scope of websites covered by this existing requirement but did not propose substantive changes. DOT also requested comment on whether these requirements would still be useful to consumers if the NPRM was finalized.

Comments: The Department received few comments on this issue. One individual stated that additional guidance on how airlines should communicate baggage fee increases to consumers is needed. A4A urged the Department to remove this required disclosure because it would be redundant and unnecessary if the rule were adopted as proposed.

DOT Response: The Department agrees with A4A that the existing requirement to disclose baggage fee increases and changes in baggage allowances on the carrier's homepage is no longer necessary. Under this final rule, airlines and ticket agents must provide the consumer with passenger-specific or itinerary-specific fees, depending on the consumer's search type, for a first checked bag, a second checked bag, and a carry-on bag when a fare and itinerary is displayed in response to a consumer's search. As discussed in section E (10)(e), under 14 CFR 399.88, these fees may not increase from what was displayed to the consumer before ticket purchase. Applicable baggage fees must also be memorialized on the e-ticket confirmation. Accordingly, prominent disclosure of baggage fee increases on carriers' websites would be unnecessary under this final rule because carriers may not apply such increases to ticketed passengers.[111]

(e) Post Purchase Price Increases

Proposal: The Department proposed to amend 14 CFR 399.88, which prohibits sellers of air transportation from increasing the price for air transportation including the price for ancillary services that have not yet been purchased after a ticket is purchased, except in the case of an increase in a government-imposed tax or fee or if the potential for an increase was disclosed as required prior to purchase. Although the existing regulation includes a broad prohibition on increases to all ancillary service fees, regardless of whether these items are purchased along with the air transportation, in 2011, the Department announced that with respect to fees for ancillary services that were not purchased with the air transportation, it would only enforce the prohibition on post-purchase price increases for carry-on bags and first and second checked bags.[112] The application of the prohibition of the post-purchase price increase was also at issue in a lawsuit filed by two airlines against the Department. The court considered the rule as applied under the Department's 2011 guidance and upheld the Department's rule prohibiting post purchase price increases as it is currently being applied.[113] The proposed revisions were intended to make the regulatory text consistent with the Department's rule as applied under the Department's 2011 guidance and upheld by the Court.

The Department did not propose changes to the rule as it is applied but sought comment on whether it should require that the price for ancillary services not purchased with the ticket be frozen beyond first and second checked bag and a carry-on item. More specifically, the Department asked whether prohibition on post purchase price increase should extend to fees for all baggage (including fees for oversized or overweight bags) or all ancillary services that have been identified as being critical to a consumer's purchasing decision.

Comments: IATA and American Airlines opposed any expansion of the post-purchase price increase beyond the fees for first checked bag, second checked bag, and carry-on bag. Citing seat fees as one example, American Airlines stated that many ancillary fees are dynamically priced, and so prohibiting post-purchase increase of those fees ''would have the unintended consequence of foreclosing discounts for early purchases and likely result in increased prices.''

AARP and FlyersRights commented on this proposal on behalf of consumers. AARP stated that the prohibition should apply to ''the ancillary fees covered by this rule'' and added that allowing fees to increase at a later date would undermine the regulatory goal of enabling consumers to make informed purchasing decisions based on the full cost of travel. FlyersRights advocated for extending the post-purchase price increase prohibition to all ancillary fees, not only those critical ancillary fees required to be displayed by this rule. This commenter stated that fees advertised at the time of ticket sale should not be increased once a consumer is locked into a ticket purchase.

DOT Response: The final rule extends the post-purchase price increase prohibition to all fees for critical ancillary services. The Department notes that, in addition to the post-purchase price increase prohibition on

[111] In response to the individual commenter, the Department notes that the post-purchase price increase prohibition at 14 CFR 399.88 does not prohibit an airline from charging different fees for a first-checked, second-checked, or carry-on bag based on when the passenger pays the baggage fee (*e.g.,* in advance or at the airport), but that it instead prohibits airlines from changing baggage fee rules that apply when a ticket is purchased.

[112] *See* Guidance on Price Increases of Ancillary Services and Products not Purchased with the Ticket (December 28, 2011).

[113] *Spirit Airlines, Inc.,* v. *U.S. Dept. of Transportation* (D.C. Cir. July 24, 2012), slip op. at 20–21. Petition for Writ of Certiorari denied on Apr. 1, 2013.

fees for first checked, second checked, and carry-on baggage, as currently applied and discussed above, change and cancellation fees may not be increased beyond what was disclosed to the consumer at the time of purchase under 14 CFR 253.7. Because the only critical ancillary services identified in this final rule are first checked, second checked, and carry-on baggage and ticket changes and cancellations, the modification from the proposal to cover all critical ancillary service fees does not impose any new burdens on carriers or ticket agents. If the Department identifies additional critical ancillary services, after notice and opportunity for comment, then the post-purchase price increase prohibition will apply to those services at that time. The Department declines to extend the prohibition to additional ancillary fees not critical to a consumer's purchasing decision at this time due to the complexity and dynamic nature of many ancillary services. For example, as noted by the airlines, some airlines offer dynamic seat fee pricing that may adjust based on demand and availability, and consumers relying on a specific seat fee may be confused if the seat associated with that fee is no longer available by the time the consumer is ready to purchase a seat assignment. As another example, freezing the price of inflight food offerings at the time of ticket purchase could cause different passengers to have different pricing regarding the same food product purchased at the same time, a situation which could cause consumer confusion and be difficult for airlines to manage.

(f) Full Fare Rule and Percentage Off Discounts

Proposal: The Department proposed non-substantive changes to the current ''full fare'' requirement in 14 CFR 399.84(a) that when a carrier or ticket agent quotes a price in advertising or a solicitation, the price must be the total fare, inclusive of taxes and fees. The proposed changes consisted of minor changes to § 399.84(a) to promote readability and accommodate the ancillary fee disclosures proposed in the NPRM. Specifically, the Department proposed that, if a consumer wishes to view ancillary service fees, such as bag fees, incorporated into the total quoted price during an itinerary search, carriers and ticket agents may display the total price of the transportation, inclusive of mandatory taxes and fees and the consumer's selected ancillary service fees, more prominently than a price that includes only all mandatory charges. These adjustments were not intended to make substantive changes to the full fare rule.

Under the existing full fare rule, carriers and ticket agents may state separately any charges included within the single total price on their websites, but such charges may not be false or misleading, may not be displayed more prominently than the total price, may not be presented in the same or larger size as the total price, and must provide cost information on a per-passenger basis that accurately reflects the cost of the item covered by the charge. Consistent with this requirement, the Department explained that advertisements that state discounts in the form of percentage-off sales must refer to a discount off the total price to be paid by the consumer for the ticket, unless the airline or ticket agent explicitly states that the discount is based on only a portion of the fare. For example, an advertisement that indicates air transportation is on sale for a percentage off but does not apply the discount to the total price would be misleading if it did not specify that it is a percentage off only the ''base fare'' or other fare component. The Department further elaborated that, when the terms ''flight,'' ''ticket,'' or ''fare'' are used in an advertisement stating a percentage off (*e.g.,* ''a 25% discount off the flight''), a reasonable consumer would understand that the percentage off applies to the total price of the transportation. In the NPRM, the Department explained that there is a lack of clarity about the meaning of the term ''base fare'' and offering a percentage discount off of the ''base fare'' may be misleading if the discount only applies to a portion of the carrier-imposed charges, and not the total amount of carrier-imposed charges (*i.e.,* the fare for the transportation plus carrier-imposed charges such as fuel surcharges and other mandatory carrier fees). The Department solicited comment on whether and how to address this issue in the final rule.

Comments: Several commenters representing both industry and consumers asked the Department to define ''base fare'' to mean all mandatory carrier-imposed charges and agreed with the Department's assessment in the NPRM that providing a ''base fare'' discount would be misleading if the base fare did not include all such mandatory charges. For example, Southwest Airlines stated that some airlines advertise ''generous eye-catching percentage-off discounts that can be fairly described as 'bait-and-switch' tactics'' of a large percentage off a low ''base fare'' that does not include all mandatory carrier-imposed fees. Southwest explained that in such circumstances mandatory carrier-imposed fees ''often make up the majority of the ticket price'' and are not discounted. In addition, both Travelers United and Southwest Airlines requested that DOT clarify that the ''base fare'' must include all mandatory airline-imposed fees on the distribution channel where a fare is viewed (*e.g.,* if there is a charge for online booking and the consumer is searching for airfare online, then the online booking fee must be included in the base fare). A small travel agent asked the Department to go further and prohibit all fuel surcharges and carrier-imposed fees, stating that fares are filed to ATPCO with the base fare only, making it difficult to compare fares between carriers. On the other hand, IATA opposed any additional regulation in this area, stating that consumers understand that percentage-off discount offers do not discount carrier surcharges.

Regarding the existing full fare rule, a joint comment from multiple State attorneys general noted that airlines often charge fees in connection with different methods of booking, including online, telephone, or in-person booking fees. These commenters noted that they understand that the existing full fare rule already requires such fees to be included in the full fare, but asked DOT to cover such fees in this rulemaking in the event that this understanding was incorrect.

DOT Response: In this final rule, the Department is permitting airlines and ticket agents to disclose a total price inclusive of mandatory taxes and fees and ancillary fees in place of or more prominently than a total price that only includes all mandatory taxes and fees.

In response to comments, the Department is adding a new paragraph (e) to § 399.84, which provides that it is an unfair and deceptive practice for an airline or ticket agent to offer a percentage-off discount for air transportation, a tour, or a tour component that does not make clear at the outset the terms and conditions of the offer, including how the discount is calculated. This new provision further provides that, when used in any advertising or solicitation, the term ''base fare'' must refer to the amount that includes all mandatory carrier-imposed charges. The Department agrees with commenters that an advertisement of a percentage-off discount that is unclear about its terms or is offered as a percentage off a ''base fare'' that does not include all mandatory carrier-imposed charges is unfair and deceptive to consumers. The Department is unpersuaded by IATA's

unsupported statement that consumers understand that base fare discounts do not include discounts off carrier-imposed surcharges, particularly as to those consumers who purchase air transportation infrequently. The Department notes that carriers and ticket agents may continue to list the components of the ''base fare'' separately, consistent with § 399.84(a).

Also, as requested in a joint comment from multiple State attorneys general, the Department is making clear that mandatory booking charges are required to be included in the quoted fare under the full fare rule. Southwest Airlines and Traveler's United also requested confirmation that if there is a charge for online booking and the consumer is searching for airfare online, then the online booking fee must be included in the base fare. That is correct. As the Department explained when it issued its final rule that addresses full fare advertising in 2011, while a carrier or ticket agent generally is not required to include a booking fee in its advertised fare if there are other means for the passenger to obtain the air transportation (*e.g.,* a booking fee only applies for tickets that are purchased over the telephone), where airfares are advertised via an internet site that permits consumers to purchase fares, the fares advertised on the site must include all charges required to make the purchase on the site. For example, it would be unfair and deceptive to hold out on such an internet site a fare that can be purchased only at airport ticket counters but that excludes a convenience fee that is applied to internet sales.[114] To avoid confusion in this area, the Department is adding this clarification to its full fare rule.

(g) Codeshare Flights

Proposal: The Department did not propose any new requirements specific to codeshare flights, separate from the general proposal that airlines and ticket agents disclose critical ancillary fees on an itinerary-specific basis.

Comments: A comment from multiple State attorneys general stated that ''where there is a codeshare arrangement in place, the consumer must be notified of the fees that will actually be charged, whether they are imposed by the airline through which the consumer booked the flight or the airline operating the flight.'' Though this comment noted that the issue appeared to be addressed by the requirement that the fees provided be accurate, these commenters asked DOT to consider whether special requirements were necessary for codeshare flights. Two individual commenters similarly stated that carriers should be required to disclose the fees of their partners.

DOT Response: The Department has determined that no revisions to the proposed rule are necessary to address these comments. The Department proposed, and this final rule requires, that airlines and ticket agents disclose critical ancillary fees on an itinerary-specific basis. This includes the requirement in § 399.85(c) of this rule for a carrier to accurately display itinerary-specific fees, including those involving flights operated by a partner carrier. In addition, this final rule maintains the existing regulatory requirement in § 399.85(e) (recodified in this rule at § 399.85(i)) that airlines must disclose through their websites any differences between their optional services and related fees and those of a carrier operating the flight under a codeshare arrangement. This existing requirement includes the fees for ancillary services that are not covered by the requirements of this final rule. This final rule also maintains the existing regulatory requirement in 14 CFR 399.87 that, for passengers whose ultimate ticketed origin or destination is a U.S. point, U.S. and foreign carriers must apply the baggage allowances and fees that apply at the beginning of a passenger's itinerary throughout his or her entire itinerary. That section also specifies that, in the case of code-share flights that form part of an itinerary whose ultimate ticketed origin or destination is a U.S. point, U.S. and foreign carriers must apply the baggage allowances and fees of the marketing carrier throughout the itinerary to the extent that they differ from those of any operating carrier.

(h) Additional Comments

The Department received several comments that did not specifically address the proposals in the NPRM.

Comment: Google noted that the NPRM did not address how the proposed requirements would affect existing requirements at 14 CFR part 256 governing how ticket agents and air carriers must respond to consumer searches and disclose display bias. Specifically, Google asked whether fees for baggage, ticket changes and cancellations, and seat assignments should be included in the total price when ranking responses based on the lowest total price.

DOT Response: The Department's existing regulation at 14 CFR 256.4 prohibits undisclosed display bias and requires each electronic airline information system to ''display information in an objective manner based on search criteria selected by the user;'' the regulation provides ''lowest total cost'' as one example of search criterion. This regulation further requires that those flight options best satisfying the user's selected search criteria ''must be ranked in lists above other flight options,'' but provides that this ''does not preclude systems from setting default display parameters that are not deceptive or offering users the option to choose a variety of display methods within those parameters.''

The Department clarifies that this final rule does not alter the existing requirements in part 256. If an airline or ticket agent's site enables a consumer to select desired ancillary services (*e.g.,* baggage) to be included in the total quoted price for search results and the consumer requests to receive search results by ''lowest total cost,'' then any ancillary fees selected by the passenger should be included in the total price for purposes of ranking flight options to reflect the consumer's selected search parameters.

Comments: FlyersRights and multiple State attorneys general stated that states should be provided with statutory authority to regulate aviation consumer protection.

DOT Response: This issue is outside the Department's authority and cannot be addressed by the Department in this final rule. The Department works with state authorities on aviation consumer protection issues where appropriate and within the confines of existing statutory authority.[115]

Comment: The U.S. PIRG Education Fund asked the Department to update its method of reporting consumer complaints, suggesting models currently used by the National Highway Traffic Safety Administration (NHTSA) and the Consumer Financial Protection Bureau (CFPB).

DOT Response: The Department has been examining how best to review, process, and report air travel service consumer complaints, which has included looking at various models including models currently used by NHTSA and CFPB. The Department anticipates that its new modernized system will be operational in 2024 and will be further enhanced with funding

[114] 76 FR 23110, 23143 (Apr. 25, 2011).

[115] On April 16, 2024, the Department announced a new partnership with State attorneys general to prioritize misconduct cases referred to DOT by State attorneys general who uncover unfair or deceptive airline practices. *See https://www.transportation.gov/briefing-room/secretary-buttigieg-launches-bipartisan-partnership-state-attorneys-general-protect.*

from the Technology Modernization Fund (TMF) in the coming years.

Comments: A few individual commenters asked the Department to impose a comprehensive passengers' bill of rights.

DOT Response: This comment is outside of the scope of this rulemaking. The Department notes that it provides a comprehensive list of current consumer protections for air consumers at *https://www.transportation.gov/airconsumer/fly-rights* and an Airline Passengers with Disabilities Bill of Rights at *https://www.transportation.gov/airconsumer/disabilitybillofrights.* Also, the Department has an open rulemaking to respond to section 429 of the 2018 FAA Act which directs the Department to require carriers to submit a one-page document that describes the rights of air consumers to the agency and require those carriers to make that document available on their websites.[116]

F. Compliance Period

Proposal: The Department proposed a six-month implementation period for the rule's requirements. In support of the proposed six-month implementation period, the Department noted that, at the June 2022 ACPAC meeting, one airline representative indicated that, broadly speaking, sharing ancillary fee data with ticket agents is not technologically difficult and could be accomplished within a short time frame.[117] The Department specifically sought comment on whether it should impose a date certain by which carriers must share ancillary service fee information with ticket agents.

Comments: The ACPAC decided to refrain from recommending a specific timeframe for compliance with the final rule. Instead, the ACPAC recommended at its January 12, 2023, meeting that the Department should consider what can be done realistically, as well as the need for consumers to have ancillary fee information as soon as possible, in determining the timeframe for compliance with the final rule.

A few groups representing consumers requested that the Department adopt either the six-month period from the NPRM or a shorter three-month implementation period. For example, AARP supported the proposed six-month compliance period, calling it a ''reasonable amount of time'' and urged the Department to finalize and implement the rule quickly ''so that the benefits of fee disclosure can be extended to travelers as soon as possible.'' In addition, FlyersRights asked the Department to instead require a three-month implementation period. In support, it cited the June 2022 ACPAC testimony that the Department cited in the NPRM as evidence that airlines and ticket agents could implement the proposed rule more quickly. On the other hand, Travelers United commented that the significant technological changes required by the proposal would require additional time to implement.

Industry commenters uniformly opposed the proposed six-month compliance period, stating that it was far too short and recommending significantly longer periods, with many stating at least three years was needed. Specifically, industry commenters raised concerns with the ability to complete data-sharing agreements, develop the proposed first page display of critical ancillary fees, display real-time, transactable family seating fees, and calculate and display passenger-specific fees within the six-month timeframe proposed. For example, A4A stated that a compliance period of at least three years was ''necessary to provide time for all parties to re-engineer their own marketing platforms and re-design and re-engineer connections to other stake holders, especially with regard to family seating transactions and passenger-specific search information.'' IATA also recommended a three-year implementation period, citing prior challenges with data sharing using EDIFACT and testifying at the Department's March 30, 2023, hearing that providing transactable family seating fees would take years. In addition, Frontier Airlines suggested that required data sharing with ticket agents ''would be measured in years, and perhaps decades,'' and American Airlines stated that ''to disclose passenger-specific ancillary fees on the first page of search results requires a highly complex reconfiguration'' of its distribution technology that ''could take years to resolve.''

Other industry commenters suggested less than three years was needed but still emphasized that implementation of the proposal would take longer than the six months proposed. For example, USTOA recommended an implementation period of at least 18 months, Travelport suggested a period of 24 months (with the first 12 months for data sharing) if the Department elected not to require data sharing with GDSs, and Travel Tech stated that at least two years would be needed to display all critical ancillary fees at the first point in the search process where schedule and fare information is provided.

Some industry commenters stated or suggested that their time estimates would be shorter if the Department modified its proposal. For example, American Airlines stated that if the Department allowed itinerary-specific disclosures later in the booking process, its ''estimate would change meaningfully.'' Bookings Holdings commented that its three-year implementation estimate could be reduced to two years if the Department required data sharing through GDSs and to 18 months if the Department allowed affirmative opt-ins or static rollovers, links, or pop-ups for the display of fees. Amadeus noted that ''[r]evision of the rules to allow more flexible displays and to eliminate the proposed requirement that all critical fee data be provided on the first search results page will go far to allow for timely and cost-efficient implementation.'' Travel Tech stated that the rule could possibly be implemented in as few as 18 months with modifications to the proposal.

DOT Response: After carefully considering the comments received, the Department extends the proposed compliance period as follows: (1) airlines must share data with ticket agents as required in this rule not later than six months after this rule's publication date, or October 30, 2024; (2) airlines must meet the critical ancillary service fee disclosure requirements not later than 12 months after this rule's publication date, or April 30, 2025; (3) ticket agents that do not meet the SBA definition of a small entity[118] must meet the critical ancillary service fee disclosure requirements to consumers not later than 18 months after this rule's publication date, or October 30, 2025; and (4) ticket agents that meet the SBA definition of small entity must meet critical ancillary fee disclosure requirements to consumers not later than 24 months after this rule's publication date, or April 30, 2026. The additional six months for large ticket agents to comply beyond the deadline for airlines reflects that carriers already have access to the required ancillary fee information, but ticket agents cannot implement the disclosure requirements

[116] ''One-Page Document on Passenger Rights'' (RIN 2015–AE82) is available in the Fall 2023 Unified Agenda of Regulatory and Deregulatory Action at *https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202310&RIN=2105-AE82.*

[117] Remark of American Airlines, *available at https://www.transportation.gov/airconsumer/ACPAC/June2022Meeting/webcast* (Day 1 afternoon session).

[118] A ticket agent is a small entity if it has total annual revenues below $25 million *See https://www.sba.gov/document/support--table-size-standards,* NAICS Code 561510.

in this rule until data-sharing arrangements are complete. The longer implementation period for small ticket agents reflects that those businesses may require additional time for compliance as discussed in section E (1)(b).

The Department believes that the implementation period set forth in this final rule is reasonable. The Department has modified several key aspects of the proposal in this final rule,—including in areas that were of particular concern to industry commenters—which will permit quicker implementation than the periods generally suggested by industry commenters. Among those significant changes, this final rule does not require display or transactability of family seating fees and provides additional flexibility in how critical ancillary fees must be disclosed, as requested by many commenters. In addition, while some commenters cited the requirement to provide passenger-specific fees as a challenge to timely implementation, the Department notes that some commenters appeared to misunderstand this requirement and mistakenly believed that information provided by the consumer would need to be validated before the airline or ticket agent could disclose passenger-specific fees, posing technological challenges. As discussed in section E (5), airlines and ticket agents may present passenger-specific ancillary fees based on the information provided by the consumer, and so this requirement should not significantly slow implementation.

Finally, although this final rule does not require data sharing with GDSs as requested by some commenters to speed implementation, the Department expects that airlines and ticket agents will work in good faith to come to an agreement on the method used to transmit the ancillary fee information required by this final rule. Nothing in this final rule prevents airlines and ticket agents from voluntarily agreeing to use GDSs to distribute the ancillary fee information if that is their preferred method for meeting the rule's requirements within the timeframe provided.

Regulatory Notices

Executive Order 12866 (Regulatory Planning and Review) and DOT Regulatory Policies and Procedures

The final rule meets the threshold for a significant regulatory action as defined in section (3)(f)(1) of E.O. 12866, ''Regulatory Planning and Review,'' as amended by E.O. 14094, ''Modernizing Regulatory Review,'' because it is likely to have an annual effect on the economy of $200 million or more. Accordingly, the Department has prepared a regulatory impact analysis for the proposed rule, summarized in this section and available in the docket. Table X summarizes the results of the analysis.

The final rule changes how U.S. air carriers, foreign air carriers, and ticket agents disclose information about certain ancillary fees for flights. Expected benefits of the rule are due to the reduction of excess consumption of air travel, or deadweight loss, which occurs because consumers who are unaware of ancillary service fees behave as if the price for air travel is lower than it is. Annual benefits expected from reducing deadweight loss amount to $5.5 million. The other source of expected benefits is from the time consumers will save when they search for airfare because they no longer need to interrupt their search to find information on ancillary service fees. The amount in expected benefits due to time savings varies significantly depending on assumptions regarding the number of consumers who consider ancillary fee information when they search for airfare.

Expected costs of this rule include costs to consumers uninterested in receiving this information due to the time needed to navigate increased amounts of information, which again, varies according to the percentage of consumers who consider ancillary fee information relevant to their purchase decision. The primary costs of the rule to carriers and ticket agents are the costs that they would incur to modify their websites to adjust their displays of fares, schedules, and fees. Third parties involved in data exchange, such as GDSs and direct-channel companies might incur some costs due the need to upgrade their systems, though the Department understands that these entities are already upgrading systems for market reasons and have been for several years. As shown in table X, the analysis considered two scenarios, each representing an alternative estimate regarding the percentage of consumers who consider ancillary fee information when they purchase airfare. Across the two scenarios, the estimate of annual net benefits ranges from $30 million to $254 million, indicating that this percentage is a key driver of the results. Formal uncertainty analysis suggests that the final rule might be expected to produce net societal benefits with a probability of about 53 percent under plausible assumptions about the percentage of consumers who consider ancillary fees when they purchase airfare.

One effect of better information on ancillary fees, however, is that some consumers will pay less for the ancillary services they use when they travel by air. These economic effects are not societal benefits or costs but represent a transfer from airlines to consumers, estimated to be about $543 million annually. This transfer represents $543 million in overpayment in fees for consumers, or from the perspective of airlines, additional revenue from consumers who are surprised by fees and, for example, then need to pay a higher fee at the airport to check a bag. This transfer, as well as the benefits due to any reduction in deadweight loss, accrue to consumers and are expected to occur regardless of any time savings impacts.

TABLE X—SUMMARY OF ANNUAL ECONOMIC EFFECTS

[Millions of $2022]

Item	Annual amount	
	Scenario 1 *	Scenario 2 **
Benefits:		
Reduction in deadweight loss	$5.5	$5.5
Reduction in search time for consumers interested in ancillary service fees when they search for airline tickets on airline sites	365.2	484.3
Reduction in search time for consumers interested in ancillary service fees when they search for airline tickets on non-airline sites	37.4	49.5
Total annualized benefits	408.1	539.4
Costs:		

TABLE X—SUMMARY OF ANNUAL ECONOMIC EFFECTS—Continued

[Millions of $2022]

Item	Annual amount	
	Scenario 1 *	Scenario 2 **
Increased time navigating search results	330.8	238.9
Annualized one-time and recurring costs for airlines to update price displays and provide fee information to ticket agents	32.1	32.1
Annualized one-time and recurring costs for ticket agents to update price displays	13.9	13.9
Annualized costs to ticket agents for offline disclosures	1.0	1.0
Costs to GDSs and other third-parties engaged in data exchange to upgrade systems	Unquantified	Unquantified
Total annualized costs	377.8	285.9
Net benefits (costs)	30.3	253.5
Transfers:		
Reduction in prices paid for ancillary services (airlines to consumers)	543.1	543.1

* Scenario 1: 46% of consumers consider ancillary fees when they search for airfare.
** Scenario 2: 61% of consumers consider ancillary fees when they search for airfare.

Executive Order 13132 (Federalism)

This final rule has been analyzed in accordance with the principles and criteria contained in E.O. 13132 (''Federalism''). This final rule does not include any requirement that (1) has substantial direct effects on the States, the relationship between the National Government and the States, or the distribution of power and responsibilities among the various levels of government, (2) imposes substantial direct compliance costs on State and local governments, or (3) preempts State law. States are already preempted from regulating in this area by the Airline Deregulation Act, 49 U.S.C. 41713. Therefore, the consultation and funding requirements of E.O. 13132 do not apply.

Executive Order 13175

This final rule has been analyzed in accordance with the principles and criteria contained in E.O. 13175 (''Consultation and Coordination with Indian Tribal Governments''). Because none of the provisions of this final rule will significantly or uniquely affect the communities of the Indian tribal governments or impose substantial direct compliance costs on them, the funding and consultation requirements of E.O. 13175 do not apply.

Regulatory Flexibility Act

When a Federal agency is required to publish a notice of proposed rulemaking (5 U.S.C. 553), the Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*) requires the agency to conduct a final regulatory flexibility analysis (FRFA). A FRFA describes the impact of the rule on small entities and describes the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes (5 U.S.C. 604). A FRFA is not required if the agency head certifies that a rule will not have a significant economic impact on a substantial number of small entities (5 U.S.C. 605). The Department has prepared a FRFA for this final rule, set forth in the paragraphs that follow. DOT has provided a statement of the need for, and objectives of, the rule elsewhere in the preamble and does not restate them here. In the preamble to this final rule, DOT responds to the comments received on the economic impacts of the rule, including on small entities, and provides DOT's assessment of those comments and any changes made as a result of those comments (*e.g.,* the extended compliance period, exclusion of corporate travel agents, removal of family seat fee disclosure and transactability, flexibilities provided in the way carriers and ticket agents display ancillary fee information, and permitting baggage and change and cancellation policies to be displayed later in the booking process). DOT does not repeat that information here. The Department's Regulatory Impact Analysis developed in support of this final rule also provides information on the economic impacts of the final rule, as modified in response to public comments and further consideration by the Department. DOT did not receive comments from the Chief Counsel for Advocacy of the Small Business Administration in response to the proposed rule.

Description of and an estimate of the number of small entities to which the rule will apply.

The rule will have some impact on U.S. air carriers, foreign air carriers and ticket agents that qualify as small entities. It would also have some impact on GDSs, but none of the three major GDS companies in the market (Amadeus, Sabre, and Travelport) qualify as small businesses.

A carrier is a small entity if it provides air transportation exclusively with small aircraft, defined as any aircraft originally designed to have a maximum passenger capacity of 60 seats or less or a maximum payload capacity of 18,000 pounds or less, as described in 14 CFR 399.73. In 2020, 28 carriers meeting these criteria reported passenger traffic data to the Bureau of Transportation Statistics.[119]

A ticket agent is a small entity if it has total annual revenues below $25 million.[120] This amount excludes funds received in trust for an unaffiliated third party, such as bookings or sales subject to commissions, but includes commissions received. In 2017, the latest year with available data, 7,827 travel agency establishments had annual revenues of less than $25 million.[121]

Description of the projected reporting, recordkeeping, and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record.

The final rule would have impacts on small entities because carriers and ticket agents would incur costs to modify websites and upgrade systems to exchange ancillary fee data. The Department stated in its initial regulatory flexibility analysis prepared in support of the proposed rule that

[119] Bureau of Transportation Statistics. No date. ''T1: U.S. Air Carrier Traffic and Capacity Summary by Service Class.'' *https://transtats.bts.gov/.*

[120] *See https://www.sba.gov/document/support--table-size-standards,* NAICS Code 561510.

[121] U.S. Census Bureau. 2022. ''Economic Census.'' *https://www.census.gov/programs-surveys/economic-census.html.*

because the Department could not estimate these costs reliably, it could not determine whether the proposed rule would impose a significant impact on a substantial number of small entities. For this final rule, the Department estimated that the primary costs of the rule to carriers and ticket agents are the costs that they would incur to modify their websites by adjusting their displays of fares, schedules, and fees. Third parties involved in data exchange, such as GDSs and direct-channel companies might incur some costs due the need to upgrade their systems, though the Department understands that these entities are already upgrading systems for market reasons and have been for several years. DOT estimated quantified costs range from $658 million to $1.5 billion annually. The Department acknowledges that some portion of these costs would be incurred by small entities.

Description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.

The Department considered several alternatives to the measures adopted in this final rule. In this section, the Department describes the steps taken to minimize the significant economic impact on small entities consistent with the objectives of 49 U.S.C. 41712 and the other authorities discussed in the Statutory Authorities section of this final rule.

The Department proposed to cover U.S. air carriers, foreign air carriers, and ticket agents that advertise or sell airline tickets, whether traditional brick-and-mortar travel agencies, corporate travel agents, OTAs or metasearch sites that display airline flight search options directly to consumers. The final rule defers for a separate rulemaking a determination on whether metasearch sites that display airline flight search options directly to consumers are ticket agents subject to the disclosure requirements in this rule. To ensure consumers have access to critical ancillary service fee information under this final rule while metasearch entities are excluded from the rule's disclosure requirements, the Department requires that airlines and ticket agents display the required critical ancillary service fee information on the landing page on the airline or ticket agent's online platform to which consumers are directed after using a metasearch site. The Department believes that this option best balances the concerns that more examination is needed in the Department's separate rulemaking on ticket agents before the Department determines whether to cover metasearch sites that display airline flight search options directly to consumers as ticket agents required to disclose critical ancillary fee and policy information to consumers.

The final rule also excludes corporate travel agents from the final rule's requirements. Ancillary fee disclosures by those agents are the subject of contractual agreements between a business client and the travel agent, with the relevant ancillary services and fees negotiated as part of the contract. Moreover, the fees often are irrelevant for corporate clients, and are not a significant consideration in corporate travelers' purchasing decisions. The corporate client, not the business traveler, generally pays the cost of transportation, including fees. The benefits of covering corporate agents would therefore be limited but would involve costs.

The Department also considered differing compliance periods for the requirements established in the rule. In the proposed rule, the Department proposed a compliance period of 6 months for all covered entities to comply with the rule's requirements. The Department received comment that additional time was needed for compliance, including from small entities. In consideration of these comments, the Department requires in this final rule that: (1) airlines must provide fee and policy information of critical ancillary services to entities required to disclose this information directly to consumers no later than six months after this rule's publication date, (2) airlines must comply with all other regulatory requirements not later than 12 months after this rule's publication date, (3) ticket agents that do not meet the SBA definition of small entity must comply with all regulatory requirements not later than 18 months after this rule's publication date, and (4) ticket agents that that meet the SBA definition of small entity must comply with all regulatory requirements not later than 24 months after this rule's publication date.

In the proposed rule, DOT would have required airlines and ticket agents to provide fee information for first and second checked bags, carry-on bags, and change and cancellation fees in text form next to the fare information provided to consumers. On consideration of comments that the proposed requirements would result in screen clutter and be potentially confusing to consumers, the Department determined in this final rule to allow fee information to be displayed using pop-ups, expandable text, or other means except for hyperlinks as long as the disclosure is clear and conspicuous. This is intended to minimize clutter and allow airlines and ticket agents flexibility in how they disclose information. The Department also allows some information—specifically, airline policies for baggage and ticket changes and cancellations—later in the process, as long as the disclosure occurs before ticket purchase. Policy information can be displayed using hyperlinks. The Department believes that these additional flexibilities will reduce costs to airlines and assist consumers because airlines will be able to present the information in a manner that, while clear and conspicuous, is not confusing to consumers.

In this final rule, the Department also made changes to the proposed requirements for offline disclosures. In the proposed rule, the Department required these disclosures to be made for every quoted itinerary. The Department received comments that such disclosures would add a significant amount of ''talk time'' that would burden airlines and ticket agents with having to provide the information and consumers with having to spend time listening to the disclosures even if the information was not relevant to them. As a result of these comments, the Department is finalizing a requirement that airlines and ticket agents inform consumers purchasing air travel offline about whether a critical ancillary fee applies to the itinerary being quoted and give the consumer an opportunity to request information on the fee. The airline or ticket agent must then provide the critical ancillary fee information upon request of the consumer. This modification is expected to reduce extra time spent on the phone, which will benefit not only airlines and ticket agents, but also consumers who will not have to listen to information not relevant to them.

The Department considered whether to apply the disclosure requirements to all online platforms, in addition to computer websites. The Department finalizes the requirement that the disclosure requirements apply to all online platforms in this final rule. While this option may increase costs, the Department determined that it was necessary to ensure consumers received the same information on critical ancillary fees and policies regardless of

the online platform used to purchase their tickets for air travel.

DOT also considered whether to require disclosure of family seating fees in this rulemaking and to make those fees transactable by ticket agents. The Department is not finalizing the proposal to require carriers and ticket agents to disclose applicable fees for passengers 13 or under to be seated next to an accompanying adult on an aircraft, and to make those fees transactable. Instead, the Department is pursuing a separate rulemaking to address the issue of a young child being able to sit adjacent to an accompanying adult at no additional cost beyond the fare. Not requiring family seating disclosures and fee transactability reduces the cost burden on airlines and ticket agents.

Paperwork Reduction Act

In this final rule, the Department imposes new collections of information that require approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 49 U.S.C. 3501 *et seq.*). The Department also amends an existing collection of information, 2105–0561, in this final rule, with regard to the requirements for customer service plans. The Department has sought approval from OMB for the collections of information established in this final rule and will also seek approval for the amendment to the collection approved under OMB Control No. 2105–0561 as part of the renewal of that OMB control number, due to expire August 31, 2024. The Department will publish a separate notice in the **Federal Register** announcing OMB approval of the new and amended collections and advising the public of the associated OMB control numbers. Notwithstanding any other provisions of law, no person shall be subject to penalty for failing to comply with a collection of information if the collection of information does not display a currently valid OMB control number.

Industry commenters generally expressed the view that the proposed rule's disclosure requirements would impose significant burdens on industry. Many airlines stated that the disclosure requirements would require a reconfiguration of their processes. A study of the NPRM commissioned by A4A estimated $33 billion in costs to airlines over 10 years. A4A estimated that the initial airline cost of implementation would be $86.5 million and $9 million annually for maintenance and additional development. American Airlines stated that over 100,000 engineering hours would be required to begin reworking the search process on the airline's desktop website and other platforms.

Booking Holdings and USTOA stated that the Department's PRA analysis in the NPRM greatly underestimated burdens for planning, development, and programming by ticket agents to provide online displays of ancillary fee information on their websites. In addition, Booking Holdings estimated that the initial costs of engineering and testing the required displays, including to ensure readability and timeliness, would be multiple millions of dollars per entity covered by the regulation for initial development. Similarly, while USTOA did not provide an alternative burden hour estimate, USTOA stated that the 80 hours per entity that DOT estimated for programming, data management, website modification, and other related costs was an underestimate, given what it characterized as the ''extensive and ongoing website revisions that would be necessary to compile ancillary fee options,'' [122] and that the hourly wage of $45.90/hour used by the Department for web and interface designs was too low.[123]

Booking Holdings and USTOA asserted that the Department was incorrect to assume no costs for ongoing website maintenance by ticket agents. Instead, Booking Holdings estimated that the proposal would impose annual maintenance costs of hundreds of thousands of dollars per entity/ticket agent, stating that the proposal would require ticket agents to employ ''multiple full time engineers/developers, a project manager, and a full-time quality assurance associate to ensure that dynamic displays continue to operate appropriately'' and to periodically update and maintain hardware associated with the searches, for example, as carriers update and change their ancillary service fee policies. Further, Booking Holdings stated that the Department failed to account for any costs of negotiating new data-sharing agreements with carriers. A4A estimated that $8.8 million would be spent to supply data to agents.

In USTOA's view, the Department underestimated the number of ticket agents who would be required to comply with the rule's requirements, given the rule's applicability to offline transactions. USTOA and ASTA also disagreed with the Department's assessment that orally conveying the proposed ancillary fee information in offline transactions would involve only a ''marginal increase in time'' with minimal burden. ASTA estimated that 17.2 million offline transactions are completed each year by ticket agents and that the proposed disclosures for offline transactions would add at least 20 seconds to each offline transaction at an estimated cost of $21.3 million per year in ''talk time'' for ticket agents.

The Department has carefully considered public comments regarding the costs of the information collections required by this rule and reexamined the burden estimates presented in this section in light of the regulatory impact analysis developed in support of the final rule. As noted above, the Department has made modifications in this final rule that may have differing effects on the information collection burdens implicated by the NPRM. In contrast to the NPRM, the final rule does not impose a requirement to disclose family seating fees and provides additional flexibility in how critical ancillary fee information is disclosed and when policy information is disclosed. The final rule also extends information collection requirements to online platforms, which includes mobile applications.

Based on comments that the hours used to account for the initial information disclosures in the NPRM was too low and comments that the rule's impact on maintenance and other ongoing costs is measurable (recognizing, however, that regulated entities have already been operating and maintaining their own online platforms prior to implementation of this rule), the Department increased the number of hours per entity that DOT estimated for programming, data management, website modification, and other related costs from 80 to 120 and also added additional burden hours for ongoing maintenance of online platforms. The Department also updated the applicable hourly wage from $45.90 to $53.27. The updated hourly wage was calculated using an hourly rate of $53.27 for computer programmers, which is based on a median wage of $40.02 for web and digital interface designers from the BLS Occupational Employment and Wage Statistics from May 2022, multiplied by 1.41 to account for employee benefits and other costs to employers.

The Department has also updated the number of ticket agents to whom this rule would apply using data from the *US Census Bureau, 2017 Economic*

[122] USTOA further stated that the costs of complying with the full fare rule were not analogous to the costs of displaying complex ancillary fee information, as DOT suggested.

[123] USTOA stated that an inflation adjustment of the Department's estimated hourly rate for such services from the 2014 NPRM would result in an hourly of wage of $142.85/hour for a total annual cost to ticket agents of ''*at least* $6,856,800.''

Census based on NAICS Code 561501 Travel Agencies.

The Department also accepts commenters' arguments that the rule imposes a measurable burden on offline transactions and has added this additional burden to its estimates.

The Department has not added costs of negotiating new data-sharing agreements between ticket agents and carriers because contract negotiations are a cost that carriers and ticket agents incur to do business and are not a paperwork burden for purposes of the PRA.

The Department has consolidated all the information collections involving the disclosure of critical ancillary fees and policies into one information collection (*i.e.,* the 24-hour cancellation and hold policy disclosure is included in the information collection for change and cancellation fee and bag fee disclosures). Consolidating the information collections better reflects the burden of respondents to implement the changes to their online platforms to implement this rule's disclosure requirements. At the same time, the Department is separately estimating the burden for offline disclosures of bag, change, and cancellation fees, as the labor type involved is substantially different from other disclosures in this rule.

This rule requires three information collections: (1) U.S. air carriers, foreign air carriers, and ticket agents must disclose, during the online booking process, applicable fee and policy information for the first and second checked baggage and for carry-on baggage, and applicable fee and policy information for changing and cancelling reservations (including 24-hour cancellation or reservation hold policy); (2) U.S. air carriers, foreign air carriers, and ticket agents in offline transactions must disclose that bag, change, or cancellation fees apply to a quoted itinerary and disclose such fees upon request, and (3) U.S. air carriers and foreign air carriers must ensure that entities to which they provide fare, schedule, and availability information that display or sell the carrier's flights directly to consumers receive information regarding baggage fee rules and policies as well as ticket change and cancellation fees and policies, if the entities are required to disclose this information to consumers.

For each of the information collections, the title, a description of the respondents, and an estimate of the burdens are set forth below:

1. *Requirement that U.S. air carriers, foreign air carriers, and ticket agents disclose, during the online booking process, the applicable fee and policy information for the first and second checked baggage, one carry-on bag, and the applicable fee and policy information for changing and canceling reservation (including 24-hour cancellation or reservation hold policy).*

Title: Disclosure of Ancillary Fees and Policies During the Air Transportation Booking Process

Respondents: U.S. carriers, foreign air carriers, and ticket agents that sell or display carrier fare and schedule information to consumers in the United States.

Number of Respondents: We estimate that as many as 206 U.S. air carriers and foreign air carriers and as many as 7,497 ticket agents may be impacted by this requirement. Our estimate is based on the following information and assumptions: Ticket agents includes OTAs, brick-and-mortar travel agencies, and tour operators that market airline tickets. We updated our number of ticket agents based on data from NAICS code 561510 (*Source: US Census Bureau, 2017 Economic Census),* although not all of those entities market air transportation online to consumers in the United States. In addition, most ticket agents rely on GDSs to create online fare and schedule displays. GDSs and entities that create or develop and maintain their own online fare and schedule displays, such as many of the impacted carriers and the largest travel agents, will incur some planning, development, and programming costs to reprogram their systems to provide online displays of fare and schedule information that includes baggage fee information on their websites. Thus, our estimate of the number of impacted ticket agents may be overstated.[124] Many smaller carriers also rely on GDSs to create online fare and schedule displays, so our estimate of 206 impacted carriers may be overstated.

Estimated Annual Burden on Respondents: Approximately 133 hours per respondent (120 hours of initial display updates and 13 hours for ongoing maintenance). We base our estimate on the following information and assumptions: the primary costs to respondents for the disclosure requirement would arise from programming, data management, website modification, and other related costs to carriers and ticket agents to display the required ancillary fee information. The Department has modified the estimated annual burden on respondents to account for the following: extension of this rule to online platforms, which have increased in usage; an incremental increase in one time and ongoing costs to maintain online platforms; inclusion of 24-hour cancellation and hold policy disclosures in this information collection; [125] and a reduction in burden from removal of the proposed requirement for family seating fee disclosures.[126] The more significant burdens in this rulemaking are expected to be incurred one time by regulated entities. Once the modifications required by this information collection have been incorporated into the online platforms of regulated entities, we expect that this information collection will impose smaller additional ongoing costs, such as website maintenance, beyond what regulated entities were already incurring for operating online platforms prior to the promulgation of this rulemaking. In response to the comments received on this point, however, the Department estimates that this information collection adds approximately 13 hours of burden per respondent to maintain online platform systems. This rulemaking does not require the creation of new websites or online platforms by regulated entities that did not already maintain such online platforms for the purpose of selling air transportation.

Estimated Total Annual Burden: Approximately 1,024,499 hours for all respondents (based on an assumption of 27,398 hours for carriers (24,720 hours for the initial upgrade and 2,678 hours for ongoing costs) and 997,101 hours for ticket agents (899,640 hours for the initial upgrade and 97,461 hours for ongoing maintenance costs)). Based on

[124] In the NPRM, we assumed for the PRA analysis that about five percent of United States ticket agents, including GDSs and large travel agencies would be impacted by this requirement. In the Department's FRIA developed in support of this final rule, however, the cost estimates for ticket agents included the total number of ticket agents who may incur costs, or 7,497. Therefore, we do not include the five percent assumption in our PRA analysis for the final rule and instead assume all ticket agents are impacted. This is consistent with the approach taken for airlines, even though smaller airlines may also use GDSs.

[125] The NPRM estimated an average annual burden of 80 hours per respondent for the design, programming, and modification of websites to provide disclosure of 24-hour cancellation or hold information. The Department believes this number was an overestimate due to the static nature of this disclosure (*i.e.,* the disclosure should not have noticeable variation due to the relatively stagnant nature of 24-hour cancellation or hold policies). Such policies also exist generally unchanged in carrier customer service plans. The burden is also reduced as this final rule does not require this disclosure if the ticket is purchased within 7 days of the flight.

[126] The Department acknowledges USTOA's comment that the burdens of this rulemaking are not analogous to those in the full fare rule (76 FR 23110). The Department has taken this comment into account in increasing the paperwork burdens in this analysis, including the considerations noted above.

an estimated median hourly wage of $53.27 for web and digital interface designers,[127] this results in a total annual cost of $49,240,657 ($1,316,834 for carriers and $47,923,823 for ticket agents) for the first year. Note that after the initial costs are incurred, the annual cost will decrease to an estimated $142,657 per year for carriers and $5,191,747 per year for ticket agents.

Frequency: One time incorporation of information into online platform displays and ongoing costs (such as for maintenance). Costs are annual.

2. *U.S. air carriers, foreign air carriers, and ticket agents in offline transactions must disclose that bag, change, or cancellation fees apply to a quoted itinerary and disclose such fees upon request.*

Title: Disclosure of Ancillary Fees During the Offline Booking Process

Respondents: U.S. carriers, foreign air carriers, and ticket agents that sell or market tickets to U.S. consumers by phone or in-person

Number of Respondents: We estimate that as many as 206 U.S. air carriers and foreign air carriers and as many as 7,497 ticket agents may be impacted by this requirement. We base our estimate on the following information and assumptions: Ticket agents includes OTAs, brick-and-mortar travel agencies, and tour operators that market airline tickets. There may be an estimated 7,497 travel agencies in the United States, based on data from NAICS code 561510 (*Source: US Census Bureau, 2017 Economic Census*), although not all of those entities market air transportation by phone or in-person to U.S. consumers. Many carriers and ticket agents may not offer sales to U.S. consumers by phone or in-person; therefore, our estimate of 7,497 impacted ticket agents and 206 impacted carriers may be overstated.

Estimated Annual Burden on Respondents: Approximately 4 hours per respondent. This information collection adds additional disclosures to in-person or phone transactions when a ticket is marketed to U.S. consumers. The time required to provide the additional disclosure is not expected to be significant, and some consumers may not request additional disclosures.

The rule would require entities selling tickets marketed to U.S. consumers by phone or in-person to inform consumers about certain ancillary service fees at the time a fare is quoted. The Department estimates that respondents will incur 4.3 additional hours of burden on average annually on providing the offline disclosures required by this rule.

Estimated Total Annual Burden: Approximately 33,123 hours for all respondents (based on an assumption of 886 hours for carriers and 32,237 hours for ticket agents). Based on an estimated median hourly wage of $31.46 for travel agents,[128] this results in a total annual cost of $1,042,050 ($27,874 for carriers and $1,014,176 for ticket agents). The PRA estimate developed here supports a determination that the additional ''talk time'' for carriers is *de minimis.*

Frequency: This information collection imposes an additional cost for carriers and ticket agents for each interaction between a consumer and the carrier or ticket agent's in-person or telephone reservation agents. Costs are annual.

3. *Requirement that U.S. air carriers and foreign air carriers ensure that entities to which they provide fare, schedule, and availability information to display or sell the carrier's flights directly to consumers receive information regarding baggage fee rules and ticket change and cancellation fees and policies, if the entities are required to disclose this information to consumers.*

Title: Disclosure of critical ancillary fee information to other entities required to disclose fee information to consumers.

Respondents: U.S. air carriers and foreign air carriers that provide fare, schedule, and availability information to ticket agents to sell or display flights within, to, or from the United States.

Number of Respondents: We estimate that approximately 206 carriers will be impacted by this requirement. This includes foreign carriers that may not serve the United States on their own equipment but may sell connecting itineraries between the United States and a foreign point, when at least one of the foreign-to-foreign segments is operated by the foreign carrier.

Estimated Annual Burden on Respondents: Approximately 30 hours per respondent. The information collection requires carriers to either distribute baggage and change and cancellation fee rules or make the specific rules, including the calculation of baggage and change and cancellation fees applicable for passenger-specific itineraries, available to third parties. Carriers selling tickets in the United States already display baggage and ancillary fee information on their websites, as required by existing regulation (14 CFR 399.85(d)). This information includes the use of baggage fee calculators and other tables accessible to consumers. The rulemaking requires that this information be made available in such a way that other entities to which they provide fare, schedule, and availability information to display or sell the carrier's flights directly to consumers have access to this information in a non-static, dynamic format such that the entities can disclose baggage fee and change and cancellation fee information to consumers during each itinerary search. The Department adjusted its number of burden hours per respondent based on comments suggesting that the cost of data sharing with ticket agents is higher than the Department initially estimated. Several carriers, however, already share this information with other entities by agreement, which suggests that the added cost of implementing any modifications required by this rule may be limited for many carriers. This potential burden of 30 hours per respondent, as referenced here, may overestimate the actual burden for most carriers.

Estimated Total Annual Burden: This information collection would result in an estimated annual burden of 6,180 hours. Based on an estimated mean hourly wage of $66.30 for computer programmers,[129] this results in a total cost of approximately $409,734.

Frequency: This information collection imposes an additional cost for carriers to provide information on critical ancillary fees to ticket agents required to disclose this information to consumers. Costs are annual.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act (UMRA) of 1995, 2 U.S.C. 1501, requires agencies to prepare a written assessment of the costs, benefits, and other effects of proposed or final rules that include a Federal mandate likely to result in the expenditures by States, local, or Tribal governments, or by the private sector, of $100 million or more (adjusted annually for inflation with base year of 1995) in any one year. The 2023 threshold after adjustment for inflation is $198 million, using the Implicit Price Deflator for the Gross Domestic Product. The assessment may be included in conjunction with other assessments, and

[127] The median base wage for web and digital interface developers in 2022 was $37.78, *https://www.bls.gov/oes/current/oes151254.htm.* We multiply this by 1.41 to account for benefits *https://www.bls.gov/news.release/archives/ecec_09202022.pdf.*

[128] The median base wage for travel agents in 2022 was $22.31, *https://www.bls.gov/oes/current/oes413041.htm.* We multiply this by 1.41 to account for benefits, *https://www.bls.gov/news.release/archives/ecec_09202022.pdf.*

[129] The median base wage for computer programmers in 2022 was $47.02, *https://www.bls.gov/oes/current/oes151251.htm.* We multiply this by 1.41 to account for benefits, *https://www.bls.gov/news.release/archives/ecec_09202022.pdf.*

the Department has provided the assessment required by UMRA within the RIA prepared in support of the final rule.

National Environmental Policy Act

The Department has analyzed the environmental impacts of this action pursuant to the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 *et seq.*) and has determined that it is categorically excluded pursuant to DOT Order 5610.1C, Procedures for Considering Environmental Impacts (44 FR 56420, Oct. 1, 1979). Categorical exclusions are actions identified in an agency's NEPA implementing procedures that do not normally have a significant impact on the environment and therefore do not require either an environmental assessment (EA) or environmental impact statement (EIS).[130] In analyzing the applicability of a categorical exclusion, the agency must also consider whether extraordinary circumstances are present that would warrant the preparation of an EA or EIS.[131] Paragraph 4(c)(6)(i) of DOT Order 5610.1C provides that ''actions relating to consumer protection, including regulations'' are categorically excluded. The purpose of this rulemaking is to enhance protections for air travelers and to improve the air travel experience. The Department does not anticipate any environmental impacts, and there are no extraordinary circumstances present in connection with this rulemaking.

Congressional Review Act

Pursuant to subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (the Congressional Review Act), OMB's Office of Information and Regulatory Affairs has found that this rule falls within the scope of 5 U.S.C. 804(2).

List of Subjects

14 CFR Part 259

Air carriers and foreign air carriers, Consumer protection, Reporting and recordkeeping requirements.

14 CFR Part 399

Administrative practice and procedure, Air carriers and foreign air carriers, Air rates and fares, Air taxis, Consumer protection, Law enforcement, Small businesses.

Peter Paul Montgomery Buttigieg,

Secretary of Transportation.

For the reasons stated in the preamble, DOT amends 14 CFR chapter II, subchapters A and F, as follows:

PART 259—ENHANCED PROTECTIONS FOR AIRLINE PASSENGERS

■ 1. The authority citation for part 259 continues to read as follows:

Authority: 49 U.S.C. 40101(a)(4), 40101(a)(9), 40113(a), 41702, 41708, 41712, and 42301.

■ 2. Amend § 259.5 by:
■ a. Revising paragraphs (a) and (b)(4);
■ b. Removing the word ''and'' at the end of paragraph (b)(13);
■ c. Removing the period at the end of paragraph (b)(14) and adding ''; and'' in its place; and
■ d. Adding paragraph (b)(15).

The revisions and addition read as follows:

§ 259.5 Customer Service Plan.

(a) *Adoption of Plan.* Each covered carrier must adopt a Customer Service Plan applicable to its scheduled flights as specified in paragraphs (b)(1) through (15) of this section and adhere to the plan's terms.

(b) * * *

(4) Allowing reservations to be held at the quoted fare without payment, or cancelled without penalty, for at least twenty-four hours after the reservation is made if the reservation is made one week or more prior to a flight's departure, and disclosing its chosen twenty-four hour policy on the last page of the booking process;

* * * * *

(15) Disclosing critical ancillary service fees to consumers on the carrier's online platform or when a customer contacts the carrier's reservation center to inquire about a fare or make a reservation in person or by telephone and disclosing policies for critical ancillary service fees to consumers on the carrier's online platform as required by § 399.85 of this chapter.

* * * * *

PART 399—STATEMENTS OF GENERAL POLICY

■ 3. The authority citation for part 399 continues to read as follows:

Authority: 49 U.S.C. 40113(a), 41712, 46106, and 46107.

■ 4. Amend § 399.80 by revising the introductory text, adding paragraph (o), and revising paragraph (s) to read as follows:

§ 399.80 Unfair and deceptive practices of ticket agents.

It is the policy of the Department to regard as an unfair or deceptive practice or unfair method of competition the practices enumerated in paragraphs (a) through (o) of this section by a ticket agent of any size and the practice enumerated in paragraph (s) of this section by a ticket agent that sells air transportation online and is not considered a small business under the Small Business Administration's size standards set forth in 13 CFR 121.201:

* * * * *

(o) Failing to disclose ancillary service fee information as required by § 399.85.

* * * * *

(s) Failing to disclose and offer web-based discount fares to prospective passengers who contact the agent through other channels (*e.g.,* by telephone or in the agent's place of business) and indicate they are unable to use the agent's website due to a disability.

■ 5. Amend § 399.84 by revising paragraph (a) and adding paragraphs (d) and (e) to read as follows:

§ 399.84 Price advertising and opt-out provisions.

(a) The Department considers any advertising or solicitation by a direct air carrier, indirect air carrier, an agent of either, or a ticket agent, for passenger air transportation, a tour (*i.e.,* a combination of air transportation and ground or cruise accommodations) or tour component (*e.g.,* a hotel stay) that must be purchased with air transportation that states a price for such air transportation, tour, or tour component to be an unfair and deceptive practice in violation of 49 U.S.C. 41712, unless the price stated is the entire price (all mandatory charges) to be paid by the customer to the carrier, or agent, for such air transportation, tour, or tour component. Mandatory charges refer to all taxes and fees that are required to purchase air transportation on the channel where the advertising or solicitation occurs (*e.g.,* if a fare is advertised online for $100 then that means the fare must be available for the consumer to purchase for $100 online). Mandatory charges included within the single total price listed may be stated separately or through links or ''pop ups'' on online platforms that display the total price, but such charges may not be false or misleading, may not be displayed prominently, may not be presented in the same or larger size as

[130] *See* 40 CFR 1508.4.

[131] *Id.*

the total price, and must provide cost information on a per passenger basis that accurately reflects the cost of the item covered by the mandatory charge.

* * * * *

(d) A carrier or ticket agent may display a price that includes all mandatory charges and one or more ancillary service fees (*i.e.,* fees charged for any optional service related to air travel beyond passenger air transportation) in place of or more prominently than a price that only includes all mandatory charges.

(e) The Department considers any offer of a percentage-off discount for passenger air transportation or for a tour (*i.e.,* a combination of air transportation and ground or cruise accommodations) or tour component (*e.g.,* a hotel stay) that must be purchased with air transportation, that does not make clear at the outset the terms and conditions of the offer, including how the discount is calculated, to be an unfair and deceptive practice in violation of 49 U.S.C. 41712. When used in any advertising or solicitation, the term ''base fare'' must refer to an amount that includes all mandatory carrier-imposed charges and the terms ''flight,'' ''ticket,'' or ''fare'' must refer to an amount that includes all mandatory carrier-imposed and government charges.

■ 6. Revise § 399.85 to read as follows:

§ 399.85 Notice of ancillary service fees.

(a) *Definitions.* For purposes of this section, the following definitions apply:

Air transportation means interstate air transportation, foreign air transportation, or the transportation of mail by aircraft as defined in 49 U.S.C. 40102(a)(23) and (25).

Ancillary service fee means the fee charged for any optional service related to air travel that a U.S. or foreign air carrier provides beyond passenger air transportation. Such fees may include, but are not limited to, fees for checked or carry-on baggage, advance seat selection, access to in-flight entertainment programs, in-flight beverages, lounge access, snacks and meals, pillows and blankets, and seat upgrades.

Ancillary service package means a package or bundle of one or more ancillary services offered for sale by a carrier or ticket agent.

Anonymous itinerary search means a search that does not take into account information specific to the passenger but does take into account information specific to the itinerary (*e.g.,* geography, travel dates, cabin class, and ticketed fare class) that may impact the critical ancillary service fees to be charged or policies to be applied.

Break in journey means a deliberate interruption by a passenger of a journey between a point in the United States and a point in a foreign country where a stopover at a foreign point is scheduled. The factors to consider to determine whether a stopover is a deliberate interruption include whether the segment between two foreign points and the segment between a foreign point and the United States were purchased in a single transaction and as a single ticket/itinerary, whether the segment between two foreign points is operated or marketed by a carrier that has no codeshare or interline agreement with the carrier operating or marketing the segment to or from the United States, and whether the stopover at a foreign point involves the passenger picking up checked baggage, leaving the airport, and continuing the next segment after a substantial amount of time.

Clear and conspicuous means that a disclosure is difficult to miss (*i.e.,* easily noticeable), easily understandable by consumers, and presented in a manner that allows consumers to determine the true cost and enable them to select the best flight options for them.

Critical ancillary service means any ancillary service critical to consumers' purchasing decisions. Such services are: transporting the first checked bag, the second checked bag, or a carry-on bag, the ability for a consumer to cancel or change a reservation, and any other services determined, after notice and opportunity to comment, to be critical by the Secretary.

Consumer or *user* refers to a person who seeks to obtain information about or purchase air transportation from a U.S. carrier, a foreign carrier, or a ticket agent, whether through an online platform or other means (*e.g.,* over the telephone, in person).

Corporate travel agent refers to a ticket agent engaged in providing travel services to the employees of a business entity pursuant to a written contract with that entity for the business travel of its employees.

Online platform refers to any interactive electronic medium, including, but not limited to, websites and mobile applications, that allow the consumer to search for or purchase air transportation from a U.S. carrier, a foreign carrier, or a ticket agent.

Passenger-specific itinerary search means a search that takes into account information specific to the passenger (*e.g.,* the passenger's status in the airline's frequent flyer program, the passenger's military status, or the passenger's status as a holder of a particular credit card) that was affirmatively provided by that passenger and information specific to the itinerary (*e.g.,* geography, travel dates, cabin class, and ticketed fare class) that may impact the critical ancillary service fees to be charged or policies to be applied.

(b) *Passenger-specific and anonymous itinerary searches.* Each U.S. air carrier, foreign air carrier, and ticket agent (except a corporate travel agent) that advertises or sells air transportation marketed to U.S. consumers must offer consumers both the option to conduct a passenger-specific itinerary search and the option to conduct an anonymous itinerary search.

(c) *Online disclosures of ancillary service fees*—(1) *Critical ancillary service fees.* Each U.S. air carrier, foreign air carrier, and ticket agent (except a corporate travel agent) that has an online platform marketed to U.S. consumers where it advertises or sells air transportation must clearly and conspicuously disclose on its online platform the accurate fee that applies, if any, for all critical ancillary services. The fee cannot be designated as $0 in circumstances where a critical ancillary service is not available to the consumer but rather must state ''not available'' or a similar notation. The fee information must be provided the first time that fare and schedule information is disclosed after a consumer conducts a passenger-specific itinerary search or an anonymous itinerary search. The fees cannot be displayed through a hyperlink.

(2) *Other ancillary service fees.* Each U.S. air carrier, foreign air carrier, and ticket agent (except a corporate travel agent) that has an online platform marketed to U.S. consumers where it advertises or sells air transportation may disclose ancillary service fees that are not critical ancillary service fees at the same time as critical ancillary service fees.

(3) *Ancillary service packages.* Each U.S. air carrier, foreign air carrier, and ticket agent (except a corporate travel agent) that has an online platform marketed to U.S. consumers where it advertises or sells air transportation must disclose the standalone fee for each critical ancillary service required under paragraph (c)(1) of this section when fare and schedule information is provided. Nothing in this section requires or prohibits a carrier or ticket agent from disclosing an ancillary service package that includes critical ancillary services if it chooses to do so.

(4) *Air tour packages.* Each ticket agent that has an online platform marketed to U.S. consumers where it advertises or sells air tour packages must clearly and conspicuously disclose, at the time the ticket agent

offers a package fare quotation for a specific itinerary selected by a consumer, where the carrier providing air transportation is not known, that additional fees for baggage may apply and that those fees may be reduced or waived based on the passenger's frequent flyer status, method of payment, or other consumer characteristic. When the carrier providing air transportation for an air-tour package is known, that ticket agent must provide baggage fee information as prescribed by this paragraph (c) at the time that the ticket agent discloses the name of the carrier to the consumer.

(5) *Website disclosure of all ancillary service fees.* A U.S. or foreign air carrier that has a website marketed to U.S. consumers where it advertises or sells air transportation must clearly and conspicuously disclose on its website accurate information on ancillary service fees available to a passenger purchasing air transportation with a clear and conspicuous link from the carrier's homepage directly to a page or a place on a page where all such ancillary services and related fees are disclosed. In general, fees for particular services may be expressed as a range; however, baggage fees must be expressed as specific charges taking into account any factors (*e.g.,* frequent flyer status, early purchase) that affect those charges.

(d) *Online disclosure of baggage policies.* Each U.S. air carrier, foreign air carrier, and ticket agent (except a corporate travel agent) that has an online platform marketed to U.S. consumers where it advertises or sells air transportation must clearly and conspicuously disclose on its online platform, before ticket purchase, the accurate weight and dimension limitations that the carrier imposes for a first and second checked bag and a carry-on bag after a consumer conducts a passenger-specific itinerary search or an anonymous itinerary search.

(e) *Intent to travel with a bag.* Each U.S. air carrier, foreign air carrier, and ticket agent that has an online platform marketed to U.S. consumers where it advertises or sells air transportation may clearly and conspicuously solicit information from a consumer prior to the consumer conducting a passenger-specific itinerary or an anonymous itinerary search for air transportation regarding the consumer's intention to travel with a carry-on bag, a first checked bag, or a second checked bag. If the consumer affirmatively takes action to indicate that the consumer and all others in the booking party do not intend to travel with a carry-on bag, a first checked bag, or a second checked bag, then the carrier or ticket agent may forego disclosing the fees for that bag with the fare and schedule information as required by paragraph (c) of this section. Carriers and ticket agents (except a corporate travel agent) must disclose the baggage policies before ticket purchase as required by paragraph (d) of this section and must disclose information regarding the passenger's free baggage allowance and fee information for a carry-on bag, a first checked bag, and a second checked bag on e-ticket confirmations as required by paragraph (k) of this section even if a consumer indicates an intention not to travel with a bag.

(f) *Online disclosure of cancellation and change policies.* Each U.S. carrier, foreign air carrier, and ticket agent (except a corporate travel agent) that has an online platform marketed to U.S. consumers where it advertises or sells air transportation must accurately, clearly, and conspicuously, disclose on its online platform, before ticket purchase, the components of change and cancellation policies identified in paragraphs (f)(1) through (4) of this section.

(1) *Restrictions and prohibitions.* A summary of the applicable restrictions and prohibitions to change or cancel a ticket that apply to the consumer conducting a passenger-specific itinerary or an anonymous itinerary search, including any prohibitions or restrictions to obtaining a refund of the full amount paid;

(2) *Form of refund.* A summary of the applicable policy regarding the form of the refund for a change or cancellation (*e.g.,* a credit to the original form of payment, airline credits or voucher) that apply to the consumer conducting a passenger-specific itinerary or an anonymous itinerary search;

(3) *Fare differential.* A summary of the applicable policy regarding a consumer's right to, or responsibility for, any fare differential, including whether the consumer is entitled to a refund in fare difference if the consumer changes to a lower cost replacement flight, that apply to the consumer conducting a passenger-specific itinerary or an anonymous itinerary search; and

(4) *24-Hour hold or cancellation.* A statement disclosed clearly and conspicuously on the last page of the booking process on allowing the reservation to be held at the quoted fare without payment, or cancelled without penalty, for at least twenty-four hours after the reservation is made, consistent with a carrier's customer service plan in § 259.5(b)(4) of this chapter and consistent with a ticket agent's policy. A ticket agent that has a policy of not allowing a 24-hour hold or cancellation must disclose that information clearly and conspicuously on the last page of the booking process. The disclosures in this paragraph (f)(4) are required if the reservation is made one week or more prior to a flight's departure.

(g) *Disclosures on landing page.* Each U.S. air carrier, foreign air carrier, and ticket agent (except a corporate travel agent) that has an online platform marketed to U.S. consumers where it sells air transportation and that accepts a redirect of consumers to its online platform to complete the booking must ensure that the required critical ancillary service fee information in paragraph (c) of this section is accurately, clearly, and conspicuously displayed on the first page of the online platform to which the consumer has been directed, unless the consumer was provided accurate fee information of critical ancillary services on the directing entity's online platform.

(h) *Seat guarantee notice.* Each U.S. carrier, foreign air carrier, and ticket agent (except a corporate travel agent) that has an online platform marketed to U.S. consumers where it advertises or sells air transportation must clearly and conspicuously disclose the following notice on any page or step of the booking process in which a consumer is offered a seat selection for a fee: ''A seat is included in your fare. You are not required to purchase a seat assignment to travel. If you decide to purchase a ticket and do not select a seat prior to purchase, a seat will be provided to you without additional charge when you travel.''

(i) *Code-share partner disclosures.* For air transportation within, to or from the United States, a carrier marketing a flight under its identity that is operated by a different carrier, otherwise known as a code-share flight, must through its website disclose to consumers booked on a code-share flight any differences between its optional services and related fees and those of the carrier operating the flight. This disclosure may be made through a conspicuous notice of the existence of such differences on the marketing carrier's website or a conspicuous hyperlink taking the reader directly to the operating carrier's fee listing or to a page on the marketing carrier's website that lists the differences in policies among code-share partners.

(j) *Offline fee disclosures of ancillary services.* Each U.S. air carrier, foreign air carrier, and ticket agent (except a corporate travel agent) that markets air transportation to U.S. consumers in person or by phone must disclose to

consumers, at the time a fare is quoted for an itinerary, that baggage fees (for a first checked, second checked, or carry-on bag), change fees, and cancellation fees apply, if that is the case. The U.S. carrier, foreign carrier, or ticket agent (other than a corporate travel agent) must then ask the consumer if they wish to hear more about the specific baggage fees, change fees, cancellation fees, and any other critical ancillary service fees that apply. These carriers and ticket agents, upon request from the consumer, must disclose those specific fees taking into account passenger-specific information provided by the consumer.

(k) *Disclosures of baggage fees on e-ticket confirmations.* A U.S. carrier, a foreign air carrier, or a ticket agent (except a corporate travel agent) that has an online platform marketed to U.S. consumers where it advertises or sells air transportation must include information regarding the passenger's free baggage allowance (including personal item) and the applicable fee for a carry-on bag and the first and second checked bag on all e-ticket confirmations for air transportation within, to or from the United States, including on the summary page at the completion of an online purchase and in a post-purchase email confirmation. Carriers and ticket agents must provide the fee information for a carry-on bag, first checked bag, and second checked bag in text form in the e-ticket confirmation taking into account any passenger-specific factors that affect those charges.

(l) *Sharing information on fee rules and policies.* Each U.S. and foreign air carrier that provides fare, schedule, and availability information for air transportation within, to, or from the United States to an entity that is required by law to disclose critical ancillary service fee and policy information directly to consumers must disclose fee and policy information for critical ancillary fee services to that entity. The information provided must be useable, current, accurate, and sufficient to ensure compliance by such entities.

(m) *Unfair and deceptive practice.* The Department considers the failure to provide and adhere to the disclosures required by this section to be an unfair and deceptive practice within the meaning of 49 U.S.C. 41712.

■ 7. Amend § 399.88 by revising paragraph (a) to read as follows:

§ 399.88 Prohibition on post-purchase price increase.

(a) It is an unfair and deceptive practice within the meaning of 49 U.S.C. 41712 for any seller of scheduled air transportation within, to or from the United States, or of a tour (*i.e.,* a combination of air transportation and ground or cruise accommodations), or tour component (*e.g.,* a hotel stay) that includes scheduled air transportation within, to or from the United States, to increase the ticket price of that air transportation, tour or tour component, or to raise the price for critical ancillary services as defined in § 399.85(a) to a consumer after the air transportation has been purchased by the consumer, except in the case of an increase in a government-imposed tax or fee. A purchase is deemed to have occurred when the full amount agreed upon has been paid by the consumer.

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Part V

Department of Commerce

Bureau of Industry and Security

15 CFR Parts 732, 734, 738, et al.
Revision of Firearms License Requirements; Interim Final Rule

DEPARTMENT OF COMMERCE

Bureau of Industry and Security

15 CFR Parts 732, 734, 738, 740, 742, 743, 748, 750, 758, 762, 772, and 774

[Docket No. 240419–0113]

RIN 0694–AJ46

Revision of Firearms License Requirements

AGENCY: Bureau of Industry and Security, Commerce.

ACTION: Interim final rule.

SUMMARY: In this interim final rule (IFR), the Bureau of Industry and Security (BIS) is amending the Export Administration Regulations (EAR) to enhance the control structure for firearms and related items. These changes will better protect U.S. national security and foreign policy interests, which include countering the diversion and misuse of firearms and related items and advancing human rights. This rule identifies semi-automatic firearms under new Export Control Classification Numbers (ECCNs); adds additional license requirements for Crime Control and Detection (CC) items, thereby resulting in additional restrictions on the availability of license exceptions for most destinations; amends license review policies so that they are more explicit as to the nature of review that will accompany different types of transactions and license exception availability (including adding a new list of high-risk destinations); updates and expands requirements for support documentation submitted with license applications; and better accounts for the import documentation requirements of other countries (such as an import certificate or other permit prior to importation) when firearms and related items are authorized under a BIS license exception. BIS is publishing this rule as an IFR to solicit comments from the public on additional changes to export controls on firearms and related items that would better protect U.S. national security and foreign policy interests.

DATES: This rule is effective May 30, 2024. Comments must be received by BIS no later than July 1, 2024.

ADDRESSES: Comments on this rule may be submitted to the Federal rulemaking portal (*www.regulations.gov*). The *regulations.gov* ID for this rule is: BIS–2024–0003. Please refer to RIN 0694–AJ46 in all comments.

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

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

The Firearms Guidance Memorandum is available at *www.bis.gov/guidance_memorandum* and at *www.regulations.gov* under the *regulations.gov* ID BIS–2024–0003.

FOR FURTHER INFORMATION CONTACT: Anthony Christino, Acting Director, Office of Nonproliferation and Foreign Policy Controls; tel. (202) 482–3825 or email *NFPC_firearms@bis.doc.gov*.

SUPPLEMENTARY INFORMATION:

A. Background

BIS is amending the EAR (15 CFR parts 730–774) by revising the license requirements and review policies, as well as other aspects of the control structure (*e.g.,* license exceptions eligibility and export clearance requirements) for firearms, shotguns and related items (*e.g.,* discharge type arms, optical devices, ammunition, and related technology and software) controlled under the following ECCNs: 0A501, 0A502, 0A504, 0A505, 0A506, 0A507, 0A508, 0A509, 0B501, 0B505, 0D501, 0D505, 0E501, 0E504, and 0E505 (collectively referred to as firearms and related items for the purposes of this IFR). Background regarding these changes is detailed below.

1. History of EAR Firearms Controls

Firearms and related items have been controlled in the current structure by the Commerce Department (Commerce) under the EAR since March 9, 2020, when jurisdiction over certain end-item firearms and related items was transferred from the State Department's (State) United States Munitions List (USML) (*see* 22 CFR part 121) to the Commerce Control List (CCL), supplement no. 1 to part 774 of the EAR, maintained by BIS. *See* the January 23, 2020, BIS final rule, ''Control of Firearms, Guns, Ammunition and Related Articles the President Determines No Longer Warrant Control Under the United States Munitions List (USML)'' (85 FR 4136) (January 2020 EAR final rule; effective date: March 9, 2020) and the January 20, 2020, State final rule, ''International Traffic in Arms Regulations: U.S. Munitions List Categories I, II, and III.'' (85 FR 3819; effective date: March 9, 2020). Notably, BIS controlled long barrel shotguns prior to the publication of those rules. For the past almost four years, BIS has required that authorization be obtained for all exports and reexports of these firearms and related items to all destinations, including Canada. This worldwide license requirement under the EAR for firearms and certain related items is more restrictive than the license requirement that applies to other items whose jurisdiction transferred from the USML to the CCL as part of the Export Control Reform initiative (*i.e.,* the ''600 series'' military items and 9x515 spacecraft items), as the license requirement for those other items in most cases does not extend to Canada.

In addition to the worldwide license requirement, since March 9, 2020, BIS has maintained other requirements with respect to firearms and related items. These include certain export clearance requirements that provide increased transparency regarding the specific items being exported; limitations on the availability of license exceptions; certain recordkeeping requirements; and requirements to address temporary imports into the United States. As referenced in the January 2020 EAR final rule, these requirements were imposed to ensure, as much as possible, that the EAR control structure for firearms and related items would protect U.S. national security and foreign policy interests, which include countering diversion and misuse of firearms and related items and advancing human rights. As part of this control structure, BIS included provisions to ensure that U.S. export

controls under the EAR account for the firearms-related import controls of other countries; specifically, the use of BIS licenses is predicated on having an Import Certificate or other permit (if required) by the importing country.

2. Firearms Licensing Pause

On October 27, 2023, Commerce paused the issuance of new BIS export licenses involving certain firearms, related ''parts'' and ''components,'' and ammunition (detailed under ECCNs 0A501, 0A502, 0A504, and 0A505) to non-governmental end users not located in Ukraine, Israel, and most Wassenaar Arrangement Participating States (*i.e.,* Country Group A:1, supplement no. 1 to part 740). During this ''pause,'' Commerce assessed export control review policies for firearms and related items to determine whether any changes to the regulatory measures implemented in March 2020 were warranted to advance U.S. national security and foreign policy interests. The review focused on assessing and mitigating the risk of firearms being diverted to entities or activities that promote regional instability, abuse or violate human rights, or fuel criminal activities, including terrorism, extortion, and illicit trafficking of any kind.

This pause followed the identification by Commerce over the past year of several instances in which lawfully exported firearms and related items from the United States have been diverted or misused in a manner contrary to U.S. national security and foreign policy interests; this includes instances predating the transfer of licensing authorities from State to the Commerce Department. Because those instances of diversion largely involved commercial exports to non-governmental end users, Commerce tailored the pause to apply only to exports involving non-governmental end users.

Leading up to the pause, Commerce reviewed aggregate data showing that a substantial number of firearms recovered by foreign law enforcement agencies were lawfully exported from the United States. For example, a GAO report published in January 2022 identified concerns that the U.S. government is licensing firearm exports that fuel criminal activity and gun violence, enable human rights abuses, and destabilize government institutions in foreign countries, particularly in Central America.[1] The report explained that in Belize, El Salvador, Guatemala, and Honduras, transnational criminal organizations and other violent criminals frequently use firearms to commit murders for hire, carry out extortion schemes, and resist local police forces. The report further explained that, between 2015 and 2019, nearly 20% of approximately 27,000 firearms recovered and traced by law enforcement agencies in those four countries were U.S.-origin firearms diverted from legitimate commerce (*i.e.,* they were not illicitly smuggled from the United States, but rather lawfully exported).

The 2023 National Firearms Commerce and Trafficking Assessment provides additional data regarding the diversion of lawfully exported firearms. As described in that report, participating law enforcement agencies in foreign countries can submit firearm trace requests to ATF's eTrace system to help determine the purchase or ownership history of a recovered crime gun. ATF's analysis of all international crime gun trace requests received between 2017 and 2021 indicates that at least 11% (18,749) of traced firearms were lawfully exported from the United States and later recovered in a foreign country. For countries outside of North America, at least 37% of firearms submitted to ATF were lawful exports; for countries in Central America, at least 19% of firearms submitted to ATF were lawful exports.[2] These data are of particular concern given that ATF was working with a limited set of international crime guns for which a trace request was submitted. Together, these reports indicate that a sizeable portion of international crime guns are diverted from lawful exports.

Commerce also identified specific cases in which lawful exports of firearms and related items were misused or diverted in a manner that adversely impacted U.S. national security and foreign policy interests. In one case, a firearm that was licensed for export to one country was subsequently diverted to a bordering country and used in a political assassination. In another, a license exception was used to export parts for the unlawful assembly of firearms in Taiwan. BIS also identified instances of firearms and ammunition exports being diverted to Russia via commercial resellers in third countries; such firearms and ammunition may be used to support Russia's further invasion of Ukraine.

In addition, partner governments, particularly those in the Western Hemisphere, have expressed, and have continued to express, concern to Commerce with respect to illicit firearms trafficking, including the diversion of lawfully exported firearms. For example, governments in the Caribbean region expressed concern that individuals are using license exceptions to bring firearms, particularly semi-automatic handguns, to their countries, and that those firearms are being diverted to violent criminals. These partner governments have sought U.S. assistance in addressing diversion, which is fueling violence, criminal activity, and instability within their countries or regions.

Commerce takes seriously its responsibility to regulate the export of firearms and related items consistent with U.S. national security and foreign policy interests, which include countering diversion and misuse of firearms and advancing human rights. Given the lethality of these items, the significant volume and value of the applications being processed, and the risk of diversion or misuse associated with them, Commerce is committed to ensuring that controls for these items appropriately protect the security of the United States and our allies and partners. Thus, during the pause, Commerce conducted a thorough review to assess the risk factors that contribute to the diversion and misuse of firearms and related items, evaluate whether existing review policies sufficiently account for those factors, and determine whether those policies could be improved. As part of that review, Commerce closely reexamined the data and case studies that led to the pause. It supplemented those data and case studies by studying reports and other empirical evidence regarding the conditions and risk factors that enable diversion and misuse of U.S. firearms and related items. Additionally, Commerce continued to engage with stakeholders and partner governments to gather different perspectives on addressing the risks associated with the diversion of firearms and related items.

As part of this review, Commerce, together with interagency export control partners in the Departments of Defense, Energy, and State, as well as other federal agencies with technical expertise in firearms and related items, assessed current U.S. firearms export control policies to determine whether updates to BIS's review process and procedures

[1] United States Government Accountability Office, *Firearms Trafficking: More Information is Needed to Inform U.S. Efforts in Central America* (Jan. 2022) (''GAO Report''), *https://www.gao.gov/assets/gao-22-104680.pdf.*

[2] Bureau of Alcohol, Tobacco, Firearms, and Explosives, ''National Firearms Commerce and Trafficking Assessment (NFCTA): Crime Guns—Volume Two, Part IV: Crime Guns Recovered Outside the United States and Traced by Law Enforcement,'' January 2023, pg 5, *https://www.atf.gov/firearms/docs/report/nfcta-volume-ii-part-iv-crime-guns-recovered-outside-us-and-traced-le/download.*

would further U.S. foreign policy and national security interests and how to appropriately implement those updates. In particular, as discussed further below, Commerce worked extensively with State, which is a key participant in the review process for license applications involving items subject to Commerce's jurisdiction. At the outset of the review process, Commerce drew upon its extensive experience reviewing applications for exports and reexports of firearms and related items and outlined an initial set of factors that increase the risk of these items being diverted or misused in a manner contrary to U.S. national security and foreign policy. Commerce consulted with State about these risk factors and, upon further review of the data and case studies as informed by State's experience, the agencies determined the key risk factors. In light of the fact that many of the factors concern conditions in destination countries, Commerce requested that State, which has deep expertise in evaluating such conditions, determine whether there are specific destinations where there is a substantial risk that firearms and related items will be diverted or misused in a manner contrary to U.S. national security and foreign policy. After conducting a thorough analysis that included consultation with U.S. Government stakeholders, State responded by developing a list of destinations in which it determined that there is a substantial risk that lawfully exported firearms sold to non-government end users will be diverted or misused in a manner contrary to U.S. national security and foreign policy.

Commerce also engaged with certain counterparts in Country Group A:1 destinations that export firearms and related items to understand the export license application requirements and risk factors considered under their firearms export control authorities and related policies. Because governments in A:1 destinations have demonstrated a commitment to export controls as participants in the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual-Use Goods and Technologies and share our interest in countering diversion or misuse of firearms and related items, advancing human rights, and promoting mutual security, BIS found it helpful to consult their processes and policies in making the regulatory updates outlined in this IFR.

Commerce also continued regular engagement with the Caribbean Community (CARICOM) to identify specific actions the U.S. could take to minimize the diversion to unauthorized end users of U.S. firearms and related items that were lawfully exported to end users in CARICOM member and partner countries. For example, concerns were raised that certain license exceptions, including License Exception Shipments of Limited Value (LVS) under § 740.3 and License Exception Baggage (BAG) under § 740.14, may have been used to bring firearms and related items into these CARICOM countries that were subsequently diverted in violation of license exception terms, or to export greater quantities of firearms and related items than were legally available under these two license exceptions. Note that License Exception LVS is not available for end-item firearms but is available for certain ''parts'' and ''components'' of firearms when for export or reexport to a Country Group B destination. Commerce also engaged with the U.S. firearms industry, as well as a wide variety of other stakeholders, to assess current export control processes and policies for firearms and related items and seek recommendations on effectively addressing diversion and misuse risks.

3. Findings of Policy Review and Engagement

As a result of this policy review and engagement, Commerce identified several concerns associated with export controls that apply under the EAR to firearms and related items. First, Commerce determined that the existing licensing procedures and requirements did not provide it with sufficient documentation and data to evaluate national security and foreign policy risks effectively. In particular, limited documentation requirements made it challenging to validate that firearms and related items are exported only to trustworthy foreign partners. Existing data collection practices also limited visibility of agencies that participate in the license review process into trade flows for different types of firearms under its jurisdiction, rendering it difficult to assess whether lawful exports might be at a particularly acute risk of diversion. In addition, these practices limited the US Government's ability to monitor potentially high-risk sales from distributors to third parties.

Second, Commerce concluded that the existing EAR license application requirements and review process for firearms and related items did not sufficiently enable identification of transactions that pose a heightened risk of diversion or misuse contrary to U.S. national security and foreign policy. Given that data and case studies show that exports of U.S. firearm and related items are at significant risk of being diverted or misused, Commerce conducted an extensive analysis to determine whether certain types of license applications warrant more scrutiny than others.

As an initial matter, Commerce determined that the risk of diversion is significantly higher for exports to non-government end users than for exports to government end users and that consequently applications involving non-government end users warrant additional scrutiny. Data show that ''[g]lobally, the private civilian stockpile is less accountable, far less strictly guarded and three times as plentiful as its state counterpart—all qualities that support easy diversion of weapons to the illegal sector.'' [3] For example, as ATF explained in a report on firearm theft in the U.S., ''more than 95% of stolen guns originate via thefts from private citizens.'' [4] The case studies reviewed by BIS provide additional support for these general trends. Indeed, in each of the case studies described above, the diverted firearm had originally been exported to a non-governmental end user.

Commerce also determined that the licensing process would benefit from clarifying the specific national security and foreign policy factors considered when license applications are reviewed; such factors are associated with the risk of diversion or misuse of firearms and related items and the potential impact to U.S. national security and foreign policy interests. While national security and foreign policy concerns have always been considered as part of the review process, detailing transparent review criteria will enable BIS, its interagency partners, exporters, and reexporters to more effectively and consistently assess the potential risks associated with a given transaction. The factors that will be considered include, but are not limited to: the nature of the end user; destination-specific national security and foreign policy risk factors, including firearms trafficking, terrorism, human rights concerns and political violence, state fragility, corruption, organized crime or gang activity, and drug trafficking; instances of past diversion or misuse; and the capabilities, potential uses, and lethality of the item. These factors are consistent

[3] Rebecca Peters, ''Small Arms: No Single Solution,'' United Nations Chronicle *https://www.un.org/en/chronicle/article/small-arms-no-single-solution*.

[4] Bureau of Alcohol, Tobacco, Firearms, and Explosives, ''National Firearms Commerce and Trafficking Assessment (NFCTA): Crime Guns—Volume Two, Part V: Firearm Thefts,'' January 2023, pg 1 *https://www.atf.gov/firearms/docs/report/nfcta-volume-ii-part-v-firearm-thefts/download*.

with U.S. National Security Memorandum 18, Conventional Arms Transfer Policy,[5] as well as the criteria that the United Kingdom and allies and partners in European Union member states apply to similar transactions, including the consideration of human rights; the preservation of regional peace, security, and stability; internal repression, tensions, or armed conflicts; terrorism and organized crime risks; and diversion risks. Notably, these key review factors, which are set forth in a new regulatory note to § 742.7(b)(3) of the EAR, apply to applications involving certain exports and reexports of firearms and related items to both government and non-government end users in all destinations.

Each of the destination-specific factors directly correlates with the risk of diversion or misuse. In countries with high rates of firearms trafficking, there is an increased risk that criminals will seek to divert U.S. firearms and sell them to traffickers. There is a similar risk in countries with high rates of drug trafficking, as ''illicit drugs are the most common non-firearms-related commodities seized together with firearms.'' [6] Drug traffickers and producers frequently seek to obtain diverted firearms, both to further their core operations [7] and to establish illicit firearms markets.[8]

Organized crime, human rights abuses, and terrorist activity are strong indicators of diversion risk because the ''interface between organized crime, violent extremism and terrorism, as well as state actors, allows regions to become flush with weapons looted from government stockpiles and weapons legally procured but sold on the black market.'' [9] As discussed, the GAO report on arms trafficking in Belize, El Salvador, Guatemala, and Honduras provides empirical evidence that countries with high degrees of organized crime, human rights abuses, and violent extremism also have high degrees of firearm diversion.[10]

A high degree of corruption in a country also increases diversion risk.[11] Specifically, in countries where corruption leads to reduced funding for law enforcement agencies, those agencies are less equipped to prevent criminals from diverting U.S. firearms. The risk of diversion is especially high in countries where corrupt government officials work directly with criminal organizations to traffic diverted U.S. firearms.[12]

Finally, state fragility correlates with diversion risk because ''strong states should have greater ability to manage and to control legal arms shipments than their weaker counterparts.'' [13] Diversion risk is especially high in countries experiencing internal violent conflict because conflict incentivizes armed groups to stockpile weapons through any means necessary, including through the diversion of U.S. firearms.[14]

The destination-specific factors also correlate with the risk that a diverted firearm will be used to commit violent acts that undermine U.S. national security and foreign policy objectives. As an initial matter, in countries with high rates of firearms trafficking, there is an increased risk that diverted firearms and related items will end up in the hands of cartels, gangs, terrorists, paramilitary groups, and other criminal organizations, all of which use firearms and related items for activities that directly undermine U.S. national security and foreign policy.

In countries with high rates of drug trafficking and organized crime, there is an increased risk that the diversion or misuse of firearms and related items will increase the ability of cartels, gangs, and other criminal organizations to undermine U.S. national security and foreign policy by flooding the United States with potentially deadly substances, sparking regional conflict that has spillover effects in the United States, and establishing transnational operations that extend into the U.S.[15] Similarly, in countries where terrorist groups have a significant presence, there is an increased risk that the diversion of firearms and related items will increase the capability of those groups to carry out attacks that undermine U.S. national security.[16] And in countries with high rates of human rights abuses and political violence, whether by government-sponsored paramilitary groups or non-state forces, there is an increased risk that the diversion of firearms and related items will enable further human rights abuses, which directly undermines a key U.S. foreign policy objective.[17]

The diversion and misuse of firearms and related items in countries with high degrees of corruption and state fragility poses similar risks to national security and foreign policy. In countries with high degrees of corruption, there is an increased risk that the diversion of firearms and related items to criminal organizations will further undermine the ability of law enforcement agencies to promote country stability, which is a central U.S. foreign policy objective. In turn, in a fragile state experiencing violent internal conflict, ''the influx of arms not only fuels the fighting but it contributes to the fragmentation and spreading of conflict; increases the number of criminal groups and their use of violence as a vehicle for market control; and strengthens armed groups against state responses.'' [18] Not only does such conflict undermine U.S. foreign policy by increasing country instability, it causes spillover effects that directly threaten U.S. national security.

In addition to the destination-specific factors, other important factors are the capabilities, lethality, and potential uses of different firearms and related items. BIS controls a diverse range of firearms and related items, including optics and

[5] U.S. National Security Memorandum 18, Memorandum on United States Conventional Arms Transfer Polic, (Feb 2023), *https://www.whitehouse.gov/briefing-room/presidential-actions/2023/02/23/memorandum-on-united-states-conventional-arms-transfer-policy/*.

[6] United Nations Office on Drugs and Crime, ''Global Study on Firearms Trafficking 2020,'' page 77 (Mar. 2020) (''UN Global Study''), *https://www.unodc.org/documents/data-and-analysis/Firearms/2020_REPORT_Global_Study_on_Firearms_Trafficking_2020_web.pdf*.

[7] UN Global Study, page 36 (''Firearms are instrumental to organized crime and gangs as they can convey the sense of threat and power which allow the protection of the group, the territory and eventually their illicit markets.'').

[8] Global Initiative Against Transnational Organized Crime, *Arms Trafficking and Organized Crime: Global trade, local impacts,* page 13 (Aug. 2022) (''GI–TOC Report'') (explaining that ''drugs and firearms markets tend to benefit and reinforce each other'' because drug operations ''[use] profits from the drug trade to buy and sell firearms not only to their members but also other criminal groups at huge mark-ups''), *https://globalinitiative.net/wp-content/uploads/2022/08/GI-TOC-policy-brief_Arms-trafficking-web-1.pdf*.

[9] GI–TOC Report, page 3.

[10] GAO Report, page 16.

[11] Trevor Thrall and Jordan Cohen, ''2021 Arms Sales Risk Index'' (Jan. 18, 2022) (''Cato Report''), *https://www.cato.org/study/2021-arms-sales-risk-index#mapping-risk*.

[12] GI–TOC Report, page 4.

[13] Carla Martinez Machain, Jeffrey Pickering, ''The Human Cost of the Weapons Trade: Small Arms Transfers and Recipient State Homicide'' Journal of Global Security Studies (2020) (showing that state strength mitigates the relationship between small arms trade and rates of homicide) *https://academic.oup.com/jogss/article-abstract/5/4/578/5592220*.

[14] UNODC Report page 37 (''In conflict and post-conflict countries, the accumulation of legal stockpiles of weapons may create the potential for firearms to reach the hands of non-state armed groups, other criminal groups or even the general population, especially if that very conflict weakens the ability of the state infrastructure to manage those stockpiles properly.'').

[15] U.S. Department of Defense, ''Framework to Counter Drug Trafficking and Other Illicit Threat Networks,'' page 1 (May 2019), *https://policy.defense.gov/Portals/11/Documents/DoD%20Framework%20to%20Counter%20Drug%20Trafficking%20and%20Other%20Illicit%20Threat%20Networks%20May%202019.pdf;* GI–TOC Report, page 10.

[16] Cato Report.

[17] GI–TOC Report, page 10; Cato Report.

[18] GI–TOC Report, page 3.

scopes, antique firearms, non-automatic and semi-automatic firearms, and ammunition. The potential for diversion or misuse of each of these categories of items should be carefully considered during the review of an export application.

The capabilities, lethality, and potential use of an item have numerous implications for U.S. national security and foreign policy interests. To begin with, certain items under BIS jurisdiction have characteristics that may render them either more or less dangerous in criminal, terrorist, or other adversaries' hands. For example, buckshot, blank ammunition, or antique firearms regulated by BIS under the EAR, have relatively limited capacity to pose harm to U.S. interests if they are diverted or misused. By contrast, some items subject to the EAR, such as certain semiautomatic firearms, may pose a higher risk to U.S. national security and foreign policy interests if diverted to criminals, terrorists, and cartels. For example, ATF studies on the import of semiautomatic rifles and shotguns have found that certain characteristics can render such firearms ''particularly suitable for the military or law enforcement'' use.[19] Firearms that could be used to give cartels, terrorist organizations, and other non-state actors parity with law enforcement agencies, including those of the U.S. and their allies, could pose a unique risk if diverted or misused. Furthermore, data from ATF indicates that weapons with these characteristics have, in fact, been diverted and misused in criminal activities,[20] and that certain types of weapons may be particularly appealing to cartels that seek to destabilize regions and engage in drug trafficking activities. Such factors are important to consider alongside other indicia of the end user's credibility and a destination's risk profile.

The capabilities, lethality, and potential uses of an item can also render it more amenable to diversion than other comparable items. In the context of drug trafficking and other criminal activity in the CARICOM region, for example, studies have indicated that criminals rely on access to unlawfully exported or diverted handguns. This is due to the fact that handguns are ''concealable, easier to use in close quarters, and just as effective for almost every criminal task'' as other firearms.[21] Similarly, a study of diversion in the CARICOM region showed both that criminals use various methods of concealment and that there is a prevalence of 9mm semiautomatic handguns in criminal activity.[22] These data are consistent with other studies showing that Central American police recovered and traced pistols at a greater rate than other types of weapons in that region.[23] Foreign government law enforcement agencies have likewise identified instances in which extraordinarily large quantities of ammunition—which is small and often can be repurposed for a large variety of firearms—are illicitly trafficked.[24] Put simply, some items may be more dangerous if they are diverted or misused, and others might be easier to divert or misuse. As such, the capabilities, lethality, and potential uses of certain items are closely linked to the U.S. national security and foreign policy interests that should be considered in the context of reviewing licensing applications.

Finally, in addition to specifying certain key factors that will be considered when reviewing license applications to export firearms and related items to any end user, Commerce determined that destination-specific factors should be used to identify destinations where firearm exports to non-government end users entail a substantial risk of diversion or misuse in a manner adverse to U.S. national security and foreign policy. Identifying those ''high-risk destinations'' enables BIS to develop a uniform review policy for license applications, ensuring that the licensing process consistently accounts for the risks associated with various transactions; provides transparency and predictability to exporters, stakeholders, and the public; and adequately safeguards U.S. foreign policy and national security interests.

As discussed above, Commerce requested that State, which has extensive expertise in evaluating country-specific conditions and associated national security and foreign policy concerns, assist in developing a list of high-risk destinations. In response, State provided Commerce with a guidance memorandum, which is available on the BIS website at *www.bis.gov/guidance_memorandum* and on *regulations.gov,* outlining a methodology to evaluate the risk that firearms exports to specific destinations will be diverted or misused in a manner contrary to U.S. national security and foreign policy (hereinafter, the ''Firearms Guidance Memorandum''). As the Firearms Guidance Memorandum explains, State leveraged its expertise in foreign policy and in subject matter areas, including human rights, international counternarcotics, counterterrorism, and arms control, and the expertise of stakeholders from across the U.S. Government in conducting its analysis.

After working with Commerce to determine the key risk factors, State gathered data and other empirical evidence relevant to assessing how those factors apply to specific destinations. That evidence came from a diverse set of credible sources, including reports produced by the U.S. Government (*e.g.,* the State Department's Country Reports on Human Rights Practices and the Presidential Determination on Major Drug Transit or Major Illicit Drug Producing Countries) and reports produced by reputable non-government organizations (*e.g.,* the Global Terrorism Index and the Corruption Perceptions Index). State also engaged in consultations with U.S. Embassy officials, including those with significant experience working with local law enforcement agencies, subject matter experts, and regional experts. Finally, State sought policy guidance from stakeholders across the U.S. Government to ensure that the assessment incorporated relevant aspects of U.S. national security and foreign policy interests.

Based on that analysis, State identified 36 countries in which there is a substantial risk that lawful firearms exports to non-governmental end users will be diverted or misused in a manner adverse to U.S. national security and foreign policy interests. Commerce has decided to apply a presumption of denial review policy to firearm license

[19] Bureau of Alcohol, Tobacco, Firearms, and Explosives, Study on the Importability of Certain Shotguns,'' January 2011, pages 8–9

[20] Bureau of Alcohol, Tobacco, Firearms, and Explosives, ''National Firearms Commerce and Trafficking Assessment (NFCTA): Crime Guns—Volume Two, Part IV: Crime Guns Recovered Outside the United States and Traced by Law Enforcement,'' January 2023, pgs 10–14, *https://www.atf.gov/firearms/docs/report/nfcta-volume-ii-part-iv-crime-guns-recovered-outside-us-and-traced-le/download.*

[21] United Nations Office on Drugs and Crime, ''Transnational Crime in Central America and the Caribbean,'' December 2012, page 59, *unodc.org/documents/data-and-analysis/Studies/TOC_Central_America_and_the_Caribbean_english.pdf.*

[22] Small Arms Survey, ''Weapons Compass: The Caribbean Firearms Study,'' April 2023, pages 67–85, *https://www.smallarmssurvey.org/sites/default/files/resources/CARICOM-IMPACS-SAS-Caribbean-Firearms-Study.pdf.*

[23] United Nations Office on Drugs and Crime, ''Transnational Crime in Central America and the Caribbean,'' December 2012, page 59, *unodc.org/documents/data-and-analysis/Studies/TOC_Central_America_and_the_Caribbean_english.pdf*; GAO report, page 19.

[24] Alessandro Ford, ''Scandal at Haiti Customs After Over 100,000 Rounds of Smuggled Ammunition Seized,'' Insight Crime, July 2022, *https://insightcrime.org/news/scandal-at-haiti-customs-after-over-100000-rounds-of-smuggled-ammunition-seized/.*

applications involving non-government end users in those destinations. That uniform policy will ensure that the licensing process consistently accounts for the risks associated with those transactions, provides transparency to exporters and other stakeholders, and safeguards U.S. national security and foreign policy interests.

4. Policy Changes

BIS has determined that the changes described in this IFR will advance U.S. national security and foreign policy interests. As with all EAR controls, these changes are designed to be as targeted as possible to accomplish BIS's mission to protect the national security and foreign policy interests of the United States, including a full consideration of this IFR's economic impact. The regulatory changes implemented by this IFR will facilitate more robust data tracking capabilities for exports and re-exports of firearms and related items. Updates to license application requirements and applicable review policies will enhance the ability of BIS and its interagency partners to review and process license applications consistent with U.S. national security and foreign policy interests. In addition, this IFR creates greater transparency for industry by identifying the risk factors considered during the application review process, as well as destinations identified in the Firearms Guidance Memorandum as presenting a substantial risk of diversion or misuse in a manner contrary to U.S. national security and foreign policy.

B. New ECCNs for Semi-Automatic Firearms and Certain Related Parts, Components, Attachments, and Accessories

Prior to this IFR, ECCN 0A501 controlled rifles, pistols, and related ''parts,'' ''components,'' and certain ''attachments,'' and ''accessories'' on the CCL, while ECCN 0A502 controlled shotguns and related ''parts,'' ''components,'' and certain ''attachments,'' and ''accessories.'' Neither ECCN distinguished between non-automatic and semi-automatic firearms. BIS was unable to readily identify what share of firearms exports to a country were semi-automatic rifles versus non-automatic pistols because they were controlled under the same item paragraph of ECCN 0A501. Accordingly, BIS was unable to readily disaggregate and review licensing and export data for specific types of end-item firearms or specific ''parts,'' ''components,'' ''attachments'' and ''accessories'' of most concern. This data gap limited BIS's ability to efficiently evaluate the export, reexport, transfer (in-country) and diversion of specific types of rifles, pistols, shotguns, and certain ''parts,'' ''components,'' ''attachments,'' and ''accessories'' that may pose risks to U.S. national security and foreign policy. However, such information is useful to assess the risk of diversion.

To better track the export, reexport, transfer (in-country) and diversion of different types of firearms and related items, this IFR adds four new ECCNs to the CCL. ECCN 0A506 controls semi-automatic rifles, ECCN 0A507 controls semi-automatic pistols, ECCN 0A508 controls semi-automatic shotguns, and ECCN 0A509 controls certain ''parts,'' ''components,'' devices, ''accessories,'' and ''attachments'' for items controlled under ECCNs 0A506, 0A507, and 0A508. The creation of these four new ECCNs will enable BIS to better track and more readily identify exports of end-item semi-automatic firearms and shotguns and certain related ''parts,'' ''components,'' ''accessories,'' and ''attachments'' of concern when reviewing the Electronic Export Information (EEI) that exporters file in the Automated Export System (AES). Pursuant to § 758.1(g)(1) and (2), an EEI must specify the ECCN of the exported item. In order to further enhance transparency and the collection and review of export data on these items, this IFR also implements export clearance changes as described below under the heading *Changes to make identification of end-item firearms mandatory in AES.*

The addition of ECCNs 0A506, 0A507, 0A508, and 0A509 is not expected to have an impact on the number of license applications received by BIS, because these items were previously controlled under different ECCNs. Other changes included in this IFR that are expected to increase the number of licenses and other support documents are described elsewhere in this preamble.

1. Addition of ECCN 0A506 for Semi-Automatic Rifles

The commodities controlled under ECCN 0A506 were controlled previously under ECCN 0A501. BIS, supported by an interagency working group, consulted the Wassenaar Munitions List (WAML1) as well as ATF's non-sporting firearm importation criteria to identify specific features or accessories to delineate in the ECCN 0A506 item paragraphs. The item paragraph structure will enable better tracking and transparency for exports of various types of end-item semi-automatic rifles. ECCN 0A506 has two primary item paragraphs. Item paragraph .a details semi-automatic centerfire (non-rimfire) rifles equal to .50 caliber (12.7 mm) or less that have any of the following characteristics (controlled under .a.1 through .a.4): the ability to accept a detachable large capacity magazine (more than 10 rounds) or may be easily modified to do so; folding, telescoping, or collapsible stock; separate pistol grips; or a flash suppressor. Item paragraph .b controls all other semi-automatic rifles equal to .50 caliber (12.7 mm) or less, including all non-centerfire (rimfire) that are not elsewhere specified (noted as ''n.e.s.'' on the CCL). ECCN 0A506 includes a note to 0A506.a and .b that ''parts'' and ''components'' that are ''specially designed'' for a commodity classified under .a or .b of 0A506, except those controlled under ECCN 0A509, are controlled under ECCN 0A501. ECCN 0A506 also includes a technical note stating that firearms controlled in 0A506 include those chambered for the .50 BMG cartridge. The reasons for control for new ECCN 0A506 mirror the reasons for control that apply to ECCN 0A501 (with the addition of CC Column 2 reason for control outlined below). Specifically, National Security (NS) Column 1, Regional Stability (RS) Column 1, Firearms Convention (FC) Column 1, CC Column 2, United Nations Security Council arms embargo (UN), and Anti-Terrorism (AT) Column 1 apply to the entire entry. License Exceptions LVS, Shipments to Country Group B Countries (GBS), and License Exception Strategic Trade Authorization (STA) are not available for use with commodities controlled under ECCN 0A506, as discussed in greater detail below.

2. Addition of ECCN 0A507 for Semi-Automatic Pistols

The commodities controlled under ECCN 0A507 were controlled previously under ECCN 0A501. BIS, supported by an interagency working group, consulted the WAML1 and 27 CFR 478.12 to identify specific features or accessories to delineate in the ECCN 0A507 item paragraphs. The item paragraph structure will enable better tracking and transparency for exports of various types of end-item semi-automatic pistols. ECCN 0A507 has two item paragraphs: paragraph .a controls semi-automatic centerfire (non-rimfire) pistols equal to .50 caliber (12.7 mm) or less; and paragraph .b controls semi-automatic (rimfire) pistols equal to .50 caliber (12.7 mm) or less. ECCN 0A507 includes a note to 0A507.a and .b to specify that ''parts'' and ''components'' that are ''specially designed'' for a commodity classified under 0A507,

except those controlled under ECCN 0A509, are controlled under ECCN 0A501.c, .d, .x, or .y. The ECCN also includes a technical note stating that firearms described in 0A507 includes those chambered for the .50 BMG cartridge, which clarifies that any handgun that may be developed to fire .50 BMG cartridges will be controlled under this ECCN. The reasons for control for new ECCN 0A507 mirror the reasons for control that apply to ECCN 0A501 (with the addition of CC Column 2 reason for control outlined in D.2 of this preamble in this IFR). Specifically, NS Column 1, RS Column 1, FC Column 1, CC Column 2, UN, and AT Column 1 apply to the entire entry. License Exceptions LVS, GBS, and STA are not available for use with commodities controlled under ECCN 0A507, as discussed in greater detail below.

3. Addition of ECCN 0A508 for Semi-Automatic Shotguns

The commodities controlled under ECCN 0A508 were controlled previously under ECCN 0A502. BIS, supported by an interagency working group, consulted both the WAML1 and ATF's non-sporting importation criteria to identify specific characteristics or attachments and accessories to delineate in the ECCN 0A508 item paragraphs. The item paragraph structure will better enable tracking and transparency for exports of various types of end-item semi-automatic shotguns. ECCN 0A508 has two item paragraphs. Item paragraph .a controls semi-automatic centerfire (non-rimfire) shotguns with any of the of the following characteristics (which are detailed in a.1 through a.6): folding, telescoping, or collapsible stock; magazine over five rounds; a drum magazine; a flash suppressor; Excessive Weight (greater than 10 lbs. for 12 gauge or smaller); or Excessive Bulk (greater than 3 inches in width and/or greater than 4 inches in depth). Item paragraph .b controls all other semi-automatic shotguns, including all non-centerfire (rimfire) shotguns that are not elsewhere specified. The reasons for control for new ECCN 0A508 mirror the reasons for control that apply to ECCN 0A502 (except for CC Column 2, which now applies to the entire 0A502 and 0A508 entry): Specifically, NS Column 1 and RS Column 1 for 0A508 commodities (with barrel length less than 18 inches), FC Column 1, CC Column 2, UN for the entire entry, and AT Column 1 for 0A508 commodities (with barrel length less than 18 inches). LVS, GBS, and License Exception STA are not available for use with ECCN 0A508, as discussed in greater detail below.

4. Addition of ECCN 0A509 for Certain ''Parts,'' ''Components,'' Devices, ''Accessories,'' and ''Attachments'' for Items Controlled Under ECCNs 0A506, 0A507, and 0A508

The commodities controlled under ECCN 0A509 were controlled previously under ECCNs 0A501 and 0A502. The commodities controlled under 0A509 warrant separate tracking under a distinct ECCN due to their sensitivity, including the potential that these firearms-related items are used to illicitly assemble firearms or are otherwise used to convert a non-automatic firearm controlled by 0A501 or 0A502 into a semi-automatic firearm or to accelerate the rate of fire of a semi-automatic firearm controlled by 0A506, 0A507, or 0A508. The item paragraph structure will enable better tracking and transparency for exports of certain ''parts,'' ''components,'' devices, ''accessories,'' and ''attachments'' separate from the end-item semi-automatic rifles, pistols, and shotguns controlled under ECCNs 0A506, 0A507, and 0A508. ECCN 0A509 has four item paragraphs. Item paragraph .a controls any ''part,'' ''component,'' device, ''attachment,'' or ''accessory'' not elsewhere specified on the USML that is designed or functions to accelerate the rate of fire of a semi-automatic firearm controlled under ECCNs 0A506, 0A507, or 0A508. Item paragraphs .b and .c control receivers (frames), including castings, forgings, stampings, or machined items thereof, ''specially designed'' for an item controlled under ECCNs 0A506 and 0A507, respectively. Item paragraph .d of ECCN 0A509 controls receivers (frames) and ''specially designed'' ''complete breech mechanisms'' for a commodity controlled under ECCN 0A508. ECCN 0A509 has a note to item paragraphs .b and .c stating that receivers (frames) under 0A509.b and .c refers to any ''part'' or ''component'' of the firearm that has or is customarily marked with a serial number when required by law; the ''parts'' and ''components'' in paragraphs 0A509.b and .c are regulated by ATF as firearms (*see* 18 U.S.C. 921(a)(3); 27 CFR parts 447, 478, and 479). The reasons for control for commodities controlled under new ECCN 0A509 are as follows: NS Column 1, RS Column 1, FC Column 1, CC Column 2, UN, and AT Column 1 apply to the entire entry. License Exceptions LVS, GBS, and STA are not available for use with commodities controlled under ECCN 0A509, as discussed in greater detail below.

5. Other Changes for Existing 0x5zz ECCNs

BIS also reevaluated the reasons for control for rifles, pistols, shotguns, ammunition, and related ''parts,'' ''components,'' ''accessories,'' ''attachments,'' ''software,'' and ''technologies'' detailed under existing ECCNs 0A501, 0A502, 0A504, 0A505, 0D501, 0D505, 0E501, 0E504, and 0E505. BIS is applying or maintaining CC column 2-based controls on most items under these ECCNs, consistent with BIS policy to apply CC controls on items to address human rights-related concerns. Certain specific ''parts'' and ''components'' and ammunition controlled under ECCNs 0A501.y and 0A505.c, 0A505.d, and 0A505.x are not controlled for CC reasons (or certain other reasons under the EAR), because they raise relatively few concerns related to human rights or other foreign policy objectives. The CC changes described in this paragraph, along with the other CC changes described in this preamble section B.5, are expected to result in an increase of 1,115 license applications received annually by BIS.

Prior to this IFR, either CC Column 1, CC Column 2, or CC Column 3 applied to shotguns controlled under ECCN 0A502 based on the barrel length and particular end user (specifically, police or law enforcement). This IFR revises the CC reasons for control on 0A502 to underscore their significant relationship to U.S. foreign policy objectives, including human rights. CC Column 2 applies to the entire entry of 0A502, regardless of barrel length or end user. Similarly, CC Column 2 applies to the entire entry of 0A508, regardless of barrel length or end user. These changes implement a new license requirement for the export of certain shotguns to certain countries and end users. All other existing reasons for control on 0A502 remain in effect under this IFR. In particular, consistent with the licensing policy for items controlled for RS reasons, § 742.6(b)(1)(i), BIS will continue to review these items to determine whether the transaction is contrary to U.S. foreign policy interests, including promoting the observance of human rights throughout the world.

Similarly, this IFR adds CC Column 2 reasons for control to software controlled under ECCNs 0D501 and 0D505 and technology controlled under 0E501. Given that these ECCNs control the software and technology that relate to firearms and related items, the same human rights concerns apply. Therefore, as noted above, this change aligns the reason for control for ECCNs 0D501,

0D505, and 0E501 with BIS policy to apply CC to firearms and related items.

6. Other EAR conforming changes to reflect the new ECCNs for semi-automatic firearms and semi-automatic shotguns.

With the exception of those commodities controlled under new ECCNs 0A506, 0A507, 0A508, and 0A509 as described above, all firearms, shotguns, and their ''parts,'' ''components,'' ''accessories,'' ''attachments,'' and equipment remain controlled under ECCNs 0A501 and 0A502 on the CCL. However, the creation of the four new ECCNs requires conforming changes throughout the EAR to maintain enhanced restrictions on end-item firearms where only ECCNs 0A501 and 0A502 were previously referenced. This IFR adds references to semi-automatic firearms and semi-automatic shotguns controlled under ECCNs 0A506, 0A507, and 0A508, as well as the commodities controlled under 0A509, where appropriate; these conforming changes ensure that the semi-automatic versions of end-use firearms and shotguns controlled under these three new ECCNs, as well as the commodities controlled under 0A509, continue to be subject to licensing restrictions and limitations on licensing exception availability.

The conforming changes appear in the following EAR provisions (referenced here in the order in which they are described under Table 1): §§ 732.2(b), 734.7(c), 740.2(a)(21), 740.2(a)(23), 740.9(a) and (b)(5) introductory text, 740.9(b)(5)(ii), 740.9, Note 1 to paragraph (b)(5), 740.10(b)(1) introductory text and (b)(4), 740.10(b)(4)(i), 740.10, Note 1 to paragraph (b)(4), 740.11 introductory text, 740.14(e)(1) introductory text, 740.14(e)(1)(i), 740.14(e)(3) introductory text, 740.14(e)(3)(i), 740.14(e)(3)(iv), 740.14(e)(4), 740.20(b)(2)(ii)(A), 740.20(b)(2)(ii)(B), 742.6(b), 742.7(a)(5), 742.17(f), 743.4(c) (redesignated as paragraph (b)), 743.6(a) introductory text, (a)(1) and (2), (b), and (c), 748.12(a)(1), 748.12, Note 2 to paragraph (d)(3), supplement no. 2 to part 748, paragraph (z), supplement no. 2 to part 748, Note 1 to paragraph (z), supplement no. 2 to part 748, paragraph (bb) (redesignates as paragraph (aa)(1)), 758.1(b)(9), Note 1 to paragraph (c)(1), and (g)(4)(i), 758.1(g)(4)(ii), 758.10(a) introductory text, Note 1 to paragraph (b)(1), and Note 2 to paragraph (b)(1), 758.11(a) and (b)(2), 762.2(a)(11), 762.3(a)(5), as well as ECCNs 0A501 heading, Related Controls paragraph, Technical Note to 0A501.c, Note 5 to 0A501.e, and 0A501.x and .y, 0A502 heading, and Related Controls paragraph, 0A505.a and .d, 0B501 heading and 0B501.e, 0D501 heading, 0E501 heading, 0E501.a and .b, 0E502 heading, and ECCN 2B018 text under the heading. These changes are not expected to have any impact on the number of license applications received by BIS.

There are a number of references to the 0x5zz ECCNs in existing EAR provisions that pertain to firearms controls. However, no changes are required to such references because the four new ECCNs are also considered 0x5zz ECCNs.

Table 1—Identification of Conforming Changes Made to Existing EAR Regulatory References to Reflect the Addition of ECCN 0A506, 0A507, 0A508, and 0A509

This table identifies the specific EAR provision and type of conforming changes required for consistency with the addition of these four new ECCNs. BIS welcomes comments in response to this IFR on these conforming changes, as well as any other conforming changes that the public believes would be warranted to reflect the addition of these four new ECCNs.

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EAR references	**Conforming changes to add references to new ECCNs 0A506, 0A507, 0A508**[1]**, and 0A509, or the items level classification for these ECCNs, as applicable**[2]
§ 732.2(b)	0A506, 0A507, or 0A509
§ 734.7(c)	0A506, 0A507, and 0A509
§ 740.2(a)(21)	0A506, 0A507, and 0A508
§ 740.2(a)(23)	0A506, 0A507, and 0A508 ***Note:*** *The reference to ECCN 0A501.a is removed consistent with the fact that the semi-automatic firearms previously controlled under that ECCN will now be controlled under new ECCNs 0A506 and 0A507.*
§ 740.9(a) and (b)(5) introductory text	0A506, 0A507 and 0A508
§ 740.9(b)(5)(ii)	0A506 and 0A507
§ 740.9, Note 1 to paragraph (b)(5)	0A506, 0A507, and 0A508
§ 740.10(b)(1) introductory text and (b)(4)	0A506, 0A507, and 0A508
§ 740.10(b)(4)(i)	0A506 and 0A507
§ 740.10, Note 1 to paragraph (b)(4)	0A506, 0A507, and 0A508
§ 740.11 introductory text	0A506, 0A507, 0A508, and 0A509
§ 740.14(e)(1) introductory text	0A508
§ 740.14(e)(1)(i)	0A506, 0A507, and 0A508
§ 740.14(e)(3) introductory text	0A506, 0A507, and 0A509
§ 740.14(e)(3)(i)	0A501, 0A506 or 0A507, as well as shotguns controlled under ECCNs 0A502 or 0A508 ***Note:*** *The restrictions for ECCNs 0A502 and 0A508 apply to all shotguns controlled under these two ECCNs*
§ 740.14(e)(3)(iv)	0A506, 0A507, and 0A509
§ 740.14(e)(4)	0A506 and 0A507
§ 740.20(b)(2)(ii)(A)	0A506, 0A507, and 0A509
§ 740.20(b)(2)(ii)(B)	0A508
§ 742.6(b)	0A502, 0A506, 0A507, 0A508, and 0A509
§ 742.7(a)(5)	0A506, 0A507, 0A508, 0A509, 0D501, 0D505, 0E501, and 0E504 ***Note:*** *This conforming change includes adding the related software and technology to the controls.*

§ 742.17(f)	0A506, 0A507, 0A508, and 0A509
§ 743.4(c) (redesignated as paragraph (b))	0A506.a. and .b and 0A507.a and .b
§ 743.6(a) introductory text, (a)(1) and (2), (b), and (c)	0A506 and 0A507
§ 748.12(a)(1)	Commodities controls under 0x5zz ***Note:*** *Instead of adding a conforming reference to ECCNs 0A506, 0A507, 0A508, and 0A509, this IFR adds the reference to 0x5zz because the specified requirements will apply to all commodities under these ECCNs. The phrase "ECCNs 0A501 (except 0A501.y), 0A502, 0A504 (except 0A504.f), or 0A505 (except 0A505.d)" is replaced with a conforming reference to commodities controlled under 0x5zz.*
§ 748.12, Note 2 to paragraph (d)(3)	0A506, 0A507, 0A508, and 0A509
Supplement no. 2 to part 748, paragraph (z)	0A506, 0A507, and 0A508 under the first reference in the paragraph, and 0A506 and 0A507 under the second reference in this paragraph. ***Note:*** *The second reference in paragraph (z) is to Annex A to supplement no. 1 to part 740. Due to the fact that this annex does not include shotguns adding a reference to 0A508 is not needed.*
Supplement no. 2 to part 748, Note 1 to paragraph (z)	0A506, 0A507, and 0A508
Supplement no. 2 to part 748, paragraph (bb) (redesignated as paragraph (aa)(1))	0A506 and 0A507
§ 758.1(b)(9), Note 1 to paragraph (c)(1), and (g)(4)(i)	0A506, 0A507, and 0A508
§ 758.1(g)(4)(ii)	0A506.a or .b, 0A507.a and .b, 0A508.a.1 or .a.2, or 0A509.a, .b, .c, or .d. ***Note:*** *This IFR also adds two references to ECCNs 0A506, 0A507, 0A508, or 0A509. However, the requirement is specific to the items paragraphs referenced in this paragraph.*
§ 758.10(a) introductory text, Note 1 to paragraph (b)(1), and Note 2 to paragraph (b)(1)	0A506, 0A507, and 0A508
§ 758.11(a) and (b)(2)	0A506, 0A507, and 0A508
§ 762.2(a)(11)	0A506, 0A507, and 0A508
§ 762.3(a)(5)	0A506, 0A507, and 0A508

ECCN 0A501 heading, Related Controls paragraph, Technical Note to 0A501.c, Note 5 to 0A501.e, and 0A501.x and .y	0A506, 0A507, 0A508, 0A509, under the heading. 0A506, 0A507, 0A508, 0A509, and 0A509.a or .c under the Related Controls paragraphs as applicable. 0A509.b or .c under Note 5 to 0A501.e 0A506 and 0A507 under Technical Note to 0A501.c 0A506, 0A507, and 0A509 under 0A501.x. 0A506 and 0A507 under 0A501.y 0A509.b or .c under Note 5 to 0A501.e
ECCN 0A502 heading, and Related Controls paragraph	0A508 and 0A509 under the heading 0A506, 0A507, 0A508, and 0A509 under Related Controls paragraphs as applicable
ECCN 0A505.a and .d	0A506 and 0A507 under 0A505.a 0A506, 0A507, and 0A508 under 0A505.d
ECCN 0B501 heading and 0B501.e	0A506, 0A507, and 0A509 under the heading 0A506, 0A507, and 0A509 under 0B501.e
ECCN 0D501 heading	0A506, 0A507, and 0A509 under the heading
ECCN 0E501 heading, 0E501.a and .b	0A506, 0A507, and 0A509 under the heading, 0E501.a, and .b
ECCN 0E502 heading	0A508 and 0A509 under the heading
ECCN 2B018 text under the heading	0A506, 0A507, and 0A509 in the text under the heading

[1] Unless otherwise noted in the table, references to 0A508 are to shotguns with a barrel length less than 18 inches to conform to the controls already in place on shotguns with a barrel length less than 18 inches that are controlled under 0A502.

[2] These conforming changes include adding one reference to 0D501, 0D505, 0E501, and 0E504 to reflect the addition of the four new ECCNs 0A506, 0A507, 0A508, and 0A509.

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C. Changes to License Exceptions and Related Changes

1. General restrictions on use of license exceptions. Section 740.2 of the EAR details restrictions in place on the use of all License Exceptions. Paragraph (a) enumerates these restrictions. This IFR makes two changes to this section. First, as a conforming change to the addition of the CC control under ECCNs 0A501, 0A506, and 0A507, this IFR revises the general restriction on the use of license exceptions under paragraph (a)(4)(iii) in § 740.2 for CC items identified in § 742.7 to remove the parenthetical phrase that limited the eligibility of License Exception BAG under paragraph (e) to certain shotguns and shotgun shells for personal use as the only License Exception BAG authorization that could overcome the general restriction in this paragraph (a)(4)(iii). Because the other firearms controlled under new ECCNs 0A506, 0A507, and 0A508 will require a license for CC as of the effective date of this IFR, all of these firearms and related items that are authorized under paragraph § 740.14(e) should be eligible to overcome this general restriction on the use of license exceptions under

§ 740.2(a)(4). These changes are not expected to have any impact on the number of license applications received by BIS.

Second, this IFR adds paragraph (a)(24) in § 740.2. New paragraph (a)(24) requires exporters to obtain a copy of an import certificate or equivalent document (if required by the government of the importing country) before the exporter can use any license exception for items controlled under ECCNs 0A501, 0A502, 0A504, 0A505, 0A506, 0A507, 0A508, or 0A509. This new requirement parallels the new policy detailed below related to obtaining and submitting an import certificate when applying for a license for certain firearms and related items. Although BIS anticipates that this requirement could increase the burden under this collection to some degree, BIS believes that exporters, as part of their current compliance programs, already have processes in place to confirm whether the firearms and related items that are to be exported may be imported into these foreign countries. Therefore, this recordkeeping requirement likely reflects practices and processes exporters already have in place and will therefore be of minimal burden to exporters. As described below under the Rulemaking section under paragraph 2, BIS welcomes comments from the public on this aspect of this IFR.

2. LVS additional restrictions. License Exception LVS is detailed under § 740.3. BIS is further restricting the eligible destinations for LVS under paragraph (b). As amended by this IFR, LVS is no longer available for commodities controlled under ECCNs 0A501, 0A502, 0A504 (except 0A504.g), 0A505, 0A506, 0A507, 0A508, and 0A509 when they are destined for destinations in ''CARICOM'' or destinations specified in both Country Groups B and D:5. The addition to the EAR of the ''CARICOM'' as a defined term is detailed below. License Exception LVS remains available only for certain commodity ECCNs. These changes are expected to result in an increase of five hundred license applications received annually by BIS.

3. License Exception BAG new restrictions and single trip limit.

i. BAG is detailed under § 740.14. License Exception BAG authorizes individuals leaving the United States either temporarily (*i.e.,* traveling) or longer-term (*i.e.,* moving) and crew members of exporting or reexporting carriers to take, as personal baggage, certain items. This IFR revises § 740.14 such that destination eligibility under License Exception BAG for items controlled under ECCNs 0A501, 0A502, 0A504, 0A505, 0A506, 0A507, 0A508, and 0A509 is limited to destinations other than those specified in Country Group D:5 (except for Zimbabwe) or destinations in ''CARICOM.''

This IFR adds ''CARICOM'' as a defined term in § 772.1, which lists the definitions of terms used in the EAR. The definition of ''CARICOM'' specifies that for purposes of §§ 740.3 and 740.14 of the EAR, the term means an intergovernmental organization that consists of the following member states and associate members: member states: Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, St. Lucia, Suriname, St. Kitts and Nevis, St. Vincent and the Grenadines, and Trinidad and Tobago; associate members: Anguilla, Bermuda, British Virgin Islands, Cayman Islands, and Turks and Caicos, as well as any other state or associate member that has acceded to membership in accordance with Article 3 or Article 231 of the Treaty of Chaguaramas for members or associate members, respectively. The definition of ''CARICOM'' includes a note specifying that Anguilla, Bermuda, British Virgin Islands, Cayman Islands, Montserrat, and Turks and Caicos are treated as the United Kingdom under all other EAR provisions that govern licensing requirements and license exceptions. These changes are expected to result in an increase of five hundred license applications received annually by BIS.

ii. *Limit BAG to three shotguns and firearms in total for a single trip.* This IFR also revises § 740.14 to limit the number of shotguns and firearms that an individual may export using BAG. Previously, paragraphs (e)(1)(i) and (e)(3)(i), read together, permitted U.S. citizens to export or reexport three shotguns, three firearms, and 1,000 rounds of ammunition on any one trip. This IFR limits U.S. citizens to three firearms or shotguns in total on any one trip. This change is expected to result in an increase of 50 license applications received annually by BIS.

D. Revisions to License Review Policies

As part of the BIS effort to review firearms-related policies and address concerns related to misuse or diversion contrary to U.S. national security and foreign policy interests, including diversion to entities or activities that promote regional instability, abuse or violate human rights, and/or fuel criminal activities, two control policies were identified for revision. This IFR revises the license review policies under the Regional Stability (RS) and Crime Control (CC) sections in part 742 of the EAR pursuant to BIS's findings. The revisions to the RS and CC license review policies, which impose presumptions of denial for certain high-risk transactions, are expected to result in a decrease of 650 license applications received annually by BIS, due to certain applicants likely being deterred from applying for licenses.

1. Revisions to RS license review policies. Under § 742.6(b)(1), licensing policy for RS column 1 items, this IFR makes several structural changes to paragraph (b)(1)(i). To make the paragraph more readily understandable, this IFR sets forth each license review policy in a separate paragraph, (b)(1)(i)(A) through (G). This IFR also makes conforming changes to clarify which items are reviewed under the policies set forth in each paragraph. This IFR also makes substantive revisions to RS reason for control, as detailed below.

i. Adoption of policy of denial review policy for D:5 for certain 0x5zz ECCNs. BIS reviews applications for exports and reexports of items classified under any 9x515 or ''600 series'' ECCN destined to Country Group D:5, destinations subject to a U.S. arms embargo, consistent with United States arms embargo policies in § 126.1 of the ITAR (22 CFR 126.1). This IFR amends § 742.6 of the EAR to extend this licensing policy to include all firearms and related items in ECCNs 0A501, 0A502, 0A505, 0A506, 0A507, 0A508, or 0A509 that are destined for D:5 destinations. This change is detailed in new paragraph (b)(1)(i)(D).

Furthermore, BIS previously reviewed applications for items controlled under certain firearms-related ECCNs and any 9x515 ECCN under a policy of denial when destined for China or a Country Group E:1 country. This IFR amends § 742.6 to extend this stringent review policy to all items classified under ECCNs 0A501, 0A502, 0A504, 0A505, 0A506, 0A507, 0A508, 0A509, 0B501, 0B505, 0D501, 0D505, 0E501, 0E504, or 0E505, or any 9x515 ECCNs. This change is detailed in new paragraph (b)(1)(i)(F).

2. Revisions to CC license review policies. As stated above, this IFR also revises the CC licensing policy in § 742.7(b) to apply stricter scrutiny to exports of firearms and related items to destinations where diversion risks are particularly acute, such as destinations in which significant drug trafficking and associated criminal activity occurs. Previously, § 742.7(a) consisted of paragraphs (a)(1) through (6). Under this IFR, the firearms and shotgun related items are listed in paragraph (a)(5) (ECCNs 0A501, 0A502, 0A504, 0A505.b,

0A506, 0A507, 0A508, 0E502, and 0E505). The contents of previous paragraphs (a)(2) and (3) are removed as a conforming change to the removal of CC Column 2 and CC Column 3 from shotguns. The non-firearms and shotgun related items remain in (a)(1). Previous paragraphs (a)(4) through (6) are now paragraphs (a)(2) though (4). Paragraphs (a)(2) and (a)(4) contain a sentence showing that controls for these items appear in each ECCN; a column specific to these controls does not appear in the Country Chart (supplement no. 1 to part 738 of the EAR).

Given that this IFR makes § 742.7(a)(5) solely pertain to firearms and shotguns related items, BIS is designating these items as having CC Column 2 reasons for control. As a result of this change, the public can more easily identify firearms and shotguns related items on the CCL. To ensure easy understanding of the applicability of license requirements for CC Column 2 designated items, BIS in this IFR is putting an X in the box on the Commerce Country Chart (supplement no. 1 to part 738) for all countries except Canada. This change does not impose licensing requirements on exports or reexports to destinations for which a license was not previously required, as NS and RS requirements are already in place for all destinations other than Canada.

Previously, § 742.7(b) consisted of paragraphs (b)(1) and (2). Under this IFR, paragraph (b) consists of paragraphs (b)(1) through (3). Paragraphs (b)(1) and (2) remain, but apply to (a)(1) through (4). Paragraph (b)(3) applies to items controlled under § 742.7(a)(5). The review policy for these items is broken out for two types of end users as described in section D.2.i and D.2.ii:

i. License review policies for government end users. Paragraph (b)(3)(i) describes policies for license applications when the items are destined for government end users. These applications will be reviewed on a case-by-case basis to determine the risk that the items will be diverted or misused in a manner that would adversely impact U.S. national security or foreign policy.

ii. License review policies for non-government end users. Paragraph (b)(3)(ii) describes policies for license applications when the items are destined for non-government end users. These license applications will also be reviewed on a case-by-case basis. They will additionally be reviewed under a presumption of denial if one of two conditions (detailed in paragraphs (b)(1)(ii)(A) and (B)) are met: (A) the items are being exported or reexported to a destination identified in the Firearms Guidance Memorandum as a destination in which it determined that there is a substantial risk that firearms exports to non-governmental end users will be diverted or misused in a manner adverse to U.S. national security and foreign policy, or (B) there is otherwise a substantial risk that the items will be diverted or misused in a manner that would adversely impact U.S. national security or foreign policy.

The presumption of denial review policy for license applications involving exports and reexports to high-risk destinations identified in the Firearms Guidance Memorandum ensures that all exports of firearms and related items to those destinations are consistent with U.S. national security and foreign policy. As discussed above, to support Commerce's ongoing efforts to impose export controls that further U.S. national security and foreign policy, State has developed a list of destinations in which there is a substantial risk that lawfully exported firearms sold to non-governmental end users could be diverted or misused in a manner adverse to U.S. national security and foreign policy. The Firearms Guidance Memorandum, which is available on the BIS website at *www.bis.gov/guidance_memorandum* and on *regulations.gov*, outlines the methodology for evaluating destination-specific risks and identifies 36 high-risk destinations.

Having carefully reviewed the list and methodology, which was developed by national security and foreign policy experts at State in consultation with other experts from across the U.S. Government, BIS has determined that a presumption of denial should apply to applications for the export and reexport of firearms and related items involving non-government end users in these 36 destinations. Thus, as part of this IFR, BIS is adopting the list and adding it to a supplement to the EAR (see below, in this section of the preamble, for details).

A presumption of denial review policy for exports and reexports to non-government end users to the destinations identified in the Firearms Guidance Memorandum will significantly further U.S. national security and foreign policy interests. As described above, based on analysis of destination-specific risk factors and consultations with U.S. Embassy officials and stakeholders across the U.S. Government, State determined that firearms and related items exported to non-government end users in those 36 destinations face a substantial risk of diversion or misuse in a manner adverse to U.S. national security and foreign policy. In other words, there is a substantial risk that firearms and related items exported to those destinations will fall into the hands of organizations and individuals that will use those items to expand transnational drug operations, spark regional conflicts, commit acts of terrorism, abuse human rights, destabilize governments, or harm communities. Applying a presumption of denial to license applications for those exports will ensure that the licensing process fully and consistently accounts for those risks, thereby significantly furthering and safeguarding U.S. national security and foreign policy interests.

In addition, transparency with respect to destinations of concern will promote predictable and timely review of license applications and will help industry and other stakeholders understand the licensing process. It will also make the review process more efficient, thereby allowing BIS to focus time and resources on other license applications, including applications for exports to other destinations and applications to government end users in all destinations. Instead of reassessing the risks associated with transactions involving destinations identified in the Firearms Guidance Memorandum as presenting a substantial risk of diversion or misuse, BIS will be able to focus on assessing applications that present other, varying risk factors or indicia of reliability.

Moreover, exporters will have the opportunity to overcome the presumption of denial by demonstrating that a specific transaction does not present a substantial risk of diversion or misuse. A presumption of denial, as opposed to an absolute prohibition, will provide BIS with the flexibility to tailor its review to the individual facts and related policy interests. For example, BIS may recommend to approve a transaction involving a non-government security service charged with protecting a third-country embassy in a destination identified in the Firearms Guidance Memorandum as presenting a substantial risk of diversion or misuse. Notably, a presumption of denial in the firearms context is generally consistent with BIS's licensing review policies under the EAR, including in connection with other sensitive items and destinations of concern.

State has also committed to lead an interagency process to assess periodically, the risk that exports of firearms and related items to specific destinations, including those identified on the list, will be diverted or misused in a manner adverse to U.S. national

security and foreign policy. State will also lead a periodic interagency review of the factors and other aspects of in the Firearms Guidance Memorandum, with the goal of updating both the guidance memorandum and its list of destinations on an annual basis. State has also noted that the Firearms Guidance Memorandum and corresponding list of destinations may be updated outside of the annual window if there are exigent circumstances (*e.g.,* a coup) or if updates are otherwise needed to advance U.S. national security and foreign policy interests.

BIS will review any changes recommended as the result of the State-led, interagency-informed assessment process, and maintain the list in supplement no. 3 to part 742 of the EAR. BIS will publish any additions or deletions to the list in the **Federal Register**. As set forth in new supp. no. 3 to part 742, the list of countries for which there is a presumption of denial application review policy for exports and reexports to non-governmental end users is as follows: The Bahamas, Bangladesh, Belize, Bolivia, Burkina Faso, Burundi, Chad, Colombia, Dominican Republic, Ecuador, El Salvador, Guatemala, Guyana, Honduras, Indonesia, Jamaica, Kazakhstan, Kyrgyzstan, Laos, Malaysia, Mali, Mozambique, Nepal, Niger, Nigeria, Pakistan, Panama, Papua New Guinea, Paraguay, Peru, Suriname, Tajikistan, Trinidad and Tobago, Uganda, Vietnam, and Yemen.

iii. Addition of factors that will be considered for all 0x5zz license applications regardless of end user. For all end users, paragraph (b)(3) details specific factors that BIS will consider in assessing the risk that firearms and related items will be diverted or misused in a manner that would adversely impact U.S. national security or foreign policy. For each license application, BIS will specifically review concerns in the destination associated with state fragility, human rights and political violence, terrorism, corruption, organized crime or gang-related activity, drug trafficking, and past diversion or misuse of firearms; the nature of the end user; the capabilities, potential uses, and lethality of the item; and other factors as needed. As always, license applicants are strongly encouraged to consider license review factors that are detailed in the EAR when sourcing potential customers abroad.

3. *Revision to license review policies for Exports of Firearms to Organization of American States (OAS) Member Countries.*

Consistent with Commerce's findings during its policy review, this IFR revises the licensing policies for the export and reexport of most firearms and related items to all OAS member countries, under § 742.17(b). There continue to be two distinct licensing policies for exports and reexports of firearms and related items to OAS member countries: a case-by-case review policy and a policy of denial for applications linked to drug trafficking, terrorism, and criminal activities. These are further discussed below under this section D.3.

Under this IFR, applications supported by an FC Import Certificate or equivalent official document issued by the government of the importing country will now be reviewed on a case-by-case basis, as opposed to the license review policy of general approval that applied before. This change matches the text in other provisions in part 742 of the EAR, which use the ''case-by-case'' text. Previously, applications supported by an FC Import Certificate or equivalent official document would ''generally be approved.'' With the increased visibility into transactions provided by other regulatory changes discussed in this IFR, a ''case-by-case'' review policy more accurately reflects the standards under which BIS will assesses these applications going forward. As part of the license review process, BIS will continue utilizing a variety of open-source and classified resources and anticipates that the other regulatory changes implemented by this IFR will provide increased visibility regarding these applications. These changes are expected to result in a decrease of 100 license applications received annually by BIS, due to certain applicants being deterred from applying for licenses because of the case-by-case license review policy.

This IFR does not change the review policy of denial for applications linked to drug trafficking, terrorism, and criminal activities. Applications linked to drug trafficking, terrorism, and transnational organized crime activities will continue to be reviewed under a policy of denial. This retention of the existing policy is not expected to have any impact on the number of license applications received by BIS.

E. Changes in Support Document Requirements for Firearms License Applications

1. Import Certificate Requirements

i. Require submission as part of the license application for all firearms license applications for Organization of American States (OAS) member countries and other destinations that require an import certificate or equivalent official document for the importation of firearms. Previously, BIS required the submission of an import certificate or other equivalent official document only for OAS member states; for non-OAS member states that require an import certificate or equivalent official document, the applicant was required to obtain a copy of such documentation but was not required to submit it with the license application unless specifically requested by BIS. Under this IFR, the requirement that all license applications for firearms and related items include an import certificate or equivalent official document as part of the submission will minimize the risk of an exporter failing to obtain an import certificate or equivalent official document if required by the importing country. This requirement will also help ensure that the importing country's government is aware of the shipment and has confirmed that the import is lawful. This requirement applies to all firearms and related items described under 0x5zz ECCNs. These changes are expected to result in an increase of 250 import certificates or other equivalent official documents that need to be submitted with BIS licenses. BIS estimates that the time to submit each document will be 1 minute. This will result in an increase in burden hours of 4 hours.

ii. Combining the OAS and non-OAS requirements to simplify the requirements and improve understanding. To facilitate this support document requirement, this IFR revises § 748.12, which addresses requirements for obtaining an import certificate or import permit. Previously, paragraph (a) specified the requirements for OAS member states and paragraph (e) specified the requirements for non-OAS member states. Given the detail set forth regarding the required documentation, and the fact that all destinations will be treated the same, this IFR removes previous paragraph (e). All applicable information in previous paragraph (e) is moved to revised paragraph (a), and conforming changes are included in revised paragraphs (a) through (d). These formatting and clarifying changes are expected to facilitate compliance and are not expected to have any impact on the number of import certificates or other equivalent official documents received by BIS. Paragraph (a)(2)(i) details OAS member countries; BIS is taking this opportunity to add a reference to this paragraph that OAS member countries includes any member country that has acceded in accordance with Chapter III of the Charter of the Organization of American States.

2. Requiring Purchase Orders for Certain Firearms License Applications

i. Conforming changes to provide clarity and to make the requirements easier to understand. To facilitate understanding by the public regarding the changes discussed in sections E.2.ii and E.3 of this preamble, this IFR redesignates paragraphs (aa) and (bb) to supplement no. 2 to part 748 (Unique Application and Submission Requirements), such that previous (aa) paragraph, detailing ''600 Series Major Defense Equipment,'' is redesignated as paragraph (bb). Previous paragraph (bb) detailing ''semi-automatic firearms controlled under ECCN 0A501.a'' is redesignated as paragraph (aa), such that it follows existing paragraph (z) detailing ''exports of firearms and certain shotguns temporarily in the U.S.'' By making these changes so that the contents of paragraphs (z) and redesignated paragraph (aa) appear sequentially, these requirements should be clearer to the public.

This IFR also revises redesignated paragraph (aa) to include the unique application and submission requirements that apply to exports of other firearms, certain shotguns, and related items. The contents of the original paragraph, ''semiautomatic firearms controlled under ECCN 0A501.a,'' are redesignated under (aa)(1), with conforming revisions made to the title corresponding to the addition of new ECCNs detailed above. New paragraph (aa)(2) requires the submission of purchase documentation for certain applications. New paragraph (aa)(3) requires the submission of passport or other national identity card information for certain applications. Requirements in new paragraphs (aa)(2) and (3) are detailed below. These formatting and clarifying changes are not expected to have any impact on the number of purchase orders received by BIS.

ii. Addition of purchase order requirement for non-A:1 countries. This IFR amends the EAR to require that a purchase order be submitted for exports and reexports of firearms and related items to non-A:1 countries. Previously, exporters were not required to submit a purchase order with BIS license applications, unless requested during the course of BIS's review of a particular application. This practice created a number of challenges. First, BIS processed and reviewed many applications that did not result in actual exports, thereby unnecessarily expending staffing resources. Previously, less than 20% of licensed quantities were actually exported. In addition, such licensing that did not result in exports offered limited visibility into actual demand for U.S. firearms abroad, which in turn made effective monitoring of diversion risks more difficult. Requiring purchase orders for exports and reexports to non-A:1 countries will enable BIS to use licensed quantities to estimate *bona fide* local demand, thereby ensuring that BIS can appropriately evaluate the national security and foreign policy risks associated with a given transaction and effectively allocate review and processing resources. This IFR specifies that purchase orders must be dated within 1 year of their submission with a license application. Purchase orders are required for certain items controlled under ECCNs 0A501 (except 0A501.y), 0A502, 0A505 (except 0A505.c), 0A505.d, and 0A505.e), 0A506, 0A507, and 0A508, and 0A509. Upon approving a license for these items, BIS will generally limit the licensed quantity to the quantity specified on the purchase order. However, applicants may request up to a 10% increase in quantity from the purchase order amount, which will be reviewed on a case-by-case basis. Additionally, parties may export or reexport various model types under the approved license, so long as the items remain consistent with the ECCN and ECCN item level paragraph specified on the approved application. These requirements appear in new paragraph (aa)(2) of supplement no. 2 to part 748. These changes are expected to result in a net increase of 7,109 purchase orders that will need to be submitted with license applications. BIS estimates that the time required to submit each will be 1 minute; this will result in an increase in burden hours of 116 hours. That estimate factors in that these changes are expected to result in a decrease of 500 license applications received annually because some exporters will be unwilling or unable to provide purchase orders.

3. Requiring Passport or National Identity Card for Firearms License Applications for Natural Persons Located in Destinations Other Than in Country Group A:1

Governmental purchasers and commercial distributors constitute the vast majority of end users identified on firearms license applications. However, in some cases, an exporter or reexporter may apply for a license to export or reexport firearms to a natural person (individual) abroad. This IFR amends the EAR to require that a passport or national identity card be submitted for exports and reexports of firearms and related items to natural persons in non-A:1 countries. Previously, passports or other national identity cards were not required with submission of applications for export to individuals unless requested by BIS for a specific license application. Based on its history of reviewing applications destined for individual recipients, BIS has determined that a passport or national identity card would help ensure robust vetting of the appropriate end user identified on the application, including vetting by local law enforcement in the recipient country, particularly to address any potential diversion risks. For example, BIS might use a national identity card to distinguish between individuals with the same name. Under this IFR, license applications for items controlled under ECCNs 0A501 (except 0A501.y), 0A502, 0A504, 0A505 (except 0A505.c, 0A505.d, and 0A505.e), 0A506, 0A507, 0A508, and 0A509 for individuals in destinations other than Country Group A:1 require the submission of passport or other national identity card information for all named individual recipient end users of those items. This requirement is detailed under new paragraph (aa)(3) to supplement no. 2 to part 748. These changes are expected to result in an increase of 3,160 passports or other national identity card information that will be submitted annually. BIS estimates that the time required to submit each document is 1 minute; resulting in an increase in burden hours of 57 hours. That estimate factors in that these changes are expected to result in a decrease of 100 license applications received annually by BIS, because some individuals will not want to provide such information to exporters or reexporters as part of the license application process.

F. Adoption of Formalized Interagency Working Group for Firearms License Application To Enhance the Existing Interagency License Review Process

BIS license applications involving 0x5zz items are reviewed by the longstanding interagency review processes specified under part 750 of the EAR. Accordingly, BIS has consulted with interagency partners regarding the review of license applications for exports and reexports of these items since their respective additions to the CCL. Additionally, BIS has participated in an informal interagency working group with representatives from State since summer 2023 to ensure appropriate focus on firearms license applications. This interagency review process is an important mechanism in ensuring that U.S. national security and foreign policy

interests are adequately considered in all licensing decisions.

This IFR builds on the existing review process by formalizing an interagency working group, chaired by State, to evaluate firearm diversion and misuse risks. By formalizing an interagency working group on the review process for licensing involving firearms and related items, BIS seeks to ensure proactive tracking across relevant stakeholder agencies of licensing and export data, ongoing review of licenses or pending applications of concern, and collaboration on addressing issues in various countries or with specific end users. Formalizing this process will help ensure its longevity and showcase the U.S. Government's commitment to its success. The creation of a formal interagency working group will help ensure that the risk factors outlined in this IFR (including terrorism, state fragility, corruption, human rights, political violence, and past diversion or misuse) are thoroughly vetted by interagency experts when reviewing firearms-related license applications. State has also committed to lead interagency efforts to use this working group to assess the determinations set out in the Firearms Guidance Memorandum, with the goal of revising the memorandum and updating its list of high-risk destinations annually and as needed. Interagency licensing working groups are detailed under § 750.4(d) of the EAR. This IFR will add § 750.4(d)(2)(v), which describes a new working group called ''The Safeguard.'' The Safeguard will be chaired by State and will review license applications involving firearm-related items controlled under 0x5zz ECCNs. These changes are not expected to have any impact on the number of license applications received by BIS.

G. Reduction in General License Validity Period (1-Year License Validity for Firearms Licenses)

This IFR amends the EAR to reduce the general validity period from four years to one year for all future licenses involving firearms and related items. Because national security and foreign policy considerations (including human rights-related considerations) in destinations abroad can change rapidly, the risks or potential benefits associated with certain transactions can be difficult to predict several years in advance. Limiting the length of the license validity period will lead to more frequent reviews of exports and thus enable BIS to account for developments and often fluid circumstances in destinations; doing so enables more precise and timely consideration of diversion risk and national security and foreign policy interests. A shortened validity period also reduces the risk of shipments on an expired import certificate, as well as the risk that BIS has to suspend or revoke a license based on rapidly developing national security and foreign policy concerns.

Previously, the general license validity period for a BIS license (with limited exceptions) was four years. Under this IFR, items controlled under ECCNs 0A501, 0A502, 0A504, 0A505, 0A506, 0A507, 0A508, and 0A509 are generally limited to a 12-month validity period under revised § 750.7(g). Licenses extending beyond 12 months for firearms and related items may still be granted in certain limited circumstances, such as transactions involving intra-company transfers of items (*e.g.,* from a subsidiary to a parent company) or government contracts that require a period of performance longer than 12 months. This IFR does not make any other changes to § 750.7(g), and all other aspects of the license validity period (such as expiration date) continue to apply to firearms and related items. This change is expected to result in an increase of 500 license applications received annually by BIS.

H. Changes To Make Mandatory in the Automated Export System the Identification of End-Item Firearms and Shotguns, Along With Certain ''Parts,'' ''Components,'' Devices, ''Accessories,'' and ''Attachments'' for Semi-Automatic Firearms and Semi-Automatic Shotguns, and Conforming Changes to Conventional Arms Reporting Requirements

As referenced above under section C of this preamble, this IFR creates four new ECCNs, 0A506, 0A507, 0A508, and 0A509, to help distinguish between non-automatic and semi-automatic firearms exports in AES EEI filings, along with the export of certain ''parts,'' ''components,'' devices, ''accessories,'' and ''attachments'' for semi-automatic firearms and semi-automatic shotguns. However, in order to further enhance the export data to distinguish between end-item firearms exports and other firearms ''parts,'' ''components,'' devices, ''accessories, or ''attachments'' exports, as well as simplify the conventional arms reporting requirements for firearms under the EAR (§ 743.4), this IFR revises the requirement in § 758.1(g)(4)(ii), which previously allowed exporters to complete their conventional arms reporting requirements without submitting conventional arms reports to BIS. This IFR revises this reporting requirement by making conventional arms reporting information in the EEI filing in AES mandatory; it does this by specifying that exporters must include the items-level classification or other items-level descriptor in the Commodity description block in the EEI filed in AES. Section I further describes the conventional arms reporting-related changes to the EAR that are being made by this IFR.

Specifically, this IFR revises paragraph (g)(4)(ii) to expand the scope of the heading to include certain ''parts,'' ''components,'' devices, ''accessories,'' and ''attachments'' controlled under new ECCN 0A509. Because of the importance of these commodities for semi-automatic firearms and semi-automatic shotguns, additional visibility is needed regarding these ''parts,'' ''components,'' devices, ''accessories,'' and ''attachments'' controlled under new ECCN 0A509, as well as the commodities controlled under ECCNs 0A506, 0A507, and 0A508, for the export clearance requirement under paragraph (g)(4)(ii).

This IFR revises the paragraph (g)(4)(ii) introductory text to make the requirements of this paragraph mandatory instead of optional for all shipments that meet the specified criteria. It also expands the scope of this mandatory export clearance requirement to include not just ECCNs 0A501.a or .b and shotguns with a barrel length less than 18 inches controlled under ECCN 0A502, but also to include items controlled under ECCNs 0A501.a or .b, 0A506.a or .b, 0A507.a and .b, shotguns with a barrel length less than 18 inches controlled under ECCNs 0A502 or 0A508.a. or .b, or ''parts,'' ''components,'' devices, ''accessories,'' or ''attachments'' controlled under 0A509.a, .b, .c, or .d, as of the effective date of this IFR. To assist exporters in identifying the information that must be included in the Commodity description block in the EEI filing in AES, this IFR also adds new paragraphs (g)(4)(ii)(A) through (F). This information will be particularly helpful for certain ECCNs, such as new ECCN 0A506.a, which controls any semi-automatic centerfire (non-rimfire) rifles equal to .50 caliber (12.7 mm) or less that has any of the characteristics that will be specified under 0A506.a.1 through .a.6. New paragraph (g)(4)(ii)(C) specifies that, in that case, .a will appear as the first text in the Commodity description block in the EEI filing in AES. These changes are not expected to result in an increase in burden; a commodity description was already required to be provided in the EEI in AES prior to the effective date of this IFR, so including this additional information as part of the commodity

description will not change the burden hours for exporters.

I. Conventional Arms Reporting—Related Changes

This IFR revises the conventional arms reporting requirements in § 743.4 to make a conforming change for new ECCNs 0A506.a. and .b and 0A507.a. and .b. This IFR also revises § 743.4 to specify that BIS will be relying solely on the alternative submission method for obtaining the required information for the conventional arms reporting, as was also referenced above under section F of this preamble.

1. *Conforming change to add 0A506.a and .b and 0A507.a and .b to the conventional arms reporting requirements.* This IFR revises § 743.4 to add references to the end-item firearms controlled under ECCNs 0A506.a and .b and 0A507.a, .b, and .c, to specify that these semi-automatic rifles and pistols are included for the conventional arms reporting for the Wassenaar Arrangement semi-annual reporting and the United Nations annual report described under § 743.4. This approach is consistent with how these items were previously reported when controlled under ECCN 0A501.a or .b. The changes discussed below regarding BIS's use of EEI data to meet conventional arms reporting requirements affect both the existing ECCNs and the newly added ECCNs referenced in § 743.4 (*i.e.,* ECCNs 0A501.a and .b, 0A506.a and .b, and 0A507.a. and .b).

2. *Specifying that BIS will use AES EEI data to meet the conventional arms reporting requirements of 0A501.a and .b, 0A506.a and .b, and 0A507.a and .b.*

In preparing this IFR, BIS reevaluated the conventional arms reporting requirements under existing § 743.4 and the alternative submission method for ECCN 0A501.a and .b referenced under §§ 743.4(h) and 758.1(g)(4)(ii) based on its experience since ECCNs 0A501.a and .b were added to the EAR on March 9, 2020. BIS determined, based on this review, that the conventional arms reporting requirements could be simplified by making the alternative submission method the sole method that exporters use to submit the information to meet the conventional arms reporting requirement for ECCN 0A501.a or .b, as well as for semi-automatic rifles controlled under ECCN 0A506.a and .b and semi-automatic pistols controlled under 0A507.a and .b.

Previously, BIS added the alternative submission method in § 743.4(h) of the EAR as part of the January 2020 EAR final rule to reflect exporters' recommendation that BIS use AES EEI data to obtain the information required for these two conventional arms reports. The alternative submission method gave exporters the option of including the additional .a or .b information as the first characters to appear in the commodity description block in AES, rather than requiring submission of information on end-item firearms under ECCN 0A501.a and .b in separate reports to BIS. Based on data reviewed by BIS, nearly all exporters have been using this alternative submission method to meet their conventional arms reporting requirements since March 9, 2020, the effective date of the January 2020 rule. The alternative submission method has also been an efficient method for extracting the data needed by BIS to prepare these reports.

In addition, consistent with BIS's interest in increasing transparency regarding exports and reexports of the semi-automatic firearms and related ''parts,'' ''components,'' devices, ''accessories,'' and ''attachments,'' this IFR revises § 758.1(g)(4)(ii), as described above under section F, to include the ''items'' level paragraph classification as the first characters to appear in the Commodity description block in the EEI filed in AES mandatory for ECCNs 0A501.a and .b, 0A506.a and .b, 0A507.a and .b, 0A508.a and .b. Given that a commodity description was already previously required in the EEI filing in AES, including this additional information as part of the commodity description is not expected to change the burden hours for exporters.

As a result of the requirement to submit item paragraph information in AES, the existing provisions in § 743.4 that require exporters to submit annual and semi-annual reports for the purposes of conventional arms reporting via email (''standard method'') unless the exporter provides the item paragraph classification with the exporter's AES EEI filings (''alternative method'') are no longer necessary, because BIS will be able to rely on AES data pursuant to the revisions to § 758.1(g)(4)(ii) addressing conventional arms reporting for ECCN 0A501.a and .b, as well as for 0A506.a and .b and 0A507.a and .b. These changes will streamline the exporter's reporting obligations by limiting them to the AES filing requirement. Because nearly all exporters that were required to submit conventional arms reports to BIS were already using the alternative method, the elimination of the submission of email reports as an available method under revised § 743.4 will not result in a substantive change in the burden on exporters.

J. Revocations and Modifications to Existing Licenses

Based on the policy rationale identified above, BIS has determined that it is necessary to revoke or modify certain valid licenses for the export and reexport of firearms and related items to non-government end users. As described below, on July 1, 2024, BIS will revoke all currently valid licenses to non-government end users in High-Risk Destinations for Firearms and Related Items. (*See* supplement no. 3 to part 742.) In addition, on May 30, 2024, BIS will modify certain other valid licenses with validity periods that end more than one year from the effective date of this IFR by rendering them invalid one year from the effective date of this IFR. These modified licenses cover exports and reexports to non-government end users in destinations outside High-Risk Destinations for Firearms and Related Items, Country Group A:1, Israel, and Ukraine.

1. License Revocations

On July 1, 2024, pursuant to § 750.8 of the EAR, BIS will revoke existing licenses for the export and reexport of firearms and related items to non-government end users in destinations identified in supplement no. 3 to part 742 (High-Risk Destinations for Firearms and Related Items). As discussed above, the Firearms Guidance Memorandum has identified that there is a substantial risk that firearms and related items exported or reexported to non-government end users in these destinations will be diverted or misused in a manner adverse to U.S. national security and foreign policy, including for use in drug trafficking, regional conflict, or human rights abuses. Accordingly, as discussed above, this IFR applies a presumption of denial to all license applications submitted on or after May 30, 2024 and seeking to export or reexport firearms and related items to non-government end users in these destinations. Existing licenses for exports and reexports to non-government end users in these destinations were issued under previous review criteria. Accordingly, failure to revoke these licenses would allow firearms and related items to continue to be exported to these destinations for up to several more years without review under the new policy. Such ongoing exports or reexports of firearms and related items could create a substantial risk of diversion and stockpiling in a manner contrary to U.S. national security and foreign policy interests.

BIS will issue these revocations on July 1, 2024, 30 days after the effective

date of this IFR, to ensure that planned shipments may be completed without disruption to ongoing trade. For any license that is revoked, the license holder may appeal a revocation to the Under Secretary for Industry and Security pursuant to § 756 of the EAR. Procedures for filing such an appeal are described in detail in § 756.2(b) of the EAR and will be included in the letters that BIS will send to notify license holders of the pending revocation. License holders whose license(s) are revoked by BIS may reapply to export or reexport the items covered by the revoked license without prejudice under BIS's new licensing policy, as described in this IFR.

2. License Modification

In addition to revoking the licenses described above, BIS will, upon the effective date of this IFR, May 30, 2024, pursuant to § 750.8 of the EAR, modify certain existing licenses for firearms and related items to non-government end users that have more than one year remaining of their validity periods to render them invalid on May 30, 2025. These modifications will not affect licenses to non-government end users in Country Group A:1, Israel, and Ukraine (which implement export controls consistent with the Wassenaar Arrangement), or to High-Risk Destinations for Firearms and Related Items. The affected licenses were not reviewed under the new policies established in this IFR, and were issued with a four-year validity period rather than the one-year general validity period established in this IFR. As discussed elsewhere in this IFR, BIS is shortening the validity period of licenses to export or reexport firearms and related items to one year to enable more precise consideration of the risk of diversion or misuse, consistent with national security and foreign policy interests. Accordingly, BIS is modifying the validity period of certain existing licenses, not subject to revocation, in furtherance of this effort.

The revocations and modifications described in section J, are expected to result in an increase of 270 license applications received annually by BIS. However, this is anticipated to be a one-time increase.

K. Request for Public Comment

In addition to seeking public comment on the changes reflected in this IFR, including the four new ECCNs and conforming changes (*see* Table 1 under section B.6 of this IFR), BIS is specifically seeking public comment on the issues below. See the **ADDRESSES** section of this rule for instructions on how to submit comments.

(1) BIS seeks comments on the expected impact on individuals, as well as industry, should BIS impose a time limit on the use of § 740.14 BAG License Exception for firearms classified under ECCNs 0A501, 0A502, 0A506, 0A507, and 0A508. Such limits would require the items to be returned to the United States or other country of re-export within the specified time limit, or to otherwise be disposed of in accordance with the EAR, *e.g.,* by obtaining a BIS license to authorize a longer temporary export or a permanent export. For temporary exports or reexports longer than the BAG time limit, a license would be required to authorize the export or reexport. In considering revisions to BAG, BIS identified that imposing a time limit of 45-, 60-, 90-, or 180-days on how long the exporter is eligible to keep the firearms out of the country could help address diversion risks.

(2) BIS seeks comments on potential additional revisions to § 740.14 of the EAR to require exporters of applicable firearms and related commodities authorized under License Exception BAG to submit EEI filings in AES under § 758.1(b)(9). This IFR does not make changes to the exemption from the EEI filing requirements for License Exception BAG authorized exports or the export clearance requirements under § 758.11, which will continue to require submission of the CBP Form 4457. However, BIS seeks comments on the potential impact on individuals if BIS were to remove the requirements in § 758.11 and instead require mandatory EEI filing in AES. BIS is aware of concerns about requiring individuals to file EEI in AES for License Exception BAG authorized exports; because of the benefits to increasing transparency and reducing the chance of diversion, BIS is considering whether additional changes may be warranted in this export clearance area. BIS also welcomes comments that provide alternative suggestions for increasing transparency and reducing diversion risk without imposing a mandatory EEI filing requirement in AES for exports authorized under License Exception BAG.

Export Control Reform Act of 2018

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

Rulemaking Requirements

1. BIS has examined the expected impact of this IFR as required by Executive Orders 12866, 13563, and 14094, which direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public, health, and safety effects, distributive impacts, and equity). This IFR is considered a ''significant regulatory action'' under section 3(f) of Executive Order 12866, as amended by Executive Order 14094.

2. Notwithstanding any other provision of law, no person may be required to respond to or be subject to a penalty for failure to comply with a collection of information, subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (PRA), unless that collection of information displays a currently valid Office of Management and Budget (OMB) Control Number. This regulation involves five collections currently approved by OMB.

- OMB Control Number 0694–0088, *Simplified Network Application Processing System;*
- OMB Control Number 0694–0096, *Five Year Records Retention Period;*
- OMB Control Number 0694–0122, *Licensing Responsibilities and Enforcement;*
- OMB Control Number 0694–0137, *License Exceptions and Exclusions;* and
- OMB Control Number 0607–0152, *Automated Export System (AES) Program.*

Additional information regarding these collections of information—including all background materials—can be found at *https://www.reginfo.gov/public/do/PRAMain* by using the search function to enter either the title of the collection or the OMB Control Number.

With regard to control number 0694–0088, *Simple Network Application Process and Multipurpose Application Form.* BIS expects an increase of 1003 burden hours for this collection; however, 132 hours of this increase is anticipated to be a one-time increase related to the revocation and modification of licenses for firearms and related items described in section J of this IFR. These additional burden hours will be added during the current renewal approval process for this information collection.

For OMB control number 0694–0137, *License Exceptions and Exclusions,* BIS expects a slight increase in burden

hours for this collection because of the new restriction on the use of License Exceptions under § 740.2(a)(24). This requires exporters to obtain a copy of an import certificate or equivalent document (if required by the importing country) before the exporter can use any license exception for items controlled under ECCNs 0A501, 0A502, 0A504, 0A505, 0A506, 0A507, 0A508, and 0A509. Although BIS anticipates that this requirement could increase reporting burden to some degree under this collection, BIS believes that exporters, as part of their existing compliance programs, likely already have processes in place to confirm whether the firearms and related items that are to be exported may be imported into these foreign countries. BIS believes this requirement is likely reflective of practices and processes exporters already have in place and will therefore be of a minimal burden to exporters. BIS welcomes comments on this information collection requirement and on the assumptions that this confirmation requirement is not a deviation from exporters' current practices to ensure that exports of firearms and related items that are authorized under BIS license exceptions may be imported into the respective countries of import. In order to protect U.S. national security and foreign policy interests and to ensure that EAR license exceptions are not used to authorize an export of a firearm or related commodity when a foreign government requires an import certificate or other equivalent document that has not been issued, this IFR imposes a new general restriction on the use of all EAR license exceptions under § 740.2(a)(24). A similar type of import certificate or other equivalent document requirement applies for items authorized under a BIS license.

The AES change included in this rule under § 758.1(g)(4)(ii) is not anticipated to result in a change in the burden under the OMB control number 0607–0152, *Automated Export System (AES) Program* because exporters are already required to provide a description in the Commodity description block in the EEI filing in AES. Similarly, changes impacting OMB control numbers 0694–0096 and 0694–0122, *Five Year Records Retention Period* and *Licensing Responsibilities and Enforcement,* respectively, are not expected to result in an increase in burden hours.

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

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

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

List of Subjects

15 CFR Part 732, 738, 740, 750, and 758

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

15 CFR Part 734

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

15 CFR Part 742

Exports, Terrorism.

15 CFR Part 743

Administrative practice and procedure, Reporting and recordkeeping requirements.

15 CFR Part 748

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

15 CFR Part 762

Administrative practice and procedure, Business and industry, Confidential business information, Exports, Reporting and recordkeeping requirements.

15 CFR Part 772

Exports.

15 CFR Part 774

Exports, Reporting and recordkeeping requirements, Terrorism.

Accordingly, parts 732, 734, 738, 740, 742, 743, 748, 750, 758, 762, 772 and 774 of the Export Administration Regulations (15 CFR parts 730–774) are amended as follows:

PART 732—STEPS FOR USING THE EAR

■ 1. The authority citation for 15 CFR part 732 continues to read as follows:

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

■ 2. Section 732.2 is amended by revising paragraph (b) introductory text to read as follows:

§ 732.2 Steps regarding scope of the EAR.

* * * * *

(b) *Step 2: Publicly available technology and software.* This step is relevant for both exports and reexports. Determine if your technology or software is publicly available as defined and explained at part 734 of the EAR. The Bureau of Industry and Security (BIS) website at *https://www.bis.doc.gov* contains several practical examples describing publicly available technology and software that are outside the scope of the EAR under the FAQ section of the website. See the FAQs under the heading, EAR Definitions, Technology and Software, Fundamental Research, and Patents FAQs at *https://www.bis.doc.gov/index.php/documents/compliance-training/export-administrationregulations-training/1554-ear-definitions-faq/file.* The examples are illustrative, not comprehensive. Note that encryption software classified under ECCN 5D002 on the Commerce Control List (refer to supplement no. 1 to part 774 of the EAR) is subject to the EAR even if publicly available, except for publicly available encryption object code software classified under ECCN 5D002 when the corresponding source code meets the criteria specified in § 740.13(e) of the EAR. The following also remains subject to the EAR: ''Software'' or ''technology'' for the production of a firearm, or firearm frame or receiver, controlled under ECCNs 0A501, 0A506, 0A507, or 0A509, as referenced in § 734.7(c) of the EAR.

* * * * *

PART 734—SCOPE OF THE EXPORT ADMINISTRATION REGULATIONS

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

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

■ 4. Section 734.7 is amended by revising paragraph (c) to read as follows:

§ 734.7 Published.

* * * * *

(c) The following remains subject to the EAR: ''software'' or ''technology'' for the production of a firearm, or firearm

frame or receiver, controlled under ECCNs 0A501, 0A506, 0A507, or 0A509, that is made available by posting on the internet in an electronic format, such as AMF or G-code, and is ready for insertion into a computer numerically controlled machine tool, additive manufacturing equipment, or any other equipment that makes use of the ''software'' or ''technology'' to produce the firearm frame or receiver or complete firearm.

* * * * *

PART 738—COMMERCE CONTROL LIST OVERVIEW AND THE COUNTRY CHART

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

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

■ 6. Supplement no. 1 to part 738 is revised to read as follows:

SUPPLEMENT NO. 1 TO PART 738—COMMERCE COUNTRY CHART

[Reason for control]

Countries	Chemical and biological weapons			Nuclear nonproliferation		National security		Missile tech	Regional stability		Firearms convention	Crime control			Anti-terrorism	
	CB 1	CB 2	CB 3	NP 1	NP 2	NS 1	NS 2	MT 1	RS 1	RS 2	FC 1	CC 1	CC 2	CC 3	AT 1	AT 2
Afghanistan	X	X	X	X		X	X	X	X	X		X	X	X		
Albania[2 3]	X	X		X		X	X	X	X	X			X			
Algeria	X	X		X		X	X	X	X	X		X	X	X		
Andorra	X	X		X		X	X	X	X	X		X	X	X		
Angola	X	X		X		X	X	X	X	X		X	X	X		
Antigua and Barbuda	X	X		X		X	X	X	X	X	X	X	X	X		
Argentina	X					X		X	X		X	X	X	X		
Armenia	X	X	X	X		X	X	X	X	X		X	X			
Aruba	X	X		X		X	X	X	X	X		X	X	X		
Australia[3]	X					X		X	X				X			
Austria[3 4]	X					X		X	X				X			
Azerbaijan	X	X	X	X		X	X	X	X	X		X	X			
Bahamas, The	X	X		X		X	X	X	X	X	X	X	X	X		
Bahrain	X	X	X	X		X	X	X	X	X		X	X	X		
Bangladesh	X	X		X		X	X	X	X	X		X	X	X		
Barbados	X	X		X		X	X	X	X	X	X	X	X	X		
Belarus[6]	X	X	X	X	X	X	X	X	X	X		X	X			
Belgium[3]	X					X		X	X				X			
Belize	X	X		X		X	X	X	X	X	X	X	X	X		
Benin	X	X		X		X	X	X	X	X		X	X	X		
Bhutan	X	X		X		X	X	X	X	X		X	X	X		
Bolivia	X	X		X		X	X	X	X	X	X	X	X	X		
Bosnia and Herzegovina	X	X		X		X	X	X	X	X		X	X	X		
Botswana	X	X		X		X	X	X	X	X		X	X	X		
Brazil	X	X				X	X	X	X	X	X	X	X	X		
Brunei	X	X		X		X	X	X	X	X		X	X	X		
Bulgaria[3]	X					X		X	X				X			
Burkina Faso	X	X		X		X	X	X	X	X		X	X	X		
Burma	X	X	X	X		X	X	X	X	X		X	X	X		
Burundi	X	X		X		X	X	X	X	X		X	X	X		
Cambodia	X	X		X		X	X	X	X	X		X	X			
Cameroon	X	X		X		X	X	X	X	X		X	X	X		
Canada	X										X					
Cape Verde	X	X		X		X	X	X	X	X		X	X	X		
Central African Republic	X	X		X		X	X	X	X	X		X	X	X		
Chad	X	X		X		X	X	X	X	X		X	X	X		
Chile	X	X		X		X	X	X	X	X	X	X	X	X		
China	X	X	X	X	X	X	X	X	X	X		X	X	X		
Colombia	X	X		X		X	X	X	X	X	X	X	X	X		
Comoros	X	X		X		X	X	X	X	X		X	X	X		
Congo (Democratic Republic of the)[1]	X	X		X		X	X	X	X	X		X	X	X		
Congo (Republic of the)	X	X		X		X	X	X	X	X		X	X	X		
Costa Rica	X	X		X		X	X	X	X	X	X	X	X	X		
Cote d'Ivoire	X	X		X		X	X	X	X	X		X	X	X		
Croatia[3]	X					X		X	X				X			
Cuba	See part 746 of the EAR to determine whether a license is required in order to export or reexport to this destination.															
Curaçao	X	X		X		X	X	X	X	X		X	X	X		
Cyprus[2 3 4]	X					X	X	X	X	X		X	X	X		
Czech Republic[3]	X					X		X	X				X			
Denmark[3]	X					X		X	X				X			
Djibouti	X	X		X		X	X	X	X	X		X	X	X		
Dominica	X	X		X		X	X	X	X	X	X	X	X	X		
Dominican Republic	X	X		X		X	X	X	X	X	X	X	X	X		
Ecuador	X	X		X		X	X	X	X	X	X	X	X	X		
Egypt	X	X	X	X		X	X	X	X	X		X	X	X		
El Salvador	X	X		X		X	X	X	X	X	X	X	X	X		
Equatorial Guinea	X	X		X		X	X	X	X	X		X	X	X		
Eritrea[1]	X	X		X		X	X	X	X	X		X	X	X		
Estonia[3]	X					X		X	X				X			
Ethiopia	X	X		X		X	X	X	X	X		X	X	X		
Fiji	X	X		X		X	X	X	X	X		X	X	X		
Finland[3 4]	X					X		X	X				X			
France[3]	X					X		X	X				X			
Gabon	X	X		X		X	X	X	X	X		X	X	X		
Gambia, The	X	X		X		X	X	X	X	X		X	X	X		
Georgia	X	X	X	X		X	X	X	X	X		X	X			
Germany[3]	X					X		X	X				X			
Ghana	X	X		X		X	X	X	X	X		X	X	X		
Greece[3]	X					X		X	X				X			
Grenada	X	X		X		X	X	X	X	X	X	X	X	X		
Guatemala	X	X		X		X	X	X	X	X	X	X	X	X		

SUPPLEMENT NO. 1 TO PART 738—COMMERCE COUNTRY CHART—Continued

[Reason for control]

Countries	Chemical and biological weapons			Nuclear nonproliferation		National security		Missile tech	Regional stability		Firearms convention	Crime control			Anti-terrorism	
	CB 1	CB 2	CB 3	NP 1	NP 2	NS 1	NS 2	MT 1	RS 1	RS 2	FC 1	CC 1	CC 2	CC 3	AT 1	AT 2
Guinea	X	X		X		X	X	X	X	X		X	X	X		
Guinea-Bissau	X	X		X		X	X	X	X	X		X	X	X		
Guyana	X	X		X		X	X	X	X	X	X	X	X	X		
Haiti	X	X		X		X	X	X	X	X	X	X	X	X		
Honduras	X	X		X		X	X	X	X	X	X	X	X	X		
Hungary [3]	X					X		X	X				X			
Iceland [3]	X					X		X	X				X			
India [7]	X			X		X		X	X				X			
Indonesia	X	X		X		X	X	X	X	X		X	X	X		
Iran [1]	See part 746 of the EAR to determine whether a license is required in order to export or reexport to this destination..															
Iraq [1]	X	X	X	X	X	X	X	X	X	X		X	X			
Ireland [3 4]	X					X		X	X				X			
Israel	X	X	X	X	X	X	X	X	X	X		X	X	X		
Italy [3]	X					X		X	X				X			
Jamaica	X	X		X		X	X	X	X	X	X	X	X	X		
Japan [3]	X					X		X	X				X			
Jordan	X	X	X	X		X	X	X	X	X		X	X	X		
Kazakhstan	X	X	X			X	X	X	X	X		X	X			
Kenya	X	X		X		X	X	X	X	X		X	X	X		
Kiribati	X	X		X		X	X	X	X	X		X	X	X		
Korea, North [1]	See Sections 742.19 and 746.4 of the EAR to determine whether a license is required in order to export or reexport to this destination.															
Korea, South [3 4]	X					X		X	X				X			
Kosovo	X	X		X		X	X	X	X	X		X	X	X		
Kuwait	X	X	X	X		X	X	X	X	X		X	X	X		
Kyrgyzstan	X	X	X	X		X	X	X	X	X		X	X			
Laos	X	X		X		X	X	X	X	X		X	X			
Latvia [3]	X					X		X	X				X			
Lebanon [1]	X	X	X	X		X	X	X	X	X		X	X	X		
Lesotho	X	X		X		X	X	X	X	X		X	X	X		
Liberia	X	X		X		X	X	X	X	X		X		X		
Libya [1]	X	X	X	X	X	X	X	X	X	X		X	X	X		
Liechtenstein [5]	X					X		X	X				X			
Lithuania [3]	X					X		X	X				X			
Luxembourg [3]	X					X		X	X				X			
Macau	X	X	X	X	X	X	X	X	X	X		X	X	X		
Macedonia (The Former Yugoslav Republic of)	X	X		X		X	X	X	X	X		X	X	X		
Madagascar	X	X		X		X	X	X	X	X		X	X	X		
Malawi	X	X		X		X	X	X	X	X		X	X	X		
Malaysia	X	X		X		X	X	X	X	X		X	X	X		
Maldives	X	X		X		X	X	X	X	X		X	X	X		
Mali	X	X		X		X	X	X	X	X		X	X	X		
Malta [2 3 4]	X					X	X	X	X	X		X	X	X		
Marshall Islands	X	X		X		X	X	X	X	X		X	X	X		
Mauritania	X	X		X		X	X	X	X	X		X	X	X		
Mauritius	X	X		X		X	X	X	X	X		X	X	X		
Mexico	X					X		X	X		X	X	X	X		
Micronesia (Federated State of)	X	X		X		X	X	X	X	X		X	X	X		
Moldova	X	X	X	X		X	X	X	X	X		X	X			
Monaco	X	X		X		X	X	X	X	X		X	X	X		
Mongolia	X	X	X	X		X	X	X	X	X		X	X			
Montenegro	X	X		X		X	X	X	X	X		X	X	X		
Morocco	X	X		X		X	X	X	X	X		X	X	X		
Mozambique	X	X		X		X	X	X	X	X		X	X	X		
Namibia	X	X		X		X	X	X	X	X		X	X	X		
Nauru	X	X		X		X	X	X	X	X		X	X	X		
Nepal	X	X		X		X	X	X	X	X		X	X	X		
Netherlands [3]	X					X		X	X				X			
New Zealand [3]	X					X		X	X				X			
Nicaragua	X	X		X		X	X	X	X	X	X	X	X	X		
Niger	X	X		X		X	X	X	X	X		X	X	X		
Nigeria	X	X		X		X	X	X	X	X		X	X	X		
Norway [3]	X					X		X	X				X			
Oman	X	X	X	X		X	X	X	X	X		X	X	X		
Pakistan	X	X	X	X	X	X	X	X	X	X		X	X	X		
Palau	X	X		X		X	X	X	X	X		X	X	X		
Panama	X	X		X		X	X	X	X	X	X	X	X	X		
Papua New Guinea	X	X		X		X	X	X	X	X		X	X	X		
Paraguay	X	X		X		X	X	X	X	X	X	X	X	X		
Peru	X	X		X		X	X	X	X	X	X	X	X	X		
Philippines	X	X		X		X	X	X	X	X		X	X	X		
Poland [3]	X					X		X	X				X			
Portugal [3]	X					X		X	X				X			
Qatar	X	X	X	X		X	X	X	X	X		X	X	X		
Romania [3]	X					X		X	X				X			
Russia [6]	X	X	X	X	X	X	X	X	X	X		X	X			
Rwanda	X	X		X		X	X	X	X	X		X	X	X		
St. Kitts and Nevis	X	X		X		X	X	X	X	X	X	X	X	X		
St. Lucia	X	X		X		X	X	X	X	X	X	X	X	X		
St. Vincent and the Grenadines	X	X		X		X	X	X	X	X	X	X	X	X		
Samoa	X	X		X		X	X	X	X	X		X	X	X		
San Marino	X	X		X		X	X	X	X	X		X	X	X		
Sao Tome and Principe	X	X		X		X	X	X	X	X		X	X	X		
Saudi Arabia	X	X	X	X		X	X	X	X	X		X	X	X		

SUPPLEMENT NO. 1 TO PART 738—COMMERCE COUNTRY CHART—Continued
[Reason for control]

Countries	Chemical and biological weapons			Nuclear nonproliferation		National security		Missile tech	Regional stability		Firearms convention	Crime control			Anti-terrorism	
	CB 1	CB 2	CB 3	NP 1	NP 2	NS 1	NS 2	MT 1	RS 1	RS 2	FC 1	CC 1	CC 2	CC 3	AT 1	AT 2
Senegal	X	X		X		X	X	X	X	X		X	X	X		
Serbia	X	X				X	X	X	X	X		X	X	X		
Seycheles	X	X		X		X	X	X	X	X		X	X	X		
Sierra Leone	X	X		X		X	X	X	X	X		X	X	X		
Singapore	X	X		X		X	X	X	X	X		X	X	X		
Sint Maarten (the Dutch two-fifths of the island of Saint Martin)	X	X		X		X	X	X	X	X		X	X	X		
Slovakia [3]	X					X		X	X				X			
Slovenia [3]	X					X		X	X				X			
Solomon Islands	X	X		X		X	X	X	X	X		X	X	X		
Somalia [1]	X	X		X		X	X	X	X	X		X	X	X		
South Africa [2 3 4]	X	X				X		X	X			X	X	X		
South Sudan, Republic of	X	X		X		X	X	X	X	X		X	X	X		
Spain [3]	X					X		X	X				X			
Sri Lanka	X	X		X		X	X	X	X	X		X	X	X		
Sudan [1]	X	X		X		X	X	X	X	X		X	X	X		
Suriname	X	X		X		X	X	X	X	X	X	X	X	X		
Swaziland	X	X		X		X	X	X	X	X		X	X	X		
Sweden [3 4]	X					X		X	X				X			
Switzerland [3 4]	X					X		X	X				X			
Syria	See § 746.9 of the EAR to determine whether a license is required in order to export or reexport to this destination.															
Taiwan	X	X	X	X		X	X	X	X	X		X	X	X		
Tajikistan	X	X	X	X		X	X	X	X	X		X	X			
Tanzania	X	X		X		X	X	X	X	X		X	X	X		
Thailand	X	X		X		X	X	X	X	X		X	X	X		
Timor–Leste	X	X		X		X	X	X	X	X		X	X	X		
Togo	X	X		X		X	X	X	X	X		X	X	X		
Tonga	X	X		X		X	X	X	X	X		X	X	X		
Trinidad and Tobago	X	X		X		X	X	X	X	X	X	X	X	X		
Tunisia	X	X		X		X	X	X	X	X		X	X	X		
Turkey [3]	X					X		X	X				X			
Turkmenistan	X	X	X	X		X	X	X	X	X		X	X			
Tuvalu	X	X		X		X	X	X	X	X		X	X	X		
Uganda	X	X		X		X	X	X	X	X		X	X	X		
Ukraine [8]	X					X	X	X	X	X		X	X			
United Arab Emirates	X	X	X	X		X	X	X	X	X		X	X	X		
United Kingdom [3]	X					X		X	X				X			
Uruguay	X	X		X		X	X	X	X	X	X	X	X	X		
Uzbekistan	X	X	X	X		X	X	X	X	X		X	X			
Vanuatu	X	X		X		X	X	X	X	X		X	X	X		
Vatican City	X	X		X		X	X	X	X	X		X	X	X		
Venezuela	X	X	X	X	X	X	X	X	X	X	X	X	X	X		
Vietnam	X	X	X	X		X	X	X	X	X		X	X			
Western Sahara	X	X		X		X	X	X	X	X		X	X	X		
Yemen	X	X	X	X		X	X	X	X	X		X	X	X		
Zambia	X	X		X		X	X	X	X	X		X	X	X		
Zimbabwe	X	X		X		X	X	X	X	X		X	X	X		

[1] See § 746.1(b) for United Nations Security Council Sanctions under the EAR. See § 746.3 for United Nations Security Council-related license requirements for exports and reexports to Iraq or transfer within Iraq under the EAR, as well as regional stability licensing requirements not included in the Country Chart.
[2] See § 742.4(a) for special provisions that apply to exports and reexports to these countries of certain thermal imaging cameras.
[3] See § 742.6(a)(3) for special provisions that apply to military commodities that are subject to ECCN 0A919.
[4] See § 742.6(a)(2) and (4)(ii) regarding special provisions for exports and reexports of certain thermal imaging cameras to these countries.
[5] Refer to Switzerland for licensing requirements for Liechtenstein under the EAR.
[6] See § 746.5 of the EAR for additional license requirements under the Russian Industry Sector Sanctions for ECCNs 0A998, 1C992, 3A229, 3A231, 3A232, 6A991, 8A992, and 8D999 and items identified in supplement no. 2 to part 746 of the EAR. See § 746.8 of the EAR for Sanctions against Russia and Belarus, including additional license requirements for items listed in any ECCN on the CCL.
[7] Note that a license is still required for items controlled under ECCNs 6A003.b.4.b and 9A515.e for RS column 2 reasons when destined to India.
[8] See § 746.6 of the EAR for additional license requirements for exports and reexports to the Crimea region of Ukraine and the so-called Donetsk People's Republic (DNR) and Luhansk People's Republic (LNR) regions of Ukraine and transfers (in-country) within the Crimea, DNR, and LNR regions of Ukraine for all items subject to the EAR, other than food and medicine designated as EAR99 and certain EAR99 or ECCN 5D992.c software for internet-based communications.

PART 740—LICENSE EXCEPTIONS

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

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

■ 8. Section 740.2 is amended by:

■ a. Revising paragraphs (a)(4)(iii), (a)(21) and (23); and

■ b. Adding paragraph (a)(24).

The revisions and addition read as follows:

§ 740.2 Restrictions on all License Exceptions.

* * * * *

(a) * * *

(4) * * *

(iii) Authorized by § 740.14(e) of the EAR; or

* * * * *

(21) The reexport or transfer (in-country) of firearms classified under ECCNs 0A501, 0A502, 0A506, 0A507, or 0A508 with either an ITAR-defined ''foreign defense article'' (22 CFR 120.39) that is not subject to Department of State jurisdiction that is incorporated into the firearm or ''knowledge'' that an ITAR-defined ''defense article'' (22 CFR 120.31) will be subsequently incorporated into the firearm, where the ''(foreign) defense article'' is described in USML Category I(h)(2). In such instances, no license exceptions are available except for License Exception GOV (§ 740.11(b)(2)(ii)).

* * * * *

(23) Exports, reexports, or transfers (in-country) of semi-automatic firearms or shotguns controlled under ECCNs 0A506, 0A507, or 0A508 sold under a contract or otherwise part of an export that includes $4,000,000 or more of such items are not eligible for any license exceptions except to personnel and agencies of the U.S. Government

under License Exception GOV (§ 740.11(b) of the EAR), for official use by an agency of NATO, or where a license exception would otherwise be available for the export, reexport, or transfer (in-country) of such items to a destination specified in Country Groups A:5 or A:6 (see supplement no. 1 to part 740 of the EAR) except Mexico, South Africa, or Turkey.

(24) Exporters of items controlled under ECCNs 0A501, 0A502, 0A504, 0A505, 0A506, 0A507, 0A508, or 0A509 wishing to use an EAR license exception for such items must first have the consignee obtain and provide to the exporter an import certification or equivalent document, if the importing country requires one, prior to using an EAR license exception.

* * * * *

■ 9. Section 740.3 is amended by revising paragraph (b) to read as follows:

§ 740.3 Shipments of limited value (LVS).

* * * * *

(b) *Eligible destinations.* This License Exception is available for all destinations in Country Group B (see supplement no. 1 to this part), provided that the net value of the commodities included in the same order and controlled under the same ECCN entry on the CCL does not exceed the amount specified in the LVS paragraph for that entry. However, License Exception LVS is not available for 0x5zz items (except 0A504.g) when destined for countries in ''CARICOM'' or countries in Country Group D:5.

* * * * *

■ 10. Section 740.9 is amended by revising paragraphs (a) introductory text, (b) introductory text, and (b)(5) to read as follows:

§ 740.9 Temporary imports, exports, reexports, and transfers (in-country) (TMP).

(a) *Temporary exports, reexports, and transfers (in-country).* License Exception TMP authorizes exports, reexports, and transfers (in-country) of items for temporary use abroad (including use in or above international waters) subject to the conditions specified in this paragraph (a). No item may be exported, reexported, or transferred (in-country) under this paragraph (a) if an order to acquire the item, such as a purchase order, has been received before shipment; with prior knowledge that the item will stay abroad beyond the terms of this License Exception; or when the item is for subsequent lease or rental abroad. The references to various countries and country groups in these TMP-specific provisions do not limit or amend the prohibitions in § 740.2 of the EAR on the use of license exceptions generally, such as for exports of 9x515 or ''600 series'' items to destinations in Country Group D:5. This paragraph (a) does not authorize any export of a commodity controlled under ECCNs 0A501.a or .b, 0A506 or 0A507, or shotguns with a barrel length less than 18 inches controlled under ECCN 0A502 or 0A508 to, or any export of such an item that was imported into the United States from, a country in Country Group D:5 (supplement no. 1 to this part), or from Russia, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Turkmenistan, Ukraine, or Uzbekistan. The only provisions of this paragraph (a) that are eligible for use to export such items are paragraph (a)(5) of this section (''Exhibition and demonstration'') and paragraph (a)(6) of this section (''Inspection, test, calibration, and repair''). In addition, this paragraph (a) may not be used to export more than 75 firearms per shipment. In accordance with the requirements in § 758.1(b)(9) and (g)(4) of the EAR, the exporter or its agent must provide documentation that includes the serial number, make, model, and caliber of each firearm being exported by filing these data elements in an EEI filing in AES. In accordance with the exclusions in License Exception TMP under paragraph (b)(5) of this section, the entry clearance requirements in § 758.1(b)(9) do not permit the temporary import of: Firearms controlled in ECCNs 0A501.a or .b, 0A506, or 0A507 that are shipped from or manufactured in a Country Group D:5 country, or that are shipped from or manufactured in Russia, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Turkmenistan, Ukraine, or Uzbekistan (except for any firearm model designation (if assigned) controlled by ECCNs 0A501, 0A506, or 0A507 that is specified under annex A in supplement no. 4 to this part); or shotguns with a barrel length less than 18 inches controlled in ECCNs 0A502 or 0A508 that are shipped from or manufactured in a Country Group D:5 country, or from Russia, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Turkmenistan, Ukraine, or Uzbekistan, because of the exclusions in License Exception TMP under paragraph (b)(5) of this section.

* * * * *

(b) *Exports of items temporarily in the United States.* No provision of this paragraph (b), other than paragraph (b)(3), (4), or (5), may be used to export firearms controlled by ECCN 0A501.a, .b, 0A506, 0A507, or shotguns with a barrel length less than 18 inches controlled in ECCN 0A502 or 0A508.

* * * * *

(5) *Exports of firearms and certain shotguns temporarily in the United States.* This paragraph (b)(5) authorizes the export of no more than 75 firearms per shipment controlled by ECCN 0A501.a or .b, 0A506, 0A507, or shotguns with a barrel length less than 18 inches controlled in ECCN 0A502 or 0A508 that are temporarily in the United States for a period not exceeding one year, provided that:

(i) The firearms were not shipped from or manufactured in a U.S. arms embargoed country, *i.e.,* destination listed in Country Group D:5 in supplement no. 1 to this part;

(ii) The firearms were not shipped from or manufactured in Russia, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Turkmenistan, Ukraine, or Uzbekistan, except for any firearm model controlled by 0A501, 0A506, or 0A507 that is specified under annex A in supplement no. 4 to this part; and

(iii) The firearms are not ultimately destined to a U.S. arms embargoed country, *i.e.,* destination listed in Country Group D:5 in supplement no. 1 to this part;

(iv) When the firearms entered the U.S. as a temporary import, the temporary importer or its agent:

(A) Provided the following statement to U.S. Customs and Border Protection: ''This shipment will be exported in accordance with and under the authority of License Exception TMP (15 CFR 740.9(b)(5))'';

(B) Provided to U.S. Customs and Border Protection an invoice or other appropriate import-related documentation (or electronic equivalents) that includes a complete list and description of the firearms being temporarily imported, including their model, make, caliber, serial numbers, quantity, and U.S. dollar value; and

(C) Provided (if temporarily imported for a trade show, exhibition, demonstration, or testing) to U.S. Customs and Border Protection the relevant invitation or registration documentation for the event and an accompanying letter that details the arrangements to maintain effective control of the firearms while they are in the United States; and

(v) In addition to the export clearance requirements of part 758 of the EAR, the exporter or its agent must provide the import documentation related to paragraph (b)(5)(iv)(B) of this section to U.S. Customs and Border Protection at the time of export.

Note 1 to paragraph (b)(5): In addition to complying with all applicable EAR

requirements for the export of commodities described in paragraph (b)(5) of this section, exporters and temporary importers should contact U.S. Customs and Border Protection (CBP) at the port of temporary import or export, or at the CBP website, for the proper procedures for temporarily importing or exporting firearms controlled in ECCNs 0A501.a or .b, 0A506, or 0A507, or shotguns with a barrel length less than 18 inches controlled in ECCN 0A502 or 0A508, including regarding how to provide any data or documentation required by BIS.

Note 2 to paragraph (b): A commodity withdrawn from a bonded warehouse in the United States under a 'withdrawal for export' customs entry is considered as 'moving in transit'. It is not considered as 'moving in transit' if it is withdrawn from a bonded warehouse under any other type of customs entry or if its transit has been broken for a processing operation, regardless of the type of customs entry.

Note 3 to paragraph (b): Items shipped on board a vessel or aircraft and passing through the United States from one foreign country to another may be exported without a license provided that (a) while passing in transit through the United States, they have not been unladen from the vessel or aircraft on which they entered, and (b) they are not originally manifested to the United States.

Note 4 to paragraph (b): A shipment originating in Canada or Mexico that incidentally transits the United States en route to a delivery point in the same country does not require a license.

* * * * *

■ 11. Section 740.10 is amended by revising paragraphs (b)(1) and (4) to read as follows:

§ 740.10 License Exception Servicing and replacement of parts and equipment (RPL).

* * * * *

(b) * * *

(1) The provisions of this paragraph (b) authorize the export and reexport to any destination, except for 9x515 or ''600 series'' items to destinations identified in Country Group D:5 (see supplement no. 1 to this part) or otherwise prohibited under the EAR, of commodities and software that were sent to the United States or to a foreign party for servicing and replacement of commodities and software ''subject to the EAR'' (see § 734.2(a) of the EAR) that are defective or that an end user or ultimate consignee has found unacceptable. The export of firearms controlled by ECCNs 0A501.a or .b, 0A506, or 0A507 or shotguns with a barrel length less than 18 inches controlled in ECCN 0A502 or 0A508 temporarily in the United States for servicing and replacement may be exported under paragraph (b)(2) or (3) of this section only if the additional requirements in paragraph (b)(4) of this section are also met.

* * * * *

(4) This paragraph (b)(4) authorizes the export of firearms controlled by ECCNs 0A501.a or .b, 0A506, 0A507 or shotguns with a barrel length less than 18 inches controlled in ECCNs 0A502 or 0A508 that are temporarily in the United States for servicing or replacement for a period not exceeding one year or the time it takes to service or replace the commodity, whichever is shorter, provided that the requirements of paragraph (b)(2) or (3) of this section are met and:

(i) The firearms were not shipped from or manufactured in Russia, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Turkmenistan, Ukraine, or Uzbekistan, except for any firearm model controlled by 0A501, 0A506, or 0A507 that is specified under Annex A in Supplement No. 4 to this part;

(ii) When the firearms entered the U.S. as a temporary import, the temporary importer or its agent:

(A) Provided the following statement to U.S. Customs and Border Protection: ''This shipment will be exported in accordance with and under the authority of License Exception RPL (15 CFR 740.10(b))'';

(B) Provided to U.S. Customs and Border Protection an invoice or other appropriate import-related documentation (or electronic equivalents) that includes a complete list and description of the firearms being temporarily imported, including their model, make, caliber, serial numbers, quantity, and U.S. dollar value; and

(C) Provided (if temporarily imported for servicing or replacement) to U.S. Customs and Border Protection the name, address and contact information (telephone number and/or email) of the organization or individual in the U.S. that will be receiving the item for servicing or replacement; and

(iii) In addition to the export clearance requirements of part 758 of the EAR, the exporter or its agent must provide the import documentation related to paragraph (b)(4)(iii)(B) of this section to U.S. Customs and Border Protection at the time of export.

Note 1 to paragraph (b)(4): In addition to complying with all applicable EAR requirements for the export of commodities described in this paragraph (b)(4), exporters and temporary importers should contact U.S. Customs and Border Protection (CBP) at the port of temporary import or export, or at the CBP website, for the proper procedures for temporarily importing or exporting firearms controlled in ECCN 0A501.a or .b, 0A506, 0A507 or shotguns with a barrel length less than 18 inches controlled in ECCN 0A502 or 0A508, including regarding how to provide any data or documentation required by BIS.

* * * * *

■ 12. Section 740.11 is amended by revising the introductory text to read as follows:

§ 740.11 Governments, international organizations, international inspections under the Chemical Weapons Convention, and the International Space Station (GOV).

This License Exception authorizes exports and reexports for international nuclear safeguards; U.S. government agencies or personnel; agencies of cooperating governments; international inspections under the Chemical Weapons Convention; and the International Space Station. Commodities listed in ECCNs 0A501, 0A506, 0A507, 0A508, and 0A509 are eligible only for transactions described in paragraphs (b)(2)(i) and (ii) of this section. Any item listed in a 0x5zz ECCN for export, reexport, or transfer (in-country) to an E:1 country is eligible only for transactions described in paragraphs (b)(2)(i) and (ii) solely for U.S. Government official use of this section.

* * * * *

■ 13. Section 740.14 is amended by revising paragraph (e) to read as follows:

§ 740.14 Baggage (BAG).

* * * * *

(e) *Special provisions for firearms and ammunition.* (1) A United States citizen or a permanent resident alien leaving the United States may export or reexport shotguns with a barrel length of 18 inches or over controlled under ECCN 0A502 and 0A508 and shotgun shells controlled under ECCN 0A505.b and .c under this License Exception, subject to the following limitations:

(i) Not more than three firearms may be taken on any one trip (this includes shotguns in ECCNs 0A502 or 0A508, as well as firearms in ECCNs 0A501, 0A506, or 0A507).

(ii) The shotguns and shotgun shells must be with the person's baggage.

(iii) The shotguns and shotgun shells must be for the person's exclusive use for legitimate hunting or lawful sporting purposes, scientific purposes, or personal protection, and not for resale or other transfer of ownership or control. Accordingly, except as provided in (e)(2) of this section, shotguns may not be exported permanently under this License Exception. All shotguns and unused shotgun shells must be returned to the United States. Note that since certain countries may require an Import Certificate or a U.S. export license

before allowing the import of a shotgun, you should determine the import requirements of your country of destination in advance.

(2) A nonresident alien leaving the United States may export or reexport under this License Exception only such shotguns and shotgun shells as he or she brought into the United States under the provisions of the Department of Justice Regulations (27 CFR 478.115(d)).

(3) A United States citizen or a permanent resident alien leaving the United States may export under this License Exception firearms, ''parts,'' ''components,'' ''accessories,'' or ''attachments'' controlled under ECCNs 0A501, 0A506, 0A507, and 0A509 and ammunition controlled under ECCN 0A505.a, subject to the following limitations:

(i) Not more than three firearms may be taken on any one trip (this includes firearms in ECCNs 0A501, 0A506, or 0A507, as well as shotguns in ECCNs 0A502 or 0A508), and no more than 1,000 rounds of ammunition may be taken on any one trip.

(ii) ''Parts,'' ''components,'' ''accessories,'' and ''attachments'' exported pursuant to this paragraph (e)(3) must be of a kind and limited to quantities that are reasonable for the activities described in paragraph (e)(3)(iv) of this section or that are necessary for routine maintenance of the firearms being exported.

(iii) The commodities must be with the person's baggage.

(iv) The commodities must be for the person's exclusive use and not for resale or other transfer of ownership or control. Accordingly, except as provided in paragraph (e)(4) of this section, firearms, ''parts,'' ''components,'' ''accessories,'' ''attachments,'' and ammunition, may not be exported permanently under this License Exception. All firearms, ''parts,'' ''components,'' ''accessories,'' or ''attachments'' controlled under ECCN 0A501, 0A506, 0A507, and 0A509 and all unused ammunition controlled under ECCN 0A505.a exported under this License Exception must be returned to the United States.

(v) Travelers leaving the United States temporarily are required to declare the firearms, ''parts,'' ''components,'' ''accessories,'' ''attachments,'' and ammunition being exported under this License Exception to a Customs and Border Protection (CBP) officer prior to departure from the United States and present such items to the CBP officer for inspection, confirming that the authority for the export is License Exception BAG and that the exporter is compliant with its terms.

(4) A nonimmigrant alien leaving the United States may export or reexport under this License Exception only such firearms controlled under ECCN 0A501, 0A506, 0A507, and ammunition controlled under ECCN 0A505 as he or she brought into the United States under the relevant provisions of Department of Justice regulations at 27 CFR part 478.

(5) Destination eligibility under this License Exception for items controlled under ECCNs 0A501, 0A502, 0A504, 0A505, 0A506, 0A507, 0A508, or 0A509 is limited to countries other than those in Country Group D:5 (except for Zimbabwe) and ''CARICOM'' countries.

* * * * *

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

§ 740.20 License Exception Strategic Trade Authorization (STA).

* * * * *

(b) * * *

(2) * * *

(ii) License Exception STA may not be used for:

(A) Any item controlled in ECCNs 0A501.a, .b, .c, .d, or .e; 0A506; 0A507; 0A509; 0A981; 0A982; 0A983; 0A503; 0E504; 0E982; or

(B) Shotguns with barrel length less than 18 inches controlled in 0A502 or 0A508.

* * * * *

PART 742—CONTROL POLICY—CCL BASED CONTROLS

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

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

■ 16. Section 742.6 is amended by revising paragraph (b)(1)(i) to read as follows:

§ 742.6 Regional stability.

* * * * *

(b) * * *

(1) * * *

(i) Applications for exports and reexports of ECCN 0A501, 0A502, 0A504, 0A505, 0A506, 0A507, 0A508, 0A509, 0B501, 0B505, 0D501, 0D505, 0E501, 0E504, and 0E505 items, 9x515, and ''600 series'' items will be reviewed under the following policies:

(A) Applications for exports and reexports of ECCN 0A501, 0A502, 0A504, 0A505, 0A506, 0A507, 0A508, 0A509, 0B501, 0B505, 0D501, 0D505, 0E501, 0E504, and 0E505 items; 9x515 and ''600 series'' items will be reviewed on a case-by-case basis to determine whether the transaction is contrary to the national security or foreign policy interests of the United States, including the foreign policy interest of promoting the observance of human rights throughout the world.

(B) Other applications for exports and reexports described in paragraph (a)(1), (2), (6), or (8) of this section will be reviewed on a case-by-case basis to determine whether the export or reexport could contribute directly or indirectly to any country's military capabilities in a manner that would alter or destabilize a region's military balance contrary to the foreign policy interests of the United States.

(C) Applications for reexports of items described in paragraph (a)(3) of this section will be reviewed applying the policies for similar commodities that are subject to the ITAR.

(D) Applications for export or reexport of items classified under ECCNs 0A501, 0A502, 0A505, 0A506, 0A507, 0A508, or 0A509, or any 9x515 or ''600 series'' ECCN requiring a license in accordance with paragraph (a)(1) or (9) of this section, will also be reviewed consistent with United States arms embargo policies in § 126.1 of the ITAR (22 CFR 126.1), if destined to a country set forth in Country Group D:5 in Supplement No. 1 to part 740 of the EAR.

(E) Applications for export or reexport of ''parts,'' ''components,'' ''accessories,'' ''attachments,'' ''software,'' or ''technology'' ''specially designed'' or otherwise required for the F–14 aircraft will generally be denied.

(F) Applications for exports and reexports of items classified under ECCNs 0A501, 0A502, 0A504, 0A505, 0A506, 0A507, 0A508, 0A509, 0B501, 0B505, 0D501, 0D505, 0E501, 0E504, or 0E505, or any 9x515 ECCN will be subject to a policy of denial, when destined to China or a country listed in E:1 in Supplement No. 1 to part 740 of the EAR.

(G) Applications for exports and reexports of ECCNs 0A501, 0A502, 0A504, 0A505, 0A506, 0A507, 0A508, 0A509, 0B501, 0B505, 0D501, 0D505, 0E501, 0E504, and 0E505 items will be subject to a policy of denial when there is reason to believe the transaction involves criminal organizations, rebel groups, street gangs, or other similar

groups or individuals, that may be disruptive to regional stability, including within individual countries.
* * *

* * * * *

■ 17. Revise § 742.7 to read as follows:

§ 742.7 Crime control and detection.

(a) *License requirements.* In support of U.S. foreign policy to promote the observance of human rights throughout the world, a license is required to export and reexport crime control and detection equipment, related technology and software as follows:

(1) Crime control and detection instruments and equipment and related ''technology'' and ''software'' identified in the appropriate ECCNs on the CCL under CC Column 1 in the Country Chart column of the ''License Requirements'' section. A license is required to countries listed in CC Column 1 (Supplement No. 1 to part 738 of the EAR). Items affected by this requirement are identified on the CCL under the following ECCNs: 0A977, 0A978, 0A979, 0D977, 0E977, 1A984, 1A985, 3A980, 3A981, 3D980, 3E980, 4A003 (for fingerprint computers only), 4A980, 4D001 (for fingerprint computers only), 4D980, 4E001 (for fingerprint computers only), 4E980, 6A002 (for police-model infrared viewers only), 6E001 (for police-model infrared viewers only), 6E002 (for police-model infrared viewers only), and 9A980.

(2) Items designed for the execution of human beings as identified in ECCN 0A981 require a license to all destinations including Australia, Canada, and the United Kingdom. Controls for these items appear in each ECCN; a column specific to these controls does not appear in the Country Chart (supplement no. 1 to part 738 of the EAR).

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

(4) See § 742.11 of the EAR for further information on items controlled under ECCN 0A983, which require a license to all destinations, including Australia, Canada, and the United Kingdom. Controls for these items appear in each ECCN; a column specific to these controls does not appear in the Country Chart (supplement no. 1 to part 738 of the EAR).

(5) Items detailed under this paragraph are specific to certain firearms, shotguns, and related items. Crime control and detection instruments and equipment and related ''technology'' and ''software'' identified in the appropriate ECCNs on the CCL under CC Column 2 in the Country Chart column of the ''License Requirements'' section. A license is required to countries listed in CC Column 2 (supplement no. 1 to part 738 of the EAR). Items affected by this requirement are identified on the CCL under the following ECCNs: 0A501 (except 0A501.y), 0A502, 0A504, 0A505. a, .b, and .x, 0A506, 0A507, 0A508, 0A509, 0D501, 0D505, 0E501, 0E502, 0E504, and 0E505.

(b) *Licensing policy.* (1) Applications for items controlled under paragraphs (a)(1) through (a)(4) of this section will generally be considered favorably on a case-by-case basis, unless there is civil disorder in the country or region or unless there is a risk that the items will be used to violate or abuse human rights. The judicious use of export controls is intended to deter human rights violations and abuses, distance the United States from such violations and abuses, and avoid contributing to civil disorder in a country or region.

(2) BIS will review license applications in accordance with the licensing policy in paragraph (b)(1) of this section for items that are not controlled under this section but that require a license pursuant to another section for any reason other than short supply and could be used by the recipient Government or other end user specifically to violate or abuse human rights.

(3) Applications for items controlled under paragraph (a)(5) of this section will be reviewed under the following license review policies:

(i) Applications destined for government end users will be reviewed on a case-by-case basis to determine whether there is a risk of diversion or misuse of the items in a manner that would adversely impact U.S. national security or foreign policy.

(ii) Those applications destined for non-government end users will be reviewed on a case-by-case basis, unless one of the following apply, in which case they will be reviewed under a presumption of denial:

(A) The destination is identified in supplement no. 3 to this part; or

(B) There is a substantial risk that the items will be diverted or misused in a manner that would adversely impact U.S. national security or foreign policy.

Note 1 to paragraph (b)(3): In reviewing applications under this paragraph, BIS will consider the following risks in the destination country or region: firearms trafficking or diversion, terrorism, corruption, human rights concerns and political violence, state fragility, organized crime or gang-related activity, and drug trafficking. BIS will also consider prior instances of diversion or misuse; the capabilities, potential uses, and lethality of the item; the nature of the end user; and other factors as appropriate.

(c) *Contract sanctity.* Contract sanctity date: August 22, 2000. Contract sanctity applies only to items controlled under ECCNs 0A982, 0A503, and 0E982 destined for countries not listed in CC Column 1 of the Country Chart (supplement no. 1 to part 738 of the EAR).

(d) *U.S. controls.* In maintaining its controls on crime control and detection items, the United States considers international norms regarding human rights and the practices of other countries that control exports to promote the observance of human rights. However, these controls are not based on the decisions of any multinational export control regime and may differ from controls imposed by other countries.

■ 18. Section 742.17 is amended by revising paragraphs (b) and (f) to read as follows:

§ 742.17 Exports of firearms to OAS member countries.

* * * * *

(b) *Licensing policy.* Applications will be reviewed on a case-by-case basis when supported by an FC Import Certificate or equivalent official document issued by the government of the importing country. However, there is a policy of denial for applications to export items linked to such activities as drug trafficking, terrorism, and transnational organized crime.

* * * * *

(f) *Items/Commodities.* Items requiring a license under this section are ECCNs 0A501 (except 0A501.y), 0A502, 0A504 (except 0A504.f), 0A505 (except 0A505.d), 0A506, 0A507, 0A508, and 0A509. (See supplement no. 1 to part 774 of the EAR).

* * * * *

■ 19. Add supplement no. 3 to part 742 to read as follows:

Supplement No. 3 to Part 742—High-Risk Destinations for Firearms and Related Items

Bahamas,
The Bangladesh
Belize
Bolivia
Burkina Faso
Burundi
Chad
Colombia

Dominican Republic
Ecuador
El Salvador
Guatemala
Guyana
Honduras
Indonesia
Jamaica
Kazakhstan
Kyrgyzstan
Laos
Malaysia
Mali
Mozambique
Nepal
Niger
Nigeria
Pakistan
Panama
Papua New Guinea
Paraguay
Peru
Suriname
Tajikistan
Trinidad and Tobago
Uganda
Vietnam
Yemen

PART 743—SPECIAL REPORTING AND NOTIFICATION

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

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

■ 21. Section 743.4 is revised to read as follows:

§ 743.4 Conventional arms reporting.

(a) *Scope.* This section outlines special reporting requirements for exports of certain items included in the UN Register of Conventional Arms (UNRoCA) and Wassenaar Arrangement (WA) Munitions List. These reports cover substantially similar arms. States participating in the UNRoCA report annually on all transfers of arms (see *www.disarmament.unoda.org/convarms/register/*); Participating States of the Wassenaar Arrangement exchange information every six months on deliveries and transfers to non-WA governments of conventional arms set forth in the *Wassenaar Arrangement's Basic Documents* under Part II ''Guideline and Procedures, including the Initial Elements'', Appendix 3: ''Specific Information Exchange on Arms Content by Category''. Public Documents, Vol. 1—Founding Documents at *https://www.wassenaar.org/app/uploads/2021/12/Public-Docs-Vol-I-Founding-Documents.pdf*). BIS obtains the information needed for such conventional arms reporting from the information exporters are required to submit in the EEI submission in AES, pursuant to § 758.1(b)(9) and (g)(4)(ii) of the EAR. No additional reporting to BIS is required for purposes of this section. BIS does not submit reports for reexports or transfers (in-country) under this section. BIS does not include exports to Wassenaar member countries, identified in supplement no. 1 to part 743 in the Wassenaar reports. required under this section.

(b) *Information included in the reports*—(1) *Authorizations reported.* Exports authorized under BIS licenses, License Exceptions TMP, RPL, STA, or GOV (see part 740 of the EAR) and under the Validated End User authorization (see § 748.15 of the EAR).

(2) *ECCNs reported.* ECCNs 0A501.a and .b, 0A506.a. and .b, and 0A507.a and .b.

(3) *Quantity and recipient state reported.* The quantity and the name of the recipient state.

(c) *Contacts.* Information concerning the reporting requirements for items identified in paragraph (b)(2) of this section is available from the Office of Nonproliferation and Foreign Policy Controls (NFPC), Tel.: (202) 482–4188, Fax: (202) 482–4145.

■ 22. Section 743.6 is amended by revising paragraphs (a), (b), and (c) to read as follows:

§ 743.6 Prior notifications to Congress of exports of certain semi-automatic firearms.

(a) *General requirement.* Applications to export semi-automatic firearms controlled by ECCNs 0A506 or 0A507 will be notified to Congress as provided in this section before licenses for such items are issued, except as specified in paragraphs (a)(1) and (2) of this section.

(1) Exports of semi-automatic firearms controlled by ECCNs 0A506 or 0A507 to personnel and agencies of the U.S. Government under License Exception GOV (§ 740.11(b) of the EAR) do not require such notification.

(2) Exports of semi-automatic firearms controlled by ECCNs 0A506 or 0A507 for official use by an agency of NATO do not require such notification.

(b) *Notification criteria.* Unless excluded in paragraphs (a)(1) and (2) of this section, BIS will notify Congress prior to issuing a license authorizing the export of items to Mexico, South Africa, or Turkey or any other country not listed in Country Group A:5 or A:6 (see supplement no. 1 to part 740 of the EAR) if the items are sold under a contract or are otherwise part of an export transaction that includes $4,000,000 or more of semi-automatic firearms controlled by ECCNs 0A506 or 0A507.

(c) *License application information.* In addition to information required on the application, the exporter must include a copy of the signed contract or, if there is no contract, a written explanation from the applicant (including a statement of the value of the firearms controlled by ECCNs 0A506 or 0A507 to be exported) for any proposed export described in paragraph (b) of this section. License applications for semi-automatic firearms controlled by ECCNs 0A506 or 0A507 may include other nonautomatic firearms, shotguns, other 0x5zz items, or other items subject to the EAR, but the applicant must clearly identify the semi-automatic firearms controlled by ECCNs 0A506 or 0A507. The applicant clearly distinguishing the semi-automatic firearms controlled by ECCNs 0A506 or 0A507 from any other items on the license application will assist BIS in assessing whether the license application requires congressional notification under this section and identifying the information that will need to be reported to Congress. Any activity intended to circumvent notification requirements is prohibited. Such devices include, but are not limited to, the splitting or structuring of contracts to avoid exceeding applicable notification dollar value limits described in paragraph (a) of this section.

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PART 748—APPLICATIONS (CLASSIFICATION, ADVISORY, AND LICENSE) AND DOCUMENTATION

■ 23. The authority citation for 15 CFR part 748 is revised to read as follows:

Authority: 50 U.S.C. 4801–4852; 50 U.S.C. 4601 *et seq.;* 50 U.S.C. 1701 *et seq.;* E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Notice of August 4, 2022, 87 FR 48077 (August 5, 2022).

■ 24. Section 748.8 is amended by revising paragraph (z) to read as follows:

§ 748.8 Unique application and submission requirements.

* * * * *

(z) Firearms.

■ 25. Section 748.12 is amended by revising the introductory text, and paragraphs (a) through (d) to read as follows:

§ 748.12 Firearms import certificate or import permit.

License applications for certain firearms and related commodities require support documents in accordance with this section.

(a) *Requirement to obtain and submit documentation.* Unless an exception in

§ 748.9(c) applies, an import certificate or permit is required for license applications for firearms and related commodities, regardless of value, if required by the importing country. For OAS member states, this requirement is consistent with the OAS Model Regulations described in § 742.17 of the EAR. The exporter or reexporter must obtain and submit with the license application the original or a copy of the import certificate or permit before applying for an export or reexport license in situations in which an import certificate or permit is required by the importing country.

(1) *Items subject to requirement.* Firearms and related commodities are those commodities controlled under 0x5zz ECCNs.

(2) *Countries subject to requirement.* (i) OAS member countries include: Antigua and Barbuda, Argentina, Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname, Trinidad and Tobago, Uruguay, Venezuela, and any member country that has acceded in accordance with Chapter III of the Charter of the Organization of American States.

(ii) All other countries that require an import certificate or permit.

(3) *Equivalent official document in place of an import certificate or permit.* For those countries that have not yet established or implemented an import certificate procedure, BIS will accept an equivalent official document (*e.g.,* import license or letter of authorization) issued by the government of the importing country as supporting documentation for the export of commodities detailed under paragraph (a)(1) of this section.

(b) *Obtaining the document.* (1) Applicants must request that the importer (*e.g.,* ultimate consignee or purchaser) obtain the import certificate, permit, or an equivalent official document from the government of the importing country, and that it be issued covering the quantities and types of firearms and related items that the applicant intends to export. Upon receipt of this document or a certified copy, the importer must provide the original or a certified copy to the license applicant.

(2) If the government of the importing country will not issue such document, the applicant must supply the information described in paragraphs (c)(1) and (c)(6) through (c)(8) of this section on company letterhead.

(c) *Content of the document.* The document must contain the following information:

(1) Applicant's name and address. The applicant may be either the exporter, supplier, or order party.

(2) Import Certificate Identifier/ Number.

(3) Name of the country issuing the certificate or unique country code.

(4) Date the document was issued, in international date format (*e.g.,* 24/12/12 for 24 December 2012, or 3/1/99 for 3 January 1999).

(5) Name of the agency issuing the certificate, address, telephone and facsimile numbers, signing officer name, and signature.

(6) Name of the importer, address, telephone and facsimile numbers, country of residence, representative's name if commercial or government body, citizenship, and signature.

(7) Name of the end user(s), if known and different from the importer, address, telephone and facsimile numbers, country of residence, representative's name if commercial (authorized distributor or reseller) or government body, citizenship, and signature. Note that BIS does not require the identification of each end user when the firearms and related commodities will be resold by a distributor or reseller if unknown at the time of export.

(8) Description of the commodities approved for import including a technical description and total quantity of firearms, parts and components, ammunition and parts.

Note 1 to paragraph (c)(8): You must furnish the consignee with a detailed technical description of each commodity to be given to the government for its use in issuing the document. For example, for shotguns, provide the type, barrel length, overall length, number of shots, the manufacturer's name, and the country of manufacture. For ammunition, provide the caliber, velocity and force, type of bullet, manufacturer's name and country of manufacture.

(9) Expiration date of the document in international date format (*e.g.,* 24/12/12) or the date the items must be imported, whichever is earlier.

(10) Name of the country of export (*i.e.,* United States).

(11) Additional information. Certain countries may require the tariff classification number, by class, under the Brussels Convention (Harmonized Tariff Code) or the specific technical description of a commodity. For example, shotguns may need to be described in barrel length, overall length, number of shots, manufacturer's name and country of manufacture. The technical description is not the Export Control Classification Number (ECCN).

(d) *Procedures for using document with license application*—(1) *Information necessary for license application.* The license application must include the same commodities as those listed on the document.

(2) *Alterations.* After the document is used to support the issuance of a license, no corrections, additions, or alterations may be made on the same document by any person. Any necessary corrections, additions, or alterations should be noted by the applicant in a separate statement on file with the applicant.

(3) *Validity period.* Documents issued by the importing country will be valid until the expiration date on the documents themselves.

Note 2 to paragraph (d)(3): Applicants for license applications for exports and reexports must submit an import certificate, permit, or comparable document with the license application. All BIS licenses for ECCNs 0A501, 0A505, 0A506, 0A507, 0A508, and 0A509 commodities will include a standard rider that requires that the applicant/exporter must have a current FC Import Certificate on file prior to export. The text of the standard rider will generally be as follows: ''A current, complete, accurate and valid Firearms Convention (FC) Import Certificate (or equivalent official document) shall be obtained, if required by the government of the importing country, from the Ultimate Consignee and maintained in the exporter's file prior to any export of the item(s) listed on this license. A copy shall be provided to the U.S. Government upon request. (Refer to § 742.17(b) of the EAR for guidance.)''

* * * * *

■ 26. Supplement no. 2 to part 748 is amended by revising paragraph (z)(1), note 1 to paragraph (z), and paragraphs (aa) and (bb) to read as follows:

Supplement No. 2 to Part 748—Unique Application and Submission Requirements

* * * * *

(z) * * *

(1) Certification. If you are submitting a license application for the export of firearms controlled by ECCNs 0A501.a or .b, 0A506, or 0A507, or shotguns with a barrel length less than 18 inches controlled in ECCNs 0A502 or 0A508 that will be temporarily in the United States, *e.g.,* for servicing and repair or for intransit shipments, you must include the following certification in Block 24:

The firearms in this license application will not be shipped from or manufactured in Russia, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Turkmenistan, Ukraine, or Uzbekistan,

except for any firearm model controlled by 0A501, 0A506, or 0A507 that is specified under Annex A in supplement no. 4 to part 740. I and the parties to this transaction will comply with the requirements specified in paragraphs (z)(2)(i) and (ii) of supplement no. 2 to part 748.

* * * * *

Note 1 to paragraph (z): In addition to complying with all applicable EAR requirements for the export of commodities described in paragraph (z) of this supplement, exporters and temporary importers should contact U.S. Customs and Border Protection (CBP) at the port of temporary import or export, or at the CBP website, for the proper procedures for temporarily importing or exporting firearms controlled in ECCNs 0A501.a or .b, 0A506, or 0A507 or shotguns with a barrel length less than 18 inches controlled in ECCNs 0A502 or 0A508, including regarding how to provide any data or documentation required by BIS.

* * * * *

(aa) *Exports of other firearms, certain shotguns, and related commodities.* (1) *Semi-automatic* firearms controlled under *0A506 and 0A507.* For export license applications that require prior notifications to congress of exports of semi-automatic firearms controlled under ECCNs 0A506 and 0A507 under the criteria of § 743.6, the exporter must include a copy of the signed contract or, if there is no contract, a written explanation from the applicant (including a statement of the value of the firearms controlled by ECCNs 0A506 and 0A507 to be exported). License applications for semi-automatic firearms controlled by ECCNs 0A506 and 0A507 may include other non-automatic firearms, shotguns, other 0x5zz items, or other items subject to the EAR, but the applicant must clearly identify the semi-automatic firearms controlled by ECCNs 0A506 and 0A507.

(2) *Purchase orders for certain commodities controlled under ECCNs 0A501, 0A502, 0A505, 0A506, 0A507, 0A508, and 0A509.* License applications for items controlled under ECCNs 0A501 (except 0A501.y), 0A502, 0A505 (except 0A505.c, 0A505.d, and 0A505.e), 0A506, 0A507, 0A508, or 0A509 to destinations other than Country Group A:1 require the submission of purchase documentation (*e.g.,* a purchase order, request for proposals, or other appropriate documentation) with the submission of the license application, dated within one year of submission with the license application. Upon approving a license for these items, BIS will generally limit the licensed quantity to the quantity specified on the purchase order. However, applicants may request up to a 10% variance in quantity from the purchase order amount, which will be reviewed on a case-by-case basis. Additionally, exporters may export various model types under the approved license, so long as the items remain consistent with the ECCN and ECCN item paragraph specified on the approved application.

(3) *Passport or other national identity card information.* License applications for items controlled under ECCNs 0A501 (except 0A501.y), 0A502, 0A505 (except 0A505.c, 0A505.d, and 0A505.e), 0A506, 0A507, 0A508, or 0A509 to destinations other than Country Group A:1 require the submission of passport or other national identity card information when the end user is an individual person.

(bb) ''600 Series Major Defense Equipment.'' For license applications that require prior notifications to Congress of exports of ''600 series major defense equipment'' pursuant to § 743.5, the exporter must include a copy of the signed contract (including a statement of the value of the ''600 Series Major Defense Equipment'' to be exported under the contract). (See § 743.5(d) of the EAR)

PART 750—APPLICATION PROCESSING, ISSUANCE, AND DENIAL

■ 27. The authority citation for 15 CFR part 750 continues to read as follows:

Authority: 50 U.S.C. 4801–4852; 50 U.S.C. 4601 *et seq.;* 50 U.S.C. 1701 *et seq.;* Sec. 1503, Pub. L. 108–11, 117 Stat. 559; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; E.O. 13637, 78 FR 16129, 3 CFR, 2013 Comp., p. 223; Presidential Determination 2003–23, 68 FR 26459, 3 CFR, 2004 Comp., p. 320.

■ 28. Section 750.4 is amended by adding paragraph (d)(2)(v) to read as follows:

§ 750.4 Procedures for processing license applications.

* * * * *

(d) * * *

(2) * * *

(v) *The Safeguard.* The Safeguard, chaired by the Department of State, reviews license applications involving firearm and shotgun related items controlled under 0x5zz ECCNs.

* * * * *

■ 29. Section 750.7 is amended by revising paragraph (g) to read as follows:

§ 750.7 Issuance of licenses.

* * * * *

(g) *License validity period.* Licenses involving the export or reexport of items will generally have a four-year validity period, unless a different validity period has been requested and specifically approved by BIS or is otherwise specified on the license at the time that it is issued. Exceptions from the four-year validity period include: license applications for items controlled for short supply reasons, which will be limited to a one-year validity period and license applications reviewed and approved as an ''emergency'' (see § 748.4(h) of the EAR); and controlled under ECCNs 0A501, 0A502, 0A504, 0A505, 0A506, 0A507, 0A508, or 0A509, which will generally be limited to a one-year validity period. Emergency licenses will expire no later than the last day of the calendar month following the month in which the emergency license is issued. The expiration date will be clearly stated on the face of the license. If the expiration date falls on a legal holiday (Federal or State), the validity period is automatically extended to midnight of the first business day following the expiration date.

(1) *Extended validity period.* BIS will consider granting a validity period exceeding four years (or exceeding one year for applications subject to that shorter validity period) on a case-by-case basis when extenuating circumstances warrant such an extension. Requests for such extensions may be made at the time of application or after the license has been issued and it is still valid. BIS will not approve changes regarding other aspects of the license, such as the parties to the transaction and the countries of ultimate destination. An extended validity period will generally be granted where, for example, the transaction is related to a multi-year project; when the period corresponds to the duration of a manufacturing license agreement, technical assistance agreement, warehouse and distribution agreement, or license issued under the International Traffic in Arms Regulations; when production lead time will not permit an export or reexport during the original validity period of the license; when an unforeseen emergency prevents shipment within the 4-year validity of the license; or for other similar circumstances.

(2) *Request for extension.* (i) The applicant must submit a letter in writing to request an extension in the validity period of a previously approved license. The subject of the letter must be titled: ''Request for Validity Period Extension'' and contain the following information:

(A) The name, address, and telephone number of the requestor;

(B) A copy of the original license, with the license number, validation

date, and current expiration date legible; and

(C) Justification for the extension;

(ii) It is the responsibility of the applicant to ensure that all applicable support documents remain valid and are in the possession of the applicant. If the request for extension is approved, BIS will provide the applicant with a written response.

* * * * *

PART 758—EXPORT CLEARANCE REQUIREMENTS AND AUTHORITIES

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

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

■ 31. Section 758.1 is amended by revising paragraphs (b)(9), (c)(1), and (g)(4) to read as follows:

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

* * * * *

(b) * * *

(9) For all exports, except for exports authorized under License Exception BAG, as set forth in § 740.14 of the EAR, of commodities controlled under ECCNs 0A501.a or .b, 0A506, or 0A507, shotguns with a barrel length less than 18 inches controlled under ECCNs 0A502 or 0A508, or ammunition controlled under ECCN 0A505 except for .c, regardless of value or destination, including exports to Australia, Canada, and the United Kingdom.

* * * * *

(c) * * *

(1) License Exception Baggage (BAG), as set forth in § 740.14 of the EAR. See 15 CFR 30.37(x) of the FTR;

Note 1 to paragraph (c)(1): See the export clearance requirements for exports of firearms controlled under ECCNs 0A501.a or .b, 0A506, or 0A507, shotguns with a barrel length less than 18 inches controlled under ECCNs 0A502 or 0A508, or ammunition controlled under ECCN 0A505, authorized under License Exception BAG, as set forth in § 740.14 of the EAR.

* * * * *

(g) * * *

(4) *Exports of firearms and related items.* This paragraph (g)(4) includes two separate requirements under paragraphs (g)(4)(i) and (ii) of this section that are used to better identify exports of certain firearms under the EAR. Paragraph (g)(4)(i) of this section is limited to certain EAR authorizations. Paragraph (g)(4)(ii) of this section applies to all EAR authorizations that require EEI filing in AES.

(i) *Identifying firearms by manufacturer, model, caliber, and serial number in the EEI filing in AES.* For any export authorized under License Exception TMP or a BIS license authorizing a temporary export of items controlled under ECCNs 0A501.a or .b, 0A506, or 0A507 or shotguns with a barrel length less than 18 inches controlled under ECCNs 0A502 or 0A508, in addition to any other required data for the associated EEI filing, you must report the manufacturer, model, caliber, and serial number of the exported items. The requirements of this paragraph (g)(4)(i) also apply to any other export authorized under a BIS license that includes a condition or proviso on the license requiring the submission of this information specified in paragraph (g) of this section when the EEI is filed in AES.

(ii) *Identifying firearms and certain ''parts,'' ''components,'' devices, ''accessories,'' and ''attachments'' by ''items'' level classification or other control descriptor in the EEI filing in AES.* For any export of items controlled under ECCNs 0A501.a or .b, 0A506, 0A507, shotguns with a barrel length less than 18 inches controlled under ECCNs 0A502 or 0A508.a.1, or .a.2, or ''parts,'' ''components,'' devices, ''accessories,'' or ''attachments'' controlled under 0A509.a, .b, .c, or .d, in addition to any other required data for the associated EEI filing, the exporter must include the items paragraph classification or other control descriptor as specified in paragraphs (g)(4)(ii)(A) through (F) for ECCNs 0A501, 0A502, 0A506, 0A507, 0A508, or 0A509, as applicable, as the first text to appear in the Commodity description block in the EEI filing in AES. (*See* § 743.4 of the EAR for the use of this information for ECCNs 0A501.a or .b, 0A506.a or .b, and 0A507.a, or .b for conventional arms reporting).

(A) If exporting firearms controlled under 0A501, enter .a or .b, as applicable;

(B) If exporting shotguns with a barrel length less than 18 inches controlled under 0A502, enter .SB;

(C) If exporting semi-automatic rifles controlled under 0A506, enter .a or .b, as applicable;

(D) If exporting semi-automatic pistols controlled under 0A507, enter .a or .b, as applicable;

(E) If exporting semi-automatic shotguns controlled under 0A508, enter .a or .b, as applicable; *or*

(F) If exporting ''parts,'' ''components,'' devices, ''accessories,'' or ''attachments'' controlled under ECCN 0A509, enter .a, .b, .c, .d, or .e, as applicable.

Note 2 to paragraph (g)(4): If a commodity described in paragraph (g)(4) of this section is exported under License Exception TMP under § 740.9(a)(6) of the EAR for inspection, test, calibration, or repair is not consumed or destroyed in the normal course of authorized temporary use abroad, the commodity must be disposed of or retained in one of the ways specified in § 740.9(a)(14)(i), (ii), or (iii) of the EAR. For example, if a commodity described in this paragraph (g)(4) was destroyed while being repaired after being exported under § 740.9(a)(6), the commodity described in this paragraph (g)(4) would not be required to be returned. If the entity doing the repair returned a replacement of the commodity to the exporter from the United States, the import would not require an EAR authorization. The entity that exported the commodity described in this paragraph (g)(4) and the entity that received the commodity would need to document this as part of their recordkeeping related to this export and subsequent import to the United States.

* * * * *

■ 32. Section 758.10 is amended by revising paragraphs (a) and notes 1 and 2 to paragraph (b)(1) to read as follows:

§ 758.10 Entry clearance requirements for temporary imports.

(a) *Scope.* This section specifies the temporary import entry clearance requirements for firearms ''subject to the EAR'' that are on the United States Munitions Import List (USMIL, 27 CFR 447.21), except for firearms ''subject to the EAR'' that are temporarily brought into the United States by nonimmigrant aliens under the provisions of Department of Justice regulations at 27 CFR part 478 (*See* § 740.14(e) of the EAR for information on the export of these firearms ''subject to the EAR''). These firearms are controlled in ECCNs 0A501.a or .b, 0A506 or 0A507, or shotguns with a barrel length less than 18 inches controlled in ECCNs 0A502 or 0A508. Items that are temporarily exported under the EAR must have met the export clearance requirements specified in § 758.1.

(1) An authorization under the EAR is *not* required for the temporary import of ''items'' that are ''subject to the EAR,'' including for ''items'' ''subject to the EAR'' that are on the USMIL. Temporary imports of firearms described in this section must meet the entry clearance requirements specified in paragraph (b) of this section.

(2) Permanent imports are regulated by the Attorney General under the direction of the Department of Justice's Bureau of Alcohol, Tobacco, Firearms and Explosives (see 28 CFR 0.130; 27 CFR parts 447, 478, 479, and 555).

(b) * * *

(1) * * *

Note 1 to paragraph (b)(1): In accordance with the exclusions in License Exception

TMP under § 740.9(b)(5) of the EAR, the entry clearance requirements in § 758.1(b)(9) do not permit the temporary import of: Firearms controlled in ECCN 0A501.a or .b, 0A506 or 0A507 that are shipped from or manufactured in a Country Group D:5 country; or that are shipped from or manufactured in Russia, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Turkmenistan, Ukraine, or Uzbekistan (except for any firearm model controlled by 0A501.a or .b, 0A506, or 0A507 that is specified under annex A in supplement no. 4 to part 740 of the EAR); or shotguns with a barrel length less than 18 inches controlled in ECCNs 0A502 or 0A508 that are shipped from or manufactured in a Country Group D:5 country, or from Russia, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Turkmenistan, Ukraine, or Uzbekistan, because of the exclusions in License Exception TMP under § 740.9(b)(5).

Note 2 to paragraph (b)(1): In accordance with the exclusions in License Exception RPL under § 740.10(b)(4) and supplement no. 2 to part 748, paragraph (z), of the EAR, the entry clearance requirements in § 758.1(b)(9) do not permit the temporary import of: Firearms controlled in ECCN 0A501.a or .b, 0A506, or 0A507 that are shipped from or manufactured in Russia, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Turkmenistan, Ukraine, or Uzbekistan (except for any firearm model controlled by 0A501.a or .b, 0A506, or 0A507 that is specified under Annex A in Supplement No. 4 to part 740 of the EAR); or shotguns with a barrel length less than 18 inches controlled in ECCNs 0A502 or 0A508 that are shipped from or manufactured in Russia, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Turkmenistan, Ukraine, or Uzbekistan, because of the exclusions in License Exception RPL under § 740.10(b)(4) and supplement no. 2 to part 748, paragraph (z), of the EAR.

* * * * *

■ 33. Section 758.11 is amended by revising paragraphs (a) and (b)(2) to read as follows:

§ 758.11 Export clearance requirements for firearms and related items.

(a) *Scope.* The export clearance requirements of this section apply to all exports of commodities controlled under ECCNs 0A501.a or .b, 0A506, or 0A507, or shotguns with a barrel length less than 18 inches controlled under ECCNs 0A502 or 0A508, or ammunition controlled under ECCN 0A505 except for .c, regardless of value or destination, including exports to Australia, Canada, and the United Kingdom, that are authorized under License Exception BAG, as set forth in § 740.14 of the EAR.

(b) * * *

(2) Required ''description of articles'' for firearms to be included on the CBP Form 4457. For all exports of firearms controlled under ECCNs 0A501.a or .b, 0A506, or 0A507, or shotguns with a barrel length less than 18 inches controlled under ECCNs 0A502 or 0A508, the exporter must provide to CBP the serial number, make, model, and caliber for each firearm being exported by entering this information under the ''Description of Articles'' field of the CBP Form 4457, Certificate of Registration for Personal Effects Taken Abroad.

* * * * *

PART 762—RECORDKEEPING

■ 34. The authority citation for 15 CFR part 762 continues to read as follows:

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

■ 35. Section 762.2 is amended by revising paragraph (a)(11) to read as follows:

§ 762.2 Records to be retained.

(a) * * *

(11) The serial number, make, model, and caliber for any firearm controlled in ECCNs 0A501.a, 0A506, or 0A507 and for shotguns with barrel length less than 18 inches controlled in 0A502 and 0A508 that have been exported. The ''exporter'' or any other party to the transaction (see § 758.3 of the EAR), that creates or receives such records is a person responsible for retaining this record; and

* * * * *

■ 36. Section 762.3 is amended by revising paragraph (a)(5) to read as follows:

§ 762.3 Records exempt from recordkeeping requirements.

(a) * * *

(5) Warranty certificate, except for a warranty certificate issued for an address located outside the United States for any firearm controlled in ECCNs 0A501.a or .b, 0A506 or 0A507 and for shotguns with barrel length less than 18 inches controlled in 0A502 or 0A508;

* * * * *

PART 772—DEFINITIONS OF TERMS

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

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

■ 38. Section 772.1 is amended by adding a definition in alphabetical order for ''CARICOM,'' to read as follows:

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

* * * * *

CARICOM (Caribbean Community). For purposes of §§ 740.3 and 740.14 of the EAR, the term CARICOM is defined as follows: An intergovernmental organization that consists of the following (1) member states Antigua and Barbuda, Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, St. Lucia, Suriname, St. Kitts and Nevis, St. Vincent and the Grenadines, and Trinidad and Tobago; (2) associate members Anguilla, Bermuda, British Virgin Islands, Cayman Islands, and Turks and Caicos; and (3) any other state or associate member that has acceded to membership in accordance with Article 3 or Article 231 of the Treaty of Chaguaramas.

Note to definition of CARICOM: Anguilla, Bermuda, British Virgin Islands, Cayman Islands, Montserrat, and Turks and Caicos are treated as the United Kingdom under all other EAR provisions that govern licensing requirements and license exceptions.

* * * * *

PART 774—THE COMMERCE CONTROL LIST

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

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

■ 40. Supplement no. 1 to part 774 is amended by:

■ a. In Category 0:

■ i. Revising ECCNs 0A501, 0A502, 0A504, and 0A505;

■ ii. Adding ECCNs 0A506, 0A507, 0A508, and 0A509; and

■ iii. Revising ECCNs 0B501, 0D501, 0E501, 0E502, 0E504 and 0E505; and

■ b. In Category 2, by revising ECCN 2B018.

The revisions and additions read as follows:

Supplement No. 1 to Part 774

Category 0—Nuclear Materials, Facilities, and Equipment [and Miscellaneous Items]

A. ''**End Items,**'' ''**Equipment,**'' ''**Accessories,**'' ''**Attachments,**'' ''**Parts,**'' ''**Components,**'' **and** ''**Systems**''

* * * * *

0A501 Firearms (except 0A502 shotguns, 0A506 semi-automatic rifles, 0A507 semi-automatic pistols, and 0A508 semi-automatic shotguns) and related commodities (except semi-automatic related commodities enumerated or otherwise described in ECCN 0A509 for

ECCNs 0A506, 0A507, or 0A508) as follows (see List of Items controlled).

License Requirements

Reason for Control: NS, RS, FC, CC, UN, AT

Control(s)	Country chart (see Supp. No. 1 to part 738)
NS applies to entire entry except 0A501.y.	NS Column 1
RS applies to entire entry except 0A501.y.	RS Column 1
FC applies to entire entry except 0A501.y.	FC Column 1
CC applies to entire entry except 0A501.y.	CC Column 2
UN applies to entire entry.	See § 746.1 of the EAR for UN controls
AT applies to entire entry.	AT Column 1

License Requirement Note: In addition to using the Commerce Country Chart to determine license requirements, a license is required for exports and reexports of ECCN 0A501.y.7 firearms to the People's Republic of China.

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

LVS: $500 for 0A501.c, .d, and .x.
$500 for 0A501.c, .d, .e, and .x if the ultimate destination is Canada.
GBS: N/A

Special Conditions for STA

STA: Paragraph (c)(2) of License Exception STA (§ 740.20(c)(2) of the EAR) may not be used for any item in this entry.

List of Items Controlled

Related Controls: (1) See USML Category I for firearms that are fully automatic, and certain related parts, components, accessories, and attachments (including magazines with a capacity of greater than 50 rounds). (2) See ECCN 0A506 for semi-automatic rifles. (3) See ECCN 0A507 for semi-automatic pistols. (4) See ECCN 0A508 for semi-automatic shotguns and ECCN 0A502 for certain ''parts'' and ''components'' for semi-automatic shotguns that are not controlled by 0A509.a or .c. (5) See ECCN 0A509 for enumerated or otherwise described ''parts,'' ''components,'' devices, ''accessories,'' and ''attachments'' for ECCNs 0A506, 0A507, and 0A508. (6) See .d, .x, and .y of this entry for other ''parts,'' ''components,'' ''accessories,'' and ''attachments'' ''specially designed'' for 0A506 and 0A507, or 0A508. (7) See ECCN 0A502 for non-automatic shotguns and their ''parts'' and ''components'' that are subject to the EAR and for certain ''parts'' and ''components'' for semi-automatic shotguns that are not controlled by 0A509.a or .c. (8) See ECCN 0A504 and USML Category XII for controls on optical sighting devices.
Related Definitions: N/A
Items:

a. Non-automatic and non-semi-automatic firearms equal to .50 caliber (12.7 mm) or less.

Note 1 to paragraph 0A501.a: *'Combination pistols' are controlled under ECCN 0A501.a. A 'combination pistol' (a.k.a., a combination gun) has at least one rifled barrel and at least one smoothbore barrel (generally a shotgun style barrel).*

Note 2 to paragraph 0A501.a: *Semi-automatic firearms* equal to .50 caliber (12.7 mm) or less *are controlled under ECCNs 0A506 and 0A507.*

Technical Note to 0A501.a: *Firearms described in 0A501.a include those chambered for the .50 BMG cartridge.*

b. Non-automatic and non-semi-automatic rifles, carbines, revolvers or pistols with a caliber greater than .50 inches (12.7 mm) but less than or equal to .72 inches (18.0 mm).

c. The following types of ''parts'' and ''components'' if ''specially designed'' for a commodity controlled by paragraph .a or .b of this entry or ECCNs 0A506 or 0A507, or USML Category I (unless otherwise enumerated or elsewhere specified on the USML or controlled under ECCN 0A509): Barrels, cylinders, barrel extensions, mounting blocks (trunnions), bolts, bolt carriers, operating rods, gas pistons, trigger housings, triggers, hammers/striker, sears, disconnectors, pistol grips that contain fire control ''parts'' or ''components'' (*e.g.,* triggers, hammers/striker, sears, disconnectors) and buttstocks that contain fire control ''parts'' or ''components.''

Technical Note to 0A501.c: *Barrel blanks that have reached a stage in manufacturing in which they are either chambered or rifled are controlled by 0A501.c.*

d. Detachable magazines with a capacity of 17 to 50 rounds ''specially designed'' for a commodity controlled by paragraph .a or .b of this entry or controlled by ECCNs 0A506 or 0A507.

Note 3 to paragraph 0A501.d: *Magazines with a capacity of 16 rounds or less are controlled under 0A501.x; for magazines with a capacity greater than 50 rounds, see USML Category I.*

e. Receivers (frames) and ''complete breech mechanisms,'' including castings, forgings, stampings, or machined items thereof, ''specially designed'' for a commodity controlled by paragraph .a or .b of this entry.

Note 4 to 0A501.e: *Frames (receivers) under 0A501.e refers to any ''part'' or ''component'' of the firearm that has or is customarily marked with a serial number when required by law. This paragraph 0A501.e is synonymous with a ''part'' or ''component'' that is regulated by the Bureau of Alcohol, Tobacco, Firearms and Explosives (see 18 U.S.C. 921(a)(3); 27 CFR parts 447, 478, and 479,) as a firearm.*

Note 5 to 0A501.e: *Frames (receivers) ''specially designed'' for semi-automatic firearms are controlled under ECCN 0A509.b or .c.*

f. through w. [Reserved]

x. ''Parts'' and ''components'' that are ''specially designed'' for a commodity classified under paragraphs .a through .c of this entry, a commodity classified under ECCNs 0A506 or 0A507, or the USML and not elsewhere specified on the USML or CCL or controlled under ECCN 0A509.

y. Specific ''parts,'' ''components,'' ''accessories'' and ''attachments'' ''specially designed'' for a commodity subject to control in this ECCN, ECCNs 0A506, 0A507, or common to a defense article in USML Category I and not elsewhere specified in the USML or CCL as follows, and ''parts,'' ''components,'' ''accessories,'' and ''attachments'' ''specially designed'' therefor.

y.1. Stocks (including adjustable, collapsible, blades and braces), grips, handguards, or forends, that do not contain any fire control ''parts'' or ''components'' (*e.g.,* triggers, hammers/striker, sears, disconnectors);

y.2 to y.5. [Reserved]

y.6. Bayonets; and

y.7. Firearms manufactured from 1890 to 1898 and reproductions thereof.

Technical Note 1 to 0A501: *ECCN 0A501 includes ''parts'' and ''components'' that are not ''subject to the ITAR'' even though they are common to firearms described in ECCN 0A501 and to those firearms ''subject to the ITAR.''*

Technical Note 2 to 0A501: *A receiver with any other controlled ''part'' or ''component'' (e.g., a barrel (0A501.c), or trigger guard (0A501.x), or stock (0A501.y.1)) is still controlled under 0A501.e.*

Note 6 to 0A501: *Antique firearms i.e., those manufactured before 1890) and reproductions thereof, muzzle loading and black powder firearms except those designs based on centerfire weapons of a post 1937 design, BB guns, pellet rifles, paint ball, and all other air rifles are EAR99 commodities.*

Note 7 to 0A501: *Muzzle loading and black powder firearms with a caliber less than 20 mm that were manufactured post 1937 that are used for hunting or sporting purposes that were not ''specially designed'' for military use and are not described on the USML nor controlled as shotguns under ECCN 0A502 are EAR99 commodities.*

Note 8 to 0A501: *Scope mounts or accessory rails, iron sights, sling swivels, and butt plates or recoil pads that are subject to the EAR are designated as EAR99. These commodities have been determined to no longer warrant being ''specially designed'' for purposes of ECCN 0A501.*

Note 9 to 0A501: *A kit, including a replacement or repair kit, of firearms ''parts'' or ''components'' customarily sold and exported together takes on the classification of the most restrictive ''part'' or ''component'' that is included in the kit. For example, a kit containing 0A501.y and .x ''parts,'' is controlled as a 0A501.x kit because the .x ''part'' is the most restrictive ''part'' included in the kit. A complete 0A501 firearm disassembled in a kit form is controlled as a firearm under 0A501.a, .b, or .y.7.*

0A502 Shotguns; shotguns ''parts'' and ''components,'' consisting of complete trigger mechanisms; magazines and magazine extension tubes; ''complete breech mechanisms;'' except: semi-

automatic shotguns controlled under ECCN 0A508; certain ''parts,'' components,'' devices, ''accessories,'' and ''attachments'' for semi-automatic shotguns controlled under ECCN 0A509; equipment used to slaughter domestic animals or used exclusively to treat or tranquilize animals; and arms designed solely for signal, flare, or saluting use.

License Requirements

Reason for Control: RS, FC, CC, UN, AT, NS

Control(s)	Country chart (see Supp. No. 1 to part 738)
NS applies to shotguns with a barrel length less than 18 inches (45.72 cm).	NS Column 1
RS applies to shotguns with a barrel length less than 18 inches (45.72 cm).	RS Column 1
FC applies to entire entry.	FC Column 1
CC applies to entire entry.	CC Column 2
UN applies to entire entry.	See § 746.1(b) of the EAR for UN controls
AT applies to shotguns with a barrel length less than 18 inches (45.72 cm).	AT Column 1

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

LVS: $500 for 0A502 shotgun ''parts'' and ''components,'' consisting of complete trigger mechanisms; magazines and magazine extension tubes. $500 for 0A502 shotgun ''parts'' and ''components,'' consisting of complete trigger mechanisms; magazines and magazine extension tubes, ''complete breech mechanisms'' if the ultimate destination is Canada.

GBS: N/A

List of Items Controlled

Related Controls: (1) See USML Category I for shotguns that are fully automatic. (2) See ECCN 0A508 for semi-automatic shotguns. (3) See ECCN 0A509 for enumerated or otherwise described ''parts,'' ''components,'' devices, ''accessories,'' and ''attachments'' for ECCN 0A508. (4) See 0A501.d, .x, and .y for other ''parts,'' ''components,'' ''accessories,'' and ''attachments'' ''specially designed'' for 0A508. (5) See ECCNs 0A501 for non-semi-automatic firearms, 0A506 for semi-automatic rifles, and 0A507 for semi-automatic pistols.

Related Definitions: N/A

Items: The list of items controlled is contained in the ECCN heading.

Note 1 to 0A502: *Shotguns made in or before 1898 are considered antique shotguns and designated as EAR99.*

Technical Note: *Non-automatic and non-semi-automatic shot pistols or shotguns that have had the shoulder stock removed and a pistol grip attached are controlled by ECCN 0A502. Non-automatic and non-semi-automatic slug guns are also controlled under ECCN 0A502.*

* * * * *

0A504 Optical sighting devices for firearms (including shotguns controlled by 0A502); and ''components'' as follows (see List of Items Controlled).

License Requirements

Reason for Control: FC, RS, CC, UN

Control(s)	Country chart (see Supp. No. 1 to part 738)
RS applies to paragraph .i.	RS Column 1
FC applies to paragraphs .a, .b, .c, .d, .e, .g, and .i of this entry.	FC Column 1
CC applies to entire entry.	CC Column 2
UN applies to entire entry.	See § 746.1(b) of the EAR for UN controls

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

LVS: $500 for 0A504.g.

GBS: N/A

List of Items Controlled

Related Controls: (1) See USML Category XII(c) for sighting devices using second generation image intensifier tubes having luminous sensitivity greater than 350 μA/lm, or third generation or higher image intensifier tubes, that are ''subject to the ITAR.'' (2) See USML Category XII(b) for laser aiming or laser illumination systems ''subject to the ITAR.'' (3) Section 744.9 of the EAR imposes a license requirement on certain commodities described in 0A504 if being exported, reexported, or transferred (in-country) for use by a military end user or for incorporation into an item controlled by ECCN 0A919.

Related Definitions: N/A

Items:

a. Telescopic sights.

b. Holographic sights.

c. Reflex or ''red dot'' sights.

d. Reticle sights.

e. Other sighting devices that contain optical elements.

f. Laser aiming devices or laser illuminators ''specially designed'' for use on firearms, and having an operational wavelength exceeding 400 nm but not exceeding 710 nm.

Note 1 to 0A504.f: *0A504.f does not control laser boresighting devices that must be placed in the bore or chamber to provide a reference for aligning the firearms sights.*

g. Lenses, other optical elements and adjustment mechanisms for articles in paragraphs .a, .b, .c, .d, .e, or .i.

h. [Reserved]

i. Riflescopes that were not ''subject to the EAR'' as of March 8, 2020 and are ''specially designed'' for use in firearms that are ''subject to the ITAR.''

Note 2 to paragraph i: *For purpose of the application of ''specially designed'' for the riflescopes controlled under 0A504.i, paragraph (a)(1) of the definition of ''specially designed'' in § 772.1 of the EAR is what is used to determine whether the riflescope is ''specially designed.''*

0A505 Ammunition as follows (see List of Items Controlled).

License Requirements

Reason for Control: NS, RS, FC, CC, UN, AT

Control(s)	Country chart (see Supp. No. 1 to part 738)
NS applies to 0A505.a and .x.	NS Column 1
RS applies to 0A505.a and .x.	RS Column 1
FC applies to entire entry except 0A505.d.	FC Column 1
CC applies to 0A505.a, .b, and .x.	CC Column 2
UN applies to entire entry.	See § 746.1 of the EAR for UN controls
AT applies to 0A505.a, .d, and .x.	AT Column 1
AT applies to 0A505.c.	A license is required for items controlled by paragraph .c of this entry to North Korea for anti-terrorism reasons. The Commerce Country Chart is not designed to determine AT licensing requirements for this entry. See § 742.19 of the EAR for additional information.

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

LVS: $500 for items in 0A505.x, except $3,000 for items in 0A505.x that, immediately prior to March 9, 2020, were classified under 0A018.b. (*i.e.,* ''Specially designed'' components and parts for ammunition, except cartridge cases, powder bags, bullets, jackets, cores, shells, projectiles, boosters, fuses and components, primers, and other detonating devices and ammunition belting and linking machines (all of which are ''subject to the ITAR''). (See 22 CFR parts 120 through 130))

GBS: N/A

Special Conditions for STA

STA: Paragraph (c)(2) of License Exception STA (§ 740.20(c)(2) of the EAR) may not be used for any item in 0A505.

List of Items Controlled

Related Controls: (1) See USML Category III for ammunition for modern heavy weapons such as howitzers, artillery, cannon, mortars and recoilless rifles as well as inherently military ammunition types such as ammunition preassembled into links or belts, caseless ammunition, tracer ammunition, ammunition with a depleted uranium projectile or a projectile with a hardened tip or core and ammunition with

an explosive projectile. (2) Percussion caps, and lead balls and bullets, for use with muzzle-loading firearms are EAR99 items. (3) See USML Category III for shotgun projectiles that are flechettes, incendiary, tracer, or explosive.

Related Definitions: 'Marking rounds' are non-lethal, typically used for training purposes, and contain a dye or paint in a capsule that is not a chemical irritant.

Items:

a. Ammunition for firearms controlled by ECCNs 0A501, 0A506, or 0A507 or USML Category I and not enumerated in paragraph .b, .c, or .d of this entry or described in USML Category III.

b. Buckshot (No. 4 .24″ diameter and larger, any material) shotgun shells and shotgun shells that contain only buckshot, or are for the dispersion of chemical irritants.

c. Shotgun shells (including less than lethal rounds) that do not contain buckshot; and ''specially designed'' ''parts'' and ''components'' of shotgun shells.

d. Blank ammunition for firearms controlled by ECCNs 0A501, 0A502, 0A506, 0A507, or 0A508 and not described in USML Category III.

Technical Note to 0A505.d: *Includes 'marking rounds' that have paint/dye as the projectile.*

e. through w. [Reserved]

x. ''Parts'' and ''components'' that are ''specially designed'' for a commodity subject to control in this ECCN or a defense article in USML Category III and not elsewhere specified on the USML or the CCL.

Note 1 to 0A505.x: *The controls on ''parts'' and ''components'' in this entry include Berdan and boxer primers, metallic cartridge cases, and standard metallic projectiles such as full metal jacket, lead core, copper projectiles, and frangible projectiles.*

Note 2 to 0A505: *Metal shot smaller than No. 4 Buckshot, empty and unprimed shotgun shells, shotgun wads, smokeless gunpowder, 'dummy rounds' and 'drill rounds' (unless linked or belted), not incorporating a lethal or non-lethal projectile(s) are designated EAR99. A 'dummy round' or 'drill round' is a round that is completely inert, (i.e., contains no primer, propellant, or explosive charge). It is typically used to check weapon function and for crew training.*

Note 3 to 0A505: *Shotgun shells that contain two or more balls/shot larger than .24-inch are controlled under 0A505.b.*

0A506 Semi-Automatic Rifles as follows (see List of Items Controlled).

License Requirements

Reason for Control: NS, RS, FC, CC, UN, AT

Control(s)	Country chart (see Supp. No. 1 to part 738)
NS applies to entire entry.	NS Column 1
RS applies to entire entry.	RS Column 1
FC applies to entire entry.	FC Column 1
CC applies to entire entry.	CC Column 2
UN applies to entire entry.	See § 746.1 of the EAR for UN controls
AT applies to entire entry.	AT Column 1

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

LVS: N/A

GBS: N/A

Special Conditions for STA

STA: License Exception STA may not be used for 0A506.

List of Items Controlled

Related Controls: (1) See USML Category I for firearms that are fully automatic, and magazines with a capacity of greater than 50 rounds. (2) See ECCN 0A507 for semi-automatic pistols, excluding pistols built with, *e.g.,* AR- or AK-style receivers (frames), which are controlled under ECCN 0A506. (3) See ECCN 0A508 for semi-automatic shotguns and ECCN 0A502 for certain ''parts'' and ''components'' for semi-automatic shotguns that are not controlled by 0A509.a or .c. (4) See ECCN 0A509 for enumerated or otherwise described ''parts,'' ''components,'' devices, ''accessories,'' and ''attachments'' for ECCNs 0A506, 0A507, and 0A508. (5) See 0A501.c, .d, .x, and .y for other ''parts,'' ''components,'' ''accessories,'' and ''attachments'' ''specially designed'' for 0A506 and 0A507, or 0A508. (6) See ECCN 0A501 for non-semi-automatic firearms (except 0A502 shotguns) and related commodities that are subject to the EAR. (7) See ECCN 0A502 for non-automatic shotguns and their ''parts'' and ''components'' that are subject to the EAR and certain ''parts'' and ''components'' for semi-automatic shotguns that are not controlled by 0A509.a or .c. (8) See ECCN 0A504 and USML Category XII for controls on optical sighting devices.

Related Definitions: N/A

Items:

a. Semi-automatic centerfire (non-rimfire) rifles equal to .50 caliber (12.7 mm) or less that has any one of the following:

a.1. ability to accept a detachable large capacity magazine (more than 10 rounds); or may be easily modified to do so;

a.2. folding or telescoping stock;

a.3. separate pistol grips;

a.4. ability to accept a bayonet;

a.5. a flash suppressor; *or*

a.6. bipods.

b. Semi-automatic rifles equal to .50 caliber (12.7 mm) or less, including all non-centerfire (rimfire), n.e.s.

Note 1 to 0A506.a and .b: ''*Parts*'' *and* ''*components*'' *that are* ''*specially designed*'' *for a commodity classified under .a or .b of this entry, except those controlled under ECCN 0A509, are controlled under ECCN 0A501.c, .d, .x, or .y.*

Technical Note 1 to 0A506: *Firearms described in 0A506 include those chambered for the .50 BMG cartridge.*

Technical Note 2 to 0A506: *Firearms described in 0A506 include pistols built with, e.g., AR- or AK-style receivers (frames).*

0A507 Semi-Automatic Pistols as follows (see List of Items Controlled).

License Requirements

Reason for Control: NS, RS, FC, CC, UN, AT

Control(s)	Country chart (see Supp. No. 1 to part 738)
NS applies to entire entry.	NS Column 1
RS applies to entire entry.	RS Column 1
FC applies to entire entry.	FC Column 1
CC applies to entire entry.	CC Column 2
UN applies to entire entry.	See § 746.1 of the EAR for UN controls
AT applies to entire entry.	AT Column 1

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

LVS: N/A

GBS: N/A

Special Conditions for STA

STA: License Exception STA may not be used for 0A507.

List of Items Controlled

Related Controls: (1) See USML Category I for firearms that are fully automatic, and magazines with a capacity of greater than 50 rounds. (2) See ECCN 0A506 for semi-automatic rifles. (3) See ECCN 0A508 for semi-automatic shotguns and ECCN 0A502 for certain ''parts'' and ''components'' for semi-automatic shotguns that are not controlled by 0A509.a or .c. (4) See ECCN 0A509 for enumerated or otherwise described ''parts,'' ''components,'' devices, ''accessories,'' and ''attachments'' for ECCNs 0A506, 0A507, and 0A508. (5) See ECCN 0A501.c, .d, .x, and .y for other ''parts,'' ''components,'' ''accessories,'' and ''attachments'' ''specially designed'' for 0A506 and 0A507, or 0A508. (6) See ECCN 0A501 for non-semi-automatic firearms (except 0A502 shotguns) and related commodities that are subject to the EAR. (7) See ECCN 0A502 for non-automatic shotguns and their ''parts'' and ''components'' that are subject to the EAR and certain ''parts'' and ''components'' for semi-automatic shotguns that are not controlled by 0A509.a or .c. (8) See ECCN 0A504 and USML Category XII for controls on optical sighting devices.

Related Definitions: N/A

Items:

a. Semi-automatic centerfire (non-rimfire) pistols equal to .50 caliber (12.7 mm) or less.

b. Semi-automatic rimfire pistols equal to .50 caliber (12.7 mm) or less.

Note 1 to 0A507.a and .b: ''*Parts*'' *and* ''*components*'' *that are* ''*specially designed*''

for a commodity classified under .a or .b of this entry, except those controlled under ECCN 0A509, are controlled under ECCN 0A501.c, .d, .x, or .y.

Technical Note to 0A507: *Firearms described in 0A507 includes those chambered for the .50 BMG cartridge, including revolvers, or that may be developed to fire .50 BMG cartridges.*

0A508 Semi-Automatic Shotguns as follows (see List of Items Controlled).

License Requirements

Reason for Control: NS, RS, FC, CC, UN, AT

Control(s)	Country chart (see Supp. No. 1 to part 738)
NS applies to semi-automatic shotguns with a barrel length less than 18 inches (45.72 cm).	NS Column 1
RS applies to semi-automatic shotguns with a barrel length less than 18 inches (45.72 cm).	RS Column 1
FC applies to entire entry.	FC Column 1
CC applies to entire entry.	CC Column 2
UN applies to entire entry.	See § 746.1 of the EAR for UN controls
AT applies to semi-automatic shotguns with a barrel length less than 18 inches (45.72 cm).	AT Column 1

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

LVS: N/A
GBS: N/A

Special Conditions for STA

STA: License Exception STA may not be used for 0A508.

List of Items Controlled

Related Controls: (1) See USML Category I for shotguns that are fully automatic. (2) See ECCN 0A502 for non-semi-automatic shotguns. (3) See ECCN 0A509 for enumerated or otherwise described ''parts,'' ''components,'' devices, ''accessories,'' and ''attachments'' for ECCN 0A508. (4) See 0A501.d, .x, and .y for other ''parts,'' ''components,'' ''accessories,'' and ''attachments'' ''specially designed'' for 0A508. (5) See ECCNs 0A501 for non-semi-automatic firearms, 0A506 for semi-automatic rifles, and 0A507 for semi-automatic pistols.
Related Definitions: N/A
Items:
a. Semi-automatic centerfire (non-rimfire) shotguns with any one of the following:
a.1. folding, telescoping, or collapsible stock;
a.2. a flash suppressor;
a.3. a magazine over five rounds;
a.4. a drum magazine;
a.5. Excessive Weight (greater than 10 lbs for 12 gauge or smaller); *or*
a.6. Excessive Bulk (greater than 3 inches in width and/or greater than 4 inches in depth).
b. Semi-automatic shotguns, including all non-centerfire (rimfire), n.e.s.

0A509 Certain ''parts,'' ''components,'' devices, ''accessories,'' and ''attachments'' for items controlled under ECCNs 0A506, 0A507, and 0A508 as follows (see List of Items Controlled).

License Requirements

Reason for Control: NS, RS, FC, CC, UN, AT

Control(s)	Country chart (see Supp. No. 1 to part 738)
NS applies to entire entry.	NS Column 1
RS applies to entire entry.	RS Column 1
FC applies to entire entry.	FC Column 1
CC applies to entire entry.	CC Column 2
UN applies to entire entry.	See § 746.1 of the EAR for UN controls
AT applies to entire entry.	AT Column 1

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

LVS: N/A
GBS: N/A

Special Conditions for STA

STA: License Exception STA may not be used for 0A509.

List of Items Controlled

Related Controls: (1) See USML Category I for firearms that are fully automatic, and magazines with a capacity of greater than 50 rounds. (2) See ECCN 0A506 for semi-automatic rifles. (3) See ECCN 0A507 for semi-automatic pistols. (4) See ECCN 0A508 for semi-automatic shotguns and ECCN 0A502 for certain ''parts'' and ''components'' for semi-automatic shotguns that are not controlled by .a or .c of this entry. (5) See ECCN 0A501.c, .d, .x, and .y for other ''parts,'' ''components,'' ''accessories,'' and ''attachments'' ''specially designed'' for 0A506 and 0A507, or 0A508. (6) See ECCN 0A501 for non-semi-automatic firearms (except 0A502 shotguns) and related commodities that are subject to the EAR. (7) See ECCN 0A502 for non-automatic shotguns and their ''parts'' and ''components'' that are subject to the EAR and certain ''parts'' and ''components'' for semi-automatic shotguns that are not controlled by .a or .c of this entry. (8) See ECCN 0A504 and USML Category XII for controls on optical sighting devices. (9) See USML Category I for similar items.
Related Definitions: N/A
Items:
a. Any ''part,'' ''component,'' device, ''attachment,'' or ''accessory'' not elsewhere specified on the USML that is designed or functions to convert a non-semi-automatic firearm controlled by 0A501 or 0A502 to semi-automatic or to accelerate the rate of fire of a semi-automatic firearm controlled by 0A506, 0A507, or 0A508.
b. Receivers (frames), including castings, forgings, stampings, or machined items thereof, ''specially designed'' for an item controlled by ECCN 0A506.
c. Receivers (frames), including castings, forgings, stampings, or machined items thereof, ''specially designed'' for an item controlled by ECCN 0A507.
d. Receivers (frames) and ''specially designed'' ''complete breech mechanisms'' for a commodity controlled by ECCN 0A508.

Note 1 to 0A509.b and .c: *Receivers (frames) under 0A509.b and .c refers to any ''part'' or ''component'' of the firearm that has or is customarily marked with a serial number when required by law. Paragraph 0A509.b and .c are synonymous with a ''part'' or ''component'' that is regulated by the Bureau of Alcohol, Tobacco, Firearms and Explosives (see 18 U.S.C. 921(a)(3); 27 CFR parts 447, 478, and 479,) as a firearm.*

* * * * *

B. ''Test'', ''Inspection'' and ''Production Equipment''

* * * * *

0B501 Test, inspection, and production ''equipment'' and related commodities for the ''development'' or ''production'' of commodities enumerated or otherwise described in ECCNs 0A501, 0A506, 0A507, or 0A509 or USML Category I as follows (see List of Items Controlled).

License Requirements

Reason for Control: NS, RS, UN, AT

Control(s)	Country chart (see Supp. No. 1 to part 738)
NS applies to entire entry except equipment for ECCN 0A501.y.	NS Column 1
RS applies to entire entry except equipment for ECCN 0A501.y.	RS Column 1
UN applies to entire entry.	See § 746.1 of the EAR for UN controls
AT applies to entire entry.	AT Column 1

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

LVS: $3000
GBS: N/A

Special Conditions for STA

STA: Paragraph (c)(2) of License Exception STA (§ 740.20(c)(2) of the EAR) may not be used to ship any item in this entry.

List of Items Controlled

Related Controls: N/A
Related Definitions: N/A
Items:
a. Small arms chambering machines.
b. Small arms deep hole drilling machines and drills therefor.

c. Small arms rifling machines.
d. Small arms boring/reaming machines.
e. Production equipment (including dies, fixtures, and other tooling) ''specially designed'' for the ''production'' of the items controlled in 0A501.a through .x., 0A506, 0A507, 0A509, or USML Category I.

* * * * *

D. ''**Software**''

* * * * *

0D501 ''Software'' ''specially designed'' for the ''development,'' ''production,'' operation, or maintenance of commodities controlled by 0A501, 0A506, 0A507, 0A509 or 0B501.

License Requirements

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

Control(s)	Country chart (see Supp. No. 1 to part 738)
NS applies to entire entry except ''software'' for commodities in ECCN 0A501.y or equipment in ECCN 0B501 for commodities in ECCN 0A501.y.	NS Column 1
RS applies to entire entry except ''software'' for commodities in ECCN 0A501.y or equipment in ECCN 0B501 for commodities in ECCN 0A501.y.	RS Column 1
CC applies to entire entry except ''software'' for commodities in ECCN 0A501.y or equipment in ECCN 0B501 for commodities in ECCN 0A501.y.	CC Column 2
UN applies to entire entry.	See § 746.1 of the EAR for UN controls
AT applies to entire entry.	AT Column 1

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

TSR: N/A

Special Conditions for STA

STA: Paragraph (c)(2) of License Exception STA (§ 740.20(c)(2) of the EAR) may not be used for any ''software'' in 0D501.

List of Items Controlled

Related Controls: See USML Category I for ''software'' directly related to articles described in USML Category I.
Related Definitions: N/A
Items: The list of items controlled is contained in this ECCN heading.

* * * * *

0D505 ''Software'' ''specially designed'' for the ''development,'' ''production,'' operation, or maintenance of commodities controlled by 0A505 or 0B505.

License Requirements

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

Control(s)	Country chart (see Supp. No. 1 to part 738)
NS applies to ''software'' for commodities in ECCN 0A505.a and .x and equipment in ECCN 0B505.a .and .x.	NS Column 1
RS applies to ''software'' for commodities in ECCN 0A505.a and .x and equipment in ECCN 0B505.a and .x.	RS Column 1
CC applies to ''software'' for commodities in ECCN 0A505.a, .b, and .x and equipment in ECCN 0B505.a and .x.	CC Column 2
UN applies to entire entry.	See § 746.1 of the EAR for UN controls
AT applies to ''software'' for commodities in ECCN 0A505.a, .d, or .x and equipment in ECCN 0B505.a, .d, or .x.	AT Column 1

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

TSR: N/A

Special Conditions for STA

STA: Paragraph (c)(2) of License Exception STA (§ 740.20(c)(2) of the EAR) may not be used for any ''software'' in 0D505.

List of Items Controlled

Related Controls: See USML Category III for ''software'' directly related to articles described in USML Category III.
Related Definitions: N/A
Items: The list of items controlled is contained in this ECCN heading.

* * * * *

E. ''**Technology**''

* * * * *

0E501 ''Technology'' ''required'' for the ''development,'' ''production,'' operation, installation, maintenance, repair, or overhaul of commodities controlled by 0A501, 0A506, 0A507, 0A509, or 0B501 as follows (see List of Items Controlled).

License Requirements

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

Control(s)	Country chart (see Supp. No. 1 to part 738)
NS applies to entire entry.	NS Column 1
RS applies to entire entry.	RS Column 1
CC applies to entire entry.	CC Column 2
UN applies to entire entry.	See § 746.1 of the EAR for UN controls
AT applies to entire entry.	AT Column 1

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

TSR: N/A

Special Conditions for STA

STA: Paragraph (c)(2) of License Exception STA (§ 740.20(c)(2) of the EAR) may not be used for any ''technology'' in ECCN 0E501.

List of Items Controlled

Related Controls: See USML Category I for technical data directly related to articles described in USML Category I.
Related Definitions: N/A
Items:
a. ''Technology'' ''required'' for the ''development'' or ''production'' of commodities controlled by ECCN 0A501 (other than 0A501.y), 0A506, 0A507, 0A509, or 0B501.
b. ''Technology'' ''required'' for the operation, installation, maintenance, repair, or overhaul of commodities controlled by ECCN 0A501 (other than 0A501.y), 0A506, 0A507, 0A509, or 0B501.

0E502 ''Technology'' ''required'' for the ''development'' or ''production'' of commodities controlled by 0A502, 0A508, or 0A509.

License Requirements

Reason for Control: CC, UN

Control(s)	Country chart (see Supp. No. 1 to part 738)
CC applies to entire entry.	CC Column 2
UN applies to entire entry.	See § 746.1 of the EAR for UN controls

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

TSR: N/A

List of Items Controlled

Related Controls: See USML Category I for technical data directly related to articles described in USML Category I.
Related Definitions: N/A
Items: The list of items controlled is contained in the ECCN heading.

* * * * *

0E504 ''Technology'' ''required'' for the ''development'' or ''production'' of commodities controlled by 0A504 that incorporate a focal plane array or image intensifier tube.

License Requirements

Reason for Control: RS, CC, UN, AT

Control(s)	Country chart (see Supp. No. 1 to part 738)
RS applies to entire entry.	RS Column 1
CC applies to entire entry.	CC Column 2
UN applies to entire entry.	See § 746.1(b) of the EAR for UN controls
AT applies to entire entry.	AT Column 1

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

TSR: N/A

List of Items Controlled

Related Controls: N/A
Related Definitions: N/A
Items: The list of items controlled is contained in the ECCN heading.

0E505 ''Technology'' ''required'' for the ''development,'' ''production,'' operation, installation, maintenance, repair, overhaul, or refurbishing of commodities controlled by 0A505.

License Requirements

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

Control(s)	Country chart (see Supp. No. 1 to part 738)
NS applies to ''technology'' for ''development,'' ''production,'' operation, installation, maintenance, repair, overhaul, or refurbishing commodities in 0A505.a and .x; for equipment for those commodities in 0B505; and for ''software'' for that equipment and those commodities in 0D505.	NS Column 1
RS applies to ''technology'' for ''development,'' ''production,'' operation, installation, maintenance, repair, overhaul, or refurbishing commodities in 0A505.a and .x; for equipment for those commodities in 0B505 and for ''software'' for those commodities and that equipment in 0D505.	RS Column 1
UN applies to entire entry.	See § 746.1 of the EAR for UN controls
CC applies to ''technology'' for the ''development'' or ''production'' of commodities in 0A505.a, .b, and .x.	CC Column 2
AT applies to ''technology'' for ''development,'' ''production,'' operation, installation, maintenance, repair, overhaul, or refurbishing commodities in 0A505.a, .d, and .x.	AT Column 1

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

TSR: N/A

Special Conditions for STA

STA: Paragraph (c)(2) of License Exception STA (§ 740.20(c)(2) of the EAR) may not be used for any ''technology'' in 0E505.

List of Items Controlled

Related Controls: See USML Category III for technical data directly related to articles described in USML Category III.
Related Definitions: N/A
Items: The list of items controlled is contained in this ECCN heading.

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Category 2—Materials Processing

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B. ''Test'', ''Inspection'' and ''Production Equipment''

* * * * *

2B018 Equipment on the Wassenaar Arrangement Munitions List.

No commodities currently are controlled by this entry. Commodities formerly controlled by paragraphs .a through .d, .m, and .s of this entry are controlled in ECCN 0B606. Commodities formerly controlled by paragraphs .e through .l of this entry are controlled by ECCN 0B602. Commodities formerly controlled by paragraphs .o through .r of this entry are controlled by ECCN 0B501. Commodities formerly controlled by paragraph .n of this entry are controlled in ECCN 0B501 if they are ''specially designed'' for the ''production'' of the items controlled in ECCNs 0A501.a through .x, 0A506, 0A507, or 0A509 or USML Category I and controlled in ECCN 0B602 if they are of the kind exclusively designed for use in the manufacture of items in ECCN 0A602 or USML Category II.

* * * * *

Thea D. Rozman Kendler

Assistant Secretary for Export Administration.

[FR Doc. 2024–08813 Filed 4–26–24; 11:15 am]

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Part VI

Department of Commerce

National Oceanic and Atmospheric Administration

15 CFR Part 902

50 CFR Part 600 and 679

Fisheries of the Exclusive Economic Zone off Alaska; Cook Inlet Salmon; Amendment 16; Final Rule

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

15 CFR 902

50 CFR Parts 600 and 679

[Docket No.: 240417–0111]

RIN 0648–BM42

Fisheries of the Exclusive Economic Zone off Alaska; Cook Inlet Salmon; Amendment 16

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

ACTION: Final rule.

SUMMARY: NMFS issues this final rule to implement amendment 16 to the Fishery Management Plan (FMP) for the Salmon Fisheries in the Exclusive Economic Zone (EEZ) Off Alaska (Salmon FMP). Amendment 16 and this final rule establish Federal fishery management for all salmon fishing that occurs in the Cook Inlet EEZ, which includes commercial drift gillnet and recreational salmon fishery sectors. This action is necessary to comply with rulings from the U.S. Court of Appeals for the Ninth Circuit and the U.S. District Court for the District of Alaska, and to ensure the Salmon FMP is consistent with the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). This final rule is intended to promote the goals and objectives of the Magnuson-Stevens Act, the Salmon FMP, and other applicable laws.

DATES: This rule is effective on May 30, 2024.

ADDRESSES: Electronic copies of amendment 16; the Environmental Assessment, the Regulatory Impact Review, and the Social Impact Analysis (contained in a single document and collectively referred to as the ''Analysis''); the Finding of No Significant Impact; and the public comment announcement and tribal consultation and meeting summaries prepared for this action may be obtained from *http://www.regulations.gov* or from the NMFS Alaska Region website at *https://www.fisheries.noaa.gov/action/amendment-16-fmp-salmon-fisheries-alaska.*

Written comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this final rule may be submitted to NMFS Alaska Region, P.O. Box 21668, Juneau, AK 99802–1668, Attn: Gretchen Harrington; in person at NMFS Alaska Region, 709 West 9th Street, Room 401, Juneau, AK; and 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: Doug Duncan, 907–586–7228 or *doug.duncan@noaa.gov.*

SUPPLEMENTARY INFORMATION: This final rule implements amendment 16 to the Salmon FMP. NMFS published the proposed rule and Notice of Availability (NOA) for amendment 16 in the **Federal Register** on October 19, 2023 (88 FR 72314), with public comments invited through December 18, 2023. Comments submitted on the NOA and the proposed rule for amendment 16 were considered jointly. The Secretary of Commerce approved amendment 16 on April 9, 2024, after considering public comment and determining that amendment 16 is consistent with the Salmon FMP, the Magnuson-Stevens Act, and other applicable laws.

NMFS manages U.S. salmon fisheries in the EEZ off of Alaska under the Salmon FMP. The North Pacific Fishery Management Council (Council) prepared, and the Secretary of Commerce (Secretary) approved, the Salmon FMP under the authority of the Magnuson-Stevens Act, 16 U.S.C. 1801 *et seq.* Regulations implementing the Salmon FMP are located at 50 CFR part 679. General regulations governing U.S. fisheries also appear at 50 CFR part 600. NMFS is authorized to prepare an FMP amendment necessary for the conservation and management of a fishery managed under the FMP if the Council fails to develop and submit such an amendment after a reasonable period of time (section 304(c)(1)(A); 16 U.S.C. 1854(c)(1)(A)). Because the Council failed to take action to recommend an FMP necessary for the conservation and management of the Cook Inlet EEZ salmon fishery, NMFS developed amendment 16 to the Salmon FMP and this final rule pursuant to section 304(c) of the Magnuson-Stevens Act in order to comply with rulings from the U.S. Court of Appeals for the Ninth Circuit and the U.S. District Court for the District of Alaska, and to ensure the Salmon FMP is consistent with the Magnuson-Stevens Act.

Amendment 16 Overview

Amendment 16 incorporates the Cook Inlet EEZ into the Salmon FMP as the Cook Inlet EEZ Area (defined as the EEZ waters of Cook Inlet north of a line at 59°46.15′ N), thereby bringing the salmon fishery that occurs within it under Federal management by the Council and NMFS.

Two different sectors participate in the Cook Inlet EEZ Area salmon fishery: the commercial drift gillnet sector and the recreational sector. Historically, the commercial drift gillnet fleet has harvested over 99.99 percent of salmon in the Cook Inlet EEZ Area. Under this action, all salmon fishing in the Cook Inlet EEZ Area is managed by NMFS and the Council separately from adjacent State of Alaska (State) water salmon fisheries.

Amendment 16 revises the Salmon FMP, beginning with an updated history of the FMP and introduction in chapter 1, as well as a revised description of the fishery management unit in chapter 2 that includes the Cook Inlet EEZ Area as a separate and distinctly managed area. The management and policy objectives in chapter 2 are revised to include consideration of the Cook Inlet EEZ Area. Amendment 16 consolidates chapters describing management of the Salmon FMP's East Area and West Area into chapter 3. No substantive changes are made to Salmon FMP content related to the East Area and West Area.

A new chapter 4 comprehensively describes Federal management measures and the roles and responsibilities of NMFS and the Council in managing the Cook Inlet EEZ Area salmon fishery. In particular, chapter 4 defines all required conservation and management measures, including maximum sustainable yield (MSY), optimum yield (OY), and status determination criteria, and includes an outline of the harvest specifications process. Chapter 4 also describes required Federal permits; fishing gear restrictions; fishing time and area restrictions; NMFS inseason management provisions; and monitoring, recordkeeping, and reporting requirements.

Chapter 5 contains all content related to domestic annual harvesting and processing capacity, finding that all salmon fisheries off Alaska can be fully utilized by U.S. harvesters and processors. This finding is unchanged by this action.

Chapter 6 contains information on Essential Fish Habitat and Habitat Areas of Particular Concern and is not modified by this action. Amendment 16 removes the outdated Fishery Impact Statement in the Salmon FMP. The Analysis prepared for amendment 16 contains the Fishery Impact Statement for the Cook Inlet EEZ salmon fishery and this action.

Maximum Sustainable Yield and Optimum Yield

Under amendment 16, MSY and OY are specified consistent with the National Standard guidelines and are briefly described below. The definitions of MSY and OY are explained in greater detail in the preamble to the proposed rule and remain unchanged in this final rule.

MSY is specified for salmon stocks and stock complexes in Cook Inlet and defined as the maximum potential yield, which is calculated by subtracting the lower bound of the escapement goal (or another escapement value as recommended by the Council's Scientific and Statistical Committee (SSC) based on the best scientific information available) from the total run size for stocks where data are available. An escapement goal is the number of spawning salmon likely to result in sustainable yields over a broad range of expected conditions. Any fish in excess of that necessary to achieve the escapement goal for each stock or stock complex are theoretically available for harvest under this definition of MSY. For stocks where escapement is not known, historical catch is used as a proxy for MSY.

Amendment 16 defines the OY range for the Cook Inlet EEZ salmon fishery in the Salmon FMP as the range between the averages of the three lowest years of total estimated EEZ salmon harvest and the three highest years of total estimated EEZ salmon harvest from 1999 to 2021. This definition of OY tempers the influence of extreme events in defining OY (*e.g.,* fishery disasters at the low end, or extremely large harvests at the high end), thereby resulting in a range of harvests that are likely to be sustainable and provide the greatest net benefit to the Nation into the future.

Status Determination Criteria and Annual Catch Limits

Amendment 16 specifies objective and measurable criteria for determining when a stock or stock complex is subject to overfishing or is overfished. These are referred to as status determination criteria and are established during the harvest specification process and evaluated each year after fishing is complete.

Amendment 16 establishes a tier system to assess salmon stocks based on the amount of available information for each stock. NMFS annually assigns each salmon stock to a tier based on the best available scientific information during the harvest specifications process as follows:

- Tier 1: salmon stocks with escapement goals and stock-specific estimates of harvests
- Tier 2: salmon stocks managed as a complex, with specific salmon stocks as indicator stocks
- Tier 3: salmon stocks or stock complexes with no reliable estimates of escapement

For stocks and stock complexes where escapement is known (Tier 1), or escapement of indicator stocks is thought to be a reliable index for the number of spawners in a stock complex (Tier 2), overfishing is defined as occurring when the fishing mortality rate in the Cook Inlet EEZ Area (F_{EEZ}) exceeds the maximum fishery mortality threshold (MFMT). The MFMT is defined as the maximum potential fishing mortality rate in the EEZ above which overfishing occurs for Tier 1 and 2 stocks, expressed as an exploitation rate that is assessed over one generation.

For Tier 1 and Tier 2 stocks, the Salmon FMP defines the overfishing limit (OFL) as the amount of salmon harvest in the EEZ for the coming year that corresponds with the spawning escapement target not being achieved, based on information available preseason. Acceptable biological catch (ABC) is established based on the OFL. As an ABC control rule, ABC must be less than or equal to OFL, and the SSC may recommend reducing ABC from OFL to account for scientific uncertainty, including uncertainty associated with the assessment of spawning escapement goals, forecasts, harvests, and other sources. The annual catch limit (ACL) for each stock is set equal to ABC.

For Cook Inlet salmon, the minimum stock size threshold (MSST)—the level of biomass below which a stock would be considered overfished—is calculated for stocks in Tier 1 and 2 as follows: a stock or stock complex is overfished when summed escapements over a generation fall below one half of summed spawning escapement goals over that generation.

For Tier 3 stocks, which have no reliable estimates of escapement, overfishing is defined as occurring when harvest exceeds the OFL. The OFL for Tier 3 stocks is set as the maximum EEZ catch of the stock multiplied by the generation time (years). The result of this calculation is compared against the cumulative EEZ catch of the stock for the most recent generation. The SSC may recommend an alternative catch value for the OFL on the basis of the best scientific information available. As with Tier 1 and 2 stocks, ABC for these stocks must be set less than or equal to the OFL, and may be reduced by a buffer to account for scientific uncertainty. For Tier 3 stocks or stock complexes with escapement goals for a suitable indicator stock, the MSST is calculated the same as for Tier 1 and 2 stocks. For Tier 3 stock complexes without any suitable indicator stocks with escapement goals, it is not possible to calculate MSST.

While OFL, ABC, and ACL are calculated based on the best scientific information available preseason when harvest specifications must be established, realized harvest and escapement data are used post-season to determine whether ACLs were exceeded, whether overfishing occurred, and whether any stocks are overfished. Accountability measures are applied to prevent ACL overages and, if they occur, to prevent the recurrence of any ACL overages.

Harvest Specifications and Annual Processes

Amendment 16 establishes a harvest specification process for the Cook Inlet EEZ Area, along with specific definitions of required status determination criteria using the tier system described in the previous section.

A Stock Assessment and Fisheries Evaluation (SAFE) report provides the SSC and Council with a summary of the most recent biological condition of the salmon stocks, including all status determination criteria, and the social and economic condition of the fishing and processing industries. NMFS develops the SAFE report for the Cook Inlet EEZ Area, with public and scientific review through the Council process and public review through publication of the proposed salmon harvest specifications in the **Federal Register**.

The SAFE report summarizes the best available scientific information concerning the past, present, and possible future condition of Cook Inlet salmon stocks and fisheries, along with ecosystem considerations, taking into account any uncertainty. This includes recommendations of OFL, ABC, and MSST that are calculated following the tier system described above. The SAFE report will include a final post-season evaluation of the previous fishing year based on realized catches and escapement with all information needed to make ''overfishing'' and ''overfished'' determinations, as well as recommendations to develop harvest specifications for the upcoming fishing year. In providing this information, the SAFE report uses a time series of historical catch for each salmon stock,

including estimates of retained and discarded catch taken in the salmon fishery; bycatch taken in other fisheries; catch in State commercial, recreational, personal use, and subsistence fisheries; and catches taken during scientific research (*e.g.,* test fisheries).

The SAFE report also provides information needed to document significant trends or changes in the stocks, marine ecosystem, and fisheries over time, as well as the impacts of management. The SAFE report will be developed to contain economic, social, community, essential fish habitat, and ecological information pertinent to the success of salmon management or the achievement of Salmon FMP objectives.

The SSC reviews the SAFE report each year and recommends the OFL, ABC, MFMT, and MSST for each stock or stock complex, which then constrain the maximum allowable harvest for each stock based on biology and scientific uncertainty identified in the assessments. This SSC review constitutes the official peer review of scientific information used to manage the Cook Inlet EEZ Area salmon fishery for purposes of National Standard 1 and for the purposes of the Information Quality Act. Upon review and acceptance by the SSC, the SAFE report, after incorporating any associated SSC comments, constitutes the best scientific information available for purposes of the Magnuson-Stevens Act.

Total allowable catches (TACs) are set for the Cook Inlet EEZ commercial salmon fishery. A TAC is a limit on the annual catch of a stock, stock complex, or species that is the management target of the fishery, and operates as an accountability measure that accounts for management uncertainty to ensure total catch remains at or below the ACL for each stock. In the Cook Inlet EEZ, TACs will initially be set at the species level because it is not currently possible to distinguish among individual stocks of the same species when monitoring harvests during the fishing season. TACs are set considering the estimated proportional contributions of each stock to total harvest of a species such that ACLs are not expected to be exceeded for any component stock if all TACs are fully achieved. Because of the uncertainty inherent to estimating the proportional contributions of each stock to total harvest pre-season, species-level TACs are reduced from the combined ACLs of component stocks by an appropriate buffer that accounts for the degree of management uncertainty.

NMFS will establish harvest specifications each year by publishing proposed and final salmon harvest specifications in the **Federal Register**. NMFS will consider public comments on proposed harvest specification prior to making a final decision. If approved, final harvest specifications are issued with any applicable modifications and the agency responses to public comments.

Changes From Proposed to Final Amendment 16

After considering public comments, NMFS revised amendment 16 to specify the salmon stocks or stock complexes for which status determination criteria are being established, and, as recommended by the SSC at their February 2024 meeting, to better describe how the OFL would be set preseason. For Tier 1 stocks, the preseason OFL was updated in accordance with the SSC recommendation that it be based solely on the preseason total run size for the coming fishing season (equation 6 within section 4.2.4 of the Salmon FMP) rather than on the generational (multi-year) formula that was defined in equations 8 and 9 of proposed amendment 16. For Tier 3 stocks, the language that describes how the preseason OFL is set was updated in accordance with the SSC recommendation that rather than considering only maximum historical catch, the preseason OFL could also be based on other values such as average or maximum catch for a particular period of time in the catch history. Finally, several technical corrections were also made to improve formatting consistency and to eliminate redundancy in the FMP.

Final Rule

This final rule modifies Federal regulations to implement amendment 16 by revising the definition of Salmon Management Area at 50 CFR 679.2 to redefine the Cook Inlet Area as the Cook Inlet EEZ Area and incorporate it into the Federal Salmon Management Area. This final rule creates figure 22 to 50 CFR part 679 to show the location of the Cook Inlet EEZ Area. Regulations at § 600.725 are modified to authorize the use of drift gillnet gear for the Cook Inlet EEZ Area commercial salmon fishery. Existing regulations related to salmon fisheries under the Salmon FMP throughout part 679 are moved to subpart J beginning at § 679.110. Management measures necessary for the Cook Inlet EEZ Area are added to subpart J. The following sections provide a summary of management measures implemented by this final rule.

Federal Commercial Fishing Season and Fishing Periods

Under this final rule, the Cook Inlet EEZ Area commercial drift gillnet fishing season begins each year on either the third Monday in June or June 19, whichever is later. For 2024, the third Monday in June is June 17, so the season will begin on June 19. However, because June 19 falls on a Wednesday—which as described below is not an open fishing period—the first day of fishing in the 2024 Cook Inlet EEZ Area commercial fishing season will be on Thursday, June 20.

On or after the season start date, NMFS will open the Cook Inlet EEZ Area for drift gillnet fishing for two, 12-hour periods each week, from 7 a.m. Monday until 7 p.m. Monday, and from 7 a.m. Thursday until 7 p.m. Thursday, a schedule that will continue until July 15 unless a harvest limit (TAC) is reached. From July 16 to July 31, drift gillnet fishing will be open for one 12-hour period per week from 7 a.m. until 7 p.m. on Thursdays, unless a TAC is reached before that time. From August 1 to August 15, the Cook Inlet EEZ Area will again be open for drift gillnet fishing for two, 12-hour periods each week, from 7 a.m. Monday until 7 p.m. Monday, and from 7 a.m. Thursday until 7 p.m. Thursday unless a TAC is reached before that time. The Cook Inlet EEZ Area will be closed to drift gillnet fishing when the TAC is reached, or on August 15, whichever comes first.

Inseason Management for Commercial Fishing

NMFS will actively monitor and manage the commercial salmon fishery in the Cook Inlet EEZ Area throughout the fishing season by exercising the inseason management authorities described in this rule. In regulations at § 679.118(c)(1)(i), this final rule provides NMFS the authority to prohibit commercial salmon fishing in the Cook Inlet EEZ Area. In regulations at § 679.25, this final rule provides NMFS inseason authority to adjust a TAC for any salmon species or stock and to close or open the Cook Inlet EEZ Area as necessary to prevent overfishing or prevent underharvest of a TAC for any species or stock (assuming there are no countervailing conservation concerns regarding co-occurring species or stocks).

Fishing will occur during the regularly scheduled fishing periods described above. Throughout the fishing season, NMFS will project the additional harvest expected from each additional opening of the fishery based on the number of participating vessels,

catch rates, and any other available information. NMFS will close the Cook Inlet EEZ Area to commercial fishing for salmon if projections indicate that an additional fishery opening is expected to exceed any specified TAC. NMFS will implement inseason management actions through publication in the **Federal Register**, consistent with the Administrative Procedure Act (APA).

NMFS will monitor all available sources of information during the fishery to evaluate whether the TAC remains appropriate. If the best scientific information available indicates that the number of salmon returning to Cook Inlet is significantly different than what was forecasted, NMFS may adjust management of the fishery using the adjustment authorities described above and specified in regulations at § 679.25. If significantly fewer fish return relative to the forecast, NMFS may close the fishery before a TAC is reached or before the season closure date to prevent overfishing. This may be determined based on fishery catches, test-fishery catches, escapement, or other scientific information.

NMFS may also consider an inseason adjustment to modify the TAC if scientific information indicates that salmon abundance is significantly higher than forecasted. To implement any inseason adjustment, NMFS publishes a temporary rule in the **Federal Register** and considers all public comments on the action. Any such action must not result in overfishing on any other co-occurring fish stocks and will also consider the potential impacts of such an action to all Cook Inlet salmon harvesters. NMFS could not adjust the TAC above any ABC or allowable de minimis amounts set forth in the harvest specifications established for the Cook Inlet EEZ Area in that fishing year without engaging in notice and comment rulemaking to amend the harvest specifications.

NMFS will use the authorities described above to achieve conservation and management goals. These tools may be used to either increase or decrease harvests in the Cook Inlet EEZ Area drift gillnet fishery as appropriate based on the specified TAC amounts, the amount already harvested, and other available information on inseason salmon abundance.

Federal Management Area

The management area is all Federal waters of upper Cook Inlet (EEZ waters of Cook Inlet north of a line at 59°46.15′ N).

Retention of Bycatch

Drift gillnet vessels fishing in the Cook Inlet EEZ Area may retain and sell non-salmon bycatch including groundfish (*e.g.,* Pacific cod, pollock, flounders, *etc.*) if they have a groundfish Federal fisheries permit (FFP). These are referred to as incidental catch species and this final rule allows retention of these species up to a specified maximum retainable amount (MRA). Drift gillnet vessels retaining non-salmon incidental catch species are also required comply with all State requirements when landing these fish in Alaska. The MRA of an incidental catch species is calculated as a proportion (percentage) of the weight of salmon on board the vessel.

Table 10 to 50 CFR part 679 establishes MRA percentages in the Gulf of Alaska (GOA) and applies to the Cook Inlet EEZ Area. For commercial salmon fishing in the Cook Inlet EEZ Area, the basis species are salmon, which is classified as ''Aggregated amount of non-groundfish species'' in the table for the purposes of the calculation. To obtain the MRAs for each incidental catch species, multiply the retainable percentage for the incidental catch species from table 10 by the round weight of salmon (Basis Species: Aggregated amount of non-groundfish species) on board. For example, if there were 100 pounds (45.36 kg) of salmon aboard the vessel, then 20 pounds (9.07 kg) of pollock and 5 pounds (2.27 kg) of aggregated rockfish could be retained, because pollock has a retainable percentage of 20 and aggregated rockfish has a retainable percentage of 5 in table 10 when the basis species is the aggregated amount of non-groundfish species (*i.e.* salmon). Pacific halibut are not defined as a groundfish and may not be retained by drift gillnet vessels.

Cook Inlet EEZ Area Commercial Salmon Fishing Monitoring, Recordkeeping, and Reporting Requirements

This action manages the Cook Inlet EEZ Area salmon fishery separately from the adjacent State waters salmon fisheries. Recordkeeping and reporting requirements for commercial salmon fishing vessels operating in the Cook Inlet EEZ Area are specified at § 679.115. This final rule requires processors to report all landings of Cook Inlet salmon harvested in the EEZ through eLandings by noon of the day following completion of the delivery.

Commercial salmon fishing vessels, processors, and other entities receiving deliveries of Cook Inlet EEZ Area salmon (*i.e.,* fish transporters, catcher sellers, and direct marketers) must obtain Federal permits and comply with Federal recordkeeping, reporting, and monitoring requirements consistent with regulations at § 679.114. While operating, all entities required to have any Federal salmon permit(s) for the Cook Inlet EEZ Area must have a legible copy of each valid permit in either paper or electronic format.

Requirements for Commercial Salmon Fishing Vessels

Harvesting vessel owners are required to obtain a Salmon Federal Fisheries Permit (SFFP). NMFS will issue SFFPs at no charge to the owner or authorized representative of a vessel. An SFFP will authorize a vessel of the United States to conduct commercial salmon fishing operations in the Cook Inlet EEZ Area, subject to all other Federal requirements. An SFFP applicant must be a citizen of the United States. NMFS will issue SFFPs after receipt, review, and approval of a complete SFFP application. SFFPs will have a 3-year application cycle. Once a vessel owner or authorized representative obtains an SFFP, it is valid until the expiration date shown on the permit, which is after 3 years if issued at the beginning of a permit cycle. Participants must maintain a physical or electronic copy of their valid SFFP aboard the named vessel. As with other Federal fisheries, if a vessel owner or authorized representative surrenders an SFFP, they could not obtain a new SFFP for that vessel until the start of the next 3-year permit cycle.

The SFFP is associated with a specific vessel and not transferable to another vessel. If the vessel is sold, the new owner will need to apply for an SFFP amendment from NMFS to reflect the new owner or authorized representative of the vessel. A vessel could not operate in the Cook Inlet EEZ Area fishery until the SFFP amendment was complete and the amended SFFP issued. The SFFP number is required to be displayed on the vessel's hull and buoys attached to the vessel's drift gillnet.

For a vessel being leased, the vessel operator is considered the authorized representative of the SFFP holder and no amendments to the permit are required. The vessel operator is subject to all SFFP requirements and limitations and liable for any violations.

This final rule requires commercial salmon fishing vessels to operate a Vessel Monitoring System (VMS) as specified at § 679.28(f)(6)(x). VMS transmits the real-time GPS location of fishing vessels to NMFS. A vessel with an SFFP is required to keep VMS active at all times when operating with drift

gillnet gear on board in the waters of Cook Inlet any day the Cook Inlet EEZ Area is open to commercial salmon fishing. This includes when operating within State waters to ensure that entire fishing trips are monitored and to help verify that no fishing occurred within State waters during a fishing trip that included salmon harvest in the Cook Inlet EEZ, or that a vessel with an SFFP does not fish in Federal waters during the same calendar day it fishes in State waters.

To collect catch and bycatch information, this final rule requires vessels to use a Federal fishing logbook as specified at § 679.115(a)(1). Commercial salmon fishing vessels will record the start and end time and GPS position of each set, as well as a count of the catch and bycatch. Logbook sheets are submitted electronically to NMFS by the vessel operator when the fish are delivered to a processor. The data provided by the logbooks will provide information to satisfy the Magnuson-Stevens Act Standardized Bycatch Reporting Methodology (SBRM) requirement (16 U.S.C. 1853(a)(11)).

State requirements, including possession of appropriate State Commercial Fisheries Entry Commission (CFEC) permit(s), continue to apply for drift gillnet vessels landing salmon or other species caught in the EEZ within the State or entering State waters.

This final rule prohibits commercial salmon fishing vessels from landing or otherwise transferring salmon caught in the Cook Inlet EEZ Area within the EEZ off Alaska. Commercial salmon fishing vessels delivering to tenders may deliver salmon caught in the Cook Inlet EEZ Area only to a tender vessel operating in State waters. This final rule prohibits processing (as defined by Federal regulations at § 679.2) salmon harvested in the Cook Inlet EEZ Area in the EEZ off Alaska in order to ensure historical participants and operation types are not displaced. Commercial salmon fishing vessels are allowed to gut, gill, and bleed salmon prior to landing but cannot freeze or further process salmon prior to landing their catch (freezing is considered processing per Federal regulations at § 679.2 and therefore is prohibited in Cook Inlet EEZ waters).

Requirements for Processors and Other Entities Receiving Deliveries of Commercially Caught Cook Inlet EEZ Salmon

This final rule requires processors that receive and process landings of salmon that are caught in the Cook Inlet EEZ Area by a vessel authorized by an SFFP to obtain a Salmon Federal Processor Permit (SFPP). This includes any person, facility, vessel, or stationary floating processor that receives, purchases, or arranges to purchase and processes unprocessed salmon harvested in the Cook Inlet EEZ Area, except registered salmon receivers. Persons or businesses that receive landings (deliveries) of Cook Inlet EEZ salmon from harvesting vessels but do not immediately process it, or transport it to another location for processing, are required to obtain a Registered Salmon Receiver Permit (RSRP). If a tender vessel or vehicle receiving deliveries of salmon is operated by an SFPP holder, it may operate under the SFPP and does not need to obtain an RSRP. SFPP and RSRP holders may not receive deliveries or process salmon that were harvested in the Cook Inlet EEZ Area while in the Cook Inlet EEZ Area or any EEZ waters.

SFPP and RSRP holders are required to report all salmon landings through eLandings by noon of the day following completion of the delivery. Landings must be reported using existing Cook Inlet drift gillnet statistical areas, with the addition of an EEZ identifier and a requirement to identify the Federal permit associated with each landing.

NMFS issues SFPPs and RSRPs on a 1-year cycle. If the ownership of an entity holding a SFPP or RSRP changes, the new owner will need to submit an application for an amended permit. An amended permit is issued with a new permit number to reflect the change.

Because SFPPs are facility-specific, one SFPP is required for every processing facility, even if a facility is controlled by a company already holding an SFPP for another processing facility. An RSRP is required for each entity receiving but not processing landings of Cook Inlet EEZ salmon at the location of the delivery if they are not operated by an SFPP holder. If a single entity operates multiple vehicles or vessels receiving landings of Cook Inlet EEZ salmon, each one of those vehicles or vessels could use the RSRP held by the entity. This includes fish transporters or buying stations unaffiliated with an SFPP holder that receive deliveries directly from harvesting vessels.

For direct-marketing operations where the owner or operator of a commercial salmon fishing vessel catches and processes their catch, both an SFFP and an SFPP are required. For catcher-seller operations where the owner or operator of a harvesting vessel catches and sells unprocessed salmon (*e.g.,* whole fish or headed and gutted) directly to someone other than an SFPP or RSRP holder, both an SFFP and an RSRP are required.

Other Commercial Fishing Management Measures and Prohibitions

This final rule defines the legal gear for the Cook Inlet EEZ Area drift gillnet fishery consistent with legal gear in the State waters drift gillnet fishery, to the extent practicable (see § 679.118(f)). Legal drift gillnet gear is no longer than 200 fathoms (365.76 m) in length, 45 meshes deep, and has a mesh size no greater than 6 inches (15.24 cm). Buoys at each end of the drift gillnet must be marked with the participant's SFFP number.

Gillnets will be measured, either wet or dry, by determining the maximum or minimum distance between the first and last hanging of the net when the net is fully extended with traction applied at one end only. It is illegal to stake or otherwise fix a drift gillnet to the seafloor. The float line and floats of drift gillnets must float on the surface of the water while the net is fishing, unless natural conditions cause the net to temporarily sink.

This final rule includes the following prohibitions specified at § 679.117 for drift gillnet fisheries in the Cook Inlet EEZ Area:

- Vessels are prohibited from fishing in both State and Federal waters on the same day, or otherwise having on board or delivering fish harvested in both EEZ and State waters, to ensure accurate catch accounting for Federal managers.
- Vessels cannot have salmon harvested in any other fishery on board.
- Vessels are prohibited from having gear in excess of the allowable configuration or deploying multiple nets.
- Vessels are prohibited from participating in other fisheries while operating drift gillnet gear for salmon in the Cook Inlet EEZ Area and are not allowed to have other fishing gear on board capable of catching salmon while commercial fishing for salmon in the Cook Inlet EEZ Area (*i.e.,* operating drift gillnet gear).
- Because vessels legally participating in adjacent State water salmon fisheries may transit across the Cook Inlet EEZ Area, vessels can have other fishing gear on board while moving through the Cook Inlet EEZ Area, but are prohibited from commercial fishing for salmon within the Cook Inlet EEZ Area on any day they are participating in State water salmon fisheries.
- Manned or unmanned aircraft cannot be used to locate salmon or otherwise direct fishing.
- Vessels are prohibited from discarding any salmon caught while harvesting salmon using drift gillnet gear in the Cook Inlet EEZ Area.

• Vessels are prohibited from commercial or recreational fishing for salmon in the Cook Inlet EEZ Area contrary to notification of inseason action, closure, or adjustment issued under § 679.25 or § 679.118.

Cook Inlet EEZ Recreational Fishing Management Measures

This final rule includes management measures for recreational salmon fishing in the Cook Inlet EEZ Area as specified at § 679.119. NMFS establishes bag and possession limits in Federal regulations. For Chinook salmon, from April 1 to August 31, the bag limit is one Chinook salmon per day including a total limit of one in possession of any size. From September 1 to March 31, the bag limit is two Chinook salmon per day including a total limit of two in possession of any size. For coho (silver) salmon, sockeye salmon, pink salmon, and chum salmon there is a combined six fish bag limit per day, including a total limit of six in possession of any size. However, only three fish per day, including a total limit of three in possession, may be coho salmon.

In addition to Federal bag limits, recreational anglers are constrained by State bag and possession limits if landing fish in Alaska. Because of this, an angler cannot exceed State limits when landing fish in Alaska, or otherwise have both an EEZ limit and a State limit on board at the same time in either area.

Recreational fishing is open for the entire calendar year. In regulations at § 679.118(c)(1)(ii), this final rule provides that NMFS may prohibit, through an inseason management action, retention of individual salmon species while still allowing harvest of other salmon species if necessary. In addition to prohibiting retention, NMFS may also prohibit fishing for one or more salmon species if required for conservation. Inseason management actions for the recreational sector will be published in the **Federal Register** and subject to the same process and timing limitations outlined for the commercial sector in the Cook Inlet EEZ.

Recreational fishing for salmon in the Cook Inlet EEZ Area may only be done using hook and line gear with a single line per angler with a maximum of two hooks. Salmon harvested must not be filleted or otherwise mutilated in a way that could prevent determining how may fish had been retained prior to landing. Gills and guts may be removed from retained fish prior to landing. Any salmon that is not returned to the water with a minimum of injury counts toward an angler's bag limit.

Federal managers will review any available developing inseason information, including escapement data, and may prohibit retention of one or more salmon species if additional harvest could not be supported. This final rule does not establish a TAC specific to the recreational sector because the recreational harvest in the Cook Inlet EEZ has been small historically (less than 100 fish per year), but estimated removals in combination with commercial harvests are evaluated against the ACL to ensure they are not exceeded and to implement accountability measures, if required, for future seasons.

The State's existing Saltwater Charter Logbook, the Statewide Harvest Survey, and creel surveys provide the information needed to account for recreational harvest in the Cook Inlet EEZ Area, as well as satisfy the Magnuson-Stevens Act SBRM requirement.

Changes From Proposed to Final Rule

In response to public comment, this final rule modifies the number of commercial salmon fishing periods in the Cook Inlet EEZ Area.

The commercial fishing season was proposed to extend from approximately June 19 to August 15 each year, with two, 12-hour fishing periods each week. Overall, public comments highlighted a conservation and management concern associated with allowing two days of harvest per week between July 16 and July 31. Under the status quo of State management, this is the time period during which there has been a single drift gillnet opener per week in order to allow salmon bound for Northern Cook Inlet to pass through Federal waters (a management option many public commenters referred to as a ''conservation corridor''). The State requested that NMFS close the EEZ to all commercial fishing after July 15 to avoid conservation concerns, including stocks not achieving spawning escapement goals. In addition, multiple Alaska Native tribes from the Cook Inlet region, communities in Northern Cook Inlet, and regional sportfishing organizations all expressed concern that two fishery openings per week from July 16–July 31—which would provide significantly more fishing opportunity to the drift gillnet fleet—was likely to result in conservation concerns when compared to the status quo of one opening per week during this time period (see Comment 34). In all, these comments emphasized that reducing drift gillnet openings to one per week from July 16–July 31 is a management measure important to stakeholders and Alaska Native tribes in Northern Cook Inlet because it gives salmon stocks of lower abundance more opportunities to pass through the EEZ during the time period they are most likely to be present in Federal waters.

In light of the public comments identifying significant potential conservation concerns, NMFS reviewed information contained in the Analysis and 2024 SAFE report to further consider the potential impacts that could result from increased commercial fishing opportunity during this late-July migratory period. State management measures that limited drift gillnet fishing effort in the Cook Inlet EEZ began in 2015. As described in section 3.1.2 of the Analysis, under Federal reference points, overfishing likely occurred on ''other sockeye salmon'' in 2008, and on Cook Inlet coho salmon in 2013. Both of these stock complexes have substantial components that originate from the Northern District. Overfishing is not thought to have occurred on any stock since the State began restricting fishing in the EEZ in late July. Susitna (Yentna) River sockeye salmon were declared a State stock of concern in 2008 after repeated failures to meet escapement goals. After subsequent restrictions to fishing, including the reductions to EEZ fishing opportunities in late July, this stock met escapement goals to the point where it was delisted from being a stock of concern by the State of Alaska's Board of Fisheries (BOF) in 2020. Given the historical evidence suggesting an increased likelihood of conservation concerns for these stocks when there is additional EEZ fishing effort from July 16 until July 31, and because some salmon stocks have continued to miss spawning escapement goals during recent years when there was only a single drift gillnet opening per week from July 16–July 31, NMFS has determined that it would be unwise to increase the number of fishing periods in late July from the status quo. Therefore, this final rule reduces the proposed number of openings to one per week during this period. The final rule, however, does not adopt the State's request to close the EEZ July 15. As explained in this final rule, the fishery will be open for one opening per week July 16–July 31 and two openings per week August 1–August 15, unless a TAC is reached.

NMFS expects that one opening per week in late July will allow for the harvest of surplus yield to the extent practicable while still achieving spawning escapement goals in most years. If TACs allow for additional harvest in August, the fishery will

return to two openings per week from August 1 to August 15. This approach is expected to reduce the risk of higher than expected harvests in the EEZ that could result in overfishing or reduce or eliminate the harvestable surplus of one or more salmon stocks for all other salmon users in Cook Inlet.

Further, NMFS expects this change will better allow the drift gillnet fleet to target the stocks of highest abundance while reducing the risk of early closures because a TAC is reached for a stock of lower abundance. As explained above and in the preamble to the proposed rule, the Cook Inlet EEZ salmon fishery will be managed using TACs. Allowing salmon stocks of lower abundance bound for Northern Cook Inlet more opportunities to pass through the EEZ in July—particularly coho and Chinook salmon—means it is less likely the fishery will close early due to reaching the TAC for a stock of lower abundance before the drift gillnet fleet is able to harvest the TAC for abundant sockeye salmon. Additionally, spreading out the sockeye salmon harvest throughout the season by reducing fishing periods in late July will reduce pressure on Northern District sockeye salmon—which are Tier 3 stocks with less known conservation status—as more of the salmon in the EEZ in August are expected to be from the highly abundant Tier 1 Kenai and Kasilof stocks for which there is better information to inform inseason management decisions.

In this final rule, NMFS also clarified language at § 679.28(f)(6)(x) to clearly define when and where VMS is required to be used by vessels named or required to be named on a SFFP. An operational and transmitting VMS unit that complies with the requirements in § 679.28(f) must be carried by any such vessel operating in the waters of Cook Inlet with drift gillnet gear on board during a calendar day when commercial salmon fishing is authorized in the Cook Inlet EEZ Area. The corresponding prohibition at § 679.117(b)(1)(xiv) is similarly revised to prohibit operation contrary to requirements specified at § 679.28(f)(6)(x). This final rule also adds a definition of the ''waters of Cook Inlet'' at § 679.2. For purposes of §§ 679.28(f)(6)(x) and 679.117(b)(1)(xiv), the waters of Cook Inlet includes all waters north of a line from Cape Douglas (58°51.10′ N) to Point Adam (59°15.27′ N). In sum, these changes from proposed to final regulations clarify that the VMS requirement for SFFP holders applies: (1) on days when directed fishing for salmon using drift gillnet gear is open in the Cook Inlet EEZ Area; (2) if the vessel has drift gillnet gear on board the vessel or deployed; and (3) if the vessel is operating in the waters of Cook Inlet.

This final rule also modifies regulations at § 679.118(c)(1)(ii) to provide NMFS the authority to prohibit fishing for one or more salmon species if required for conservation. While the recreational salmon fishery in the Cook Inlet EEZ Area is extremely small, this would give NMFS all management tools potentially required to conserve stocks at very low abundance. The most likely potential need for this authority is because declines in Chinook salmon abundance have, in some cases, entirely eliminated the harvestable surplus of Chinook (*i.e.,* escapement goals cannot be achieved even if no fish are harvested). In this instance, even the limited mortality resulting from catch and release fishing (*i.e.,* what would be allowed under a prohibition on retention) could potentially result in exceeding an ABC/ACL. NMFS would also maintain the authority to prohibit retention of one or more species if a closure to salmon fishing was not required to achieve conservation objectives or avoid exceeding an ABC/ACL.

Additionally, this final rule adds two new prohibitions to § 679.117 to clarify that it is unlawful for any person to: (1) engage in commercial fishing for salmon in the Cook Inlet EEZ Area contrary to notification of inseason action, closure, or adjustment issued under §§ 679.25 and 679.118 (see § 679.117(b)(1)(xvi)); or (2) engage in recreational fishing for salmon in the Cook Inlet EEZ Area contrary to notification of inseason action, closure, or adjustment issued under § 679.118 (see § 679.117(b)(2)(v)). The final rule also makes clarifying edits to § 679.117(b) as follows: (1) moves ''of the Salmon Management Area, defined at § 679.2 and Figure 22 to this part,'' from § 679.117(b)(1)(ii), to § 679.117(b)(1)(i), which is the first time the term ''Cook Inlet EEZ Area'' appears in § 679.117(b)(1); (2) replaces the word ''set'' in § 679.117(b)(1)(v), and replaces it with ''deploy''; and (3) adds the term ''Cook Inlet EEZ Area'' to two prohibitions applicable to recreational fishing (see § 679.117(b)(2)(ii) and (iii)). Throughout the regulatory text, NMFS also made technical and grammar edits to correct regulatory cross references, use consistent terms, remove redundancy, and promote clarity.

One additional change from the proposed rule was removing a proposed requirement that any interactions or entanglements with marine mammals would be required to be recorded in the logbook. NMFS determined that this requirement would be duplicative with and may be confused with existing reporting requirements under the Marine Mammal Authorization Program and has therefore removed the requirement from this final rule. Participants are, however, still required to report marine mammal interactions under the Marine Mammal Authorization Program.

Comments and Responses

NMFS received 87 comment submissions on amendment 16 and the proposed rule. NMFS has summarized and responded to 95 unique and relevant comments below. The comments were from individuals, environmental groups, local governments, the Alaska Department of Fish and Game (ADF&G), sportfishing organizations, fishing guides, tribes and tribal members, drift gillnet fishermen, and commercial fishing organizations. Several comment submissions were duplicates or addressed topics outside the scope of amendment 16 and the proposed rule. Overall, there was a mix of support and opposition, with those comments opposing the rule expressing concerns about expanding Federal management to salmon fisheries, impacts to adjacent state salmon fisheries, the cost and burden of monitoring requirements, adverse economic impacts, preseason catch limits, the prohibition on fishing in both state and Federal waters on the same day, and underharvest (exceeding spawning escapement goals). The vast majority of commenters supported some version of Federal management (mostly drift gillnet fishers, commercial processors, and tribal groups), and a small minority opposed any type of Federal management. Comments are organized by topic into the following categories:

- Scope of the Fishery Management Plan
- National Standard 1
- Status Determination Criteria and Annual Catch Limits
- Inseason Management
- Cook Inlet EEZ Commercial Salmon Fishing Management Measures
- Federal Commercial Fishing Season and Fishing Periods
- Monitoring, Recordkeeping, and Reporting Requirements
- Other Commercial Salmon Fishing Management Measures and Prohibitions
- Recreational Fishing
- National Standard 2
- National Standard 3
- National Standard 4
- National Standards 5 and 7
- National Standard 8
- National Standard 10
- Economic Impacts

- General Support
- General Opposition
- Tribal Comments
- Marine Mammals
- Process Concerns
- Other

Scope of the Fishery Management Plan

Comment 1: NMFS's decision to limit the scope of Federal management to the Cook Inlet EEZ violates *UCIDA* v. *NMFS,* 837 F.3d 1055 (9th Cir. 2016), in which the Ninth Circuit Court of Appeals held that NMFS must manage the entire ''fishery,'' including State waters.

Response: NMFS disagrees that the Ninth Circuit's decision requires this FMP to cover both State and Federal waters. Rather, limiting NMFS management solely to Federal waters (*i.e.,* the Cook Inlet EEZ) is consistent with the court's decision in *UCIDA* v. *NMFS.* In that case, UCIDA challenged amendment 12 to the Salmon FMP, which had excluded the Cook Inlet EEZ from the Salmon FMP. The Ninth Circuit considered only whether NMFS had the legal authority to exclude portions of the EEZ from the FMP. In ruling against NMFS, the Court held that NMFS must include the Cook Inlet EEZ in the Salmon FMP because it has an obligation to issue an FMP for each fishery under its authority that requires conservation and management. The phrase ''under its authority'' was critical to that Ninth Circuit decision, which considered whether a State could manage a fishery in Federal waters outside the context of an FMP. Nothing in *UCIDA* v. *NMFS* implied that a Federal FMP must cover fishing that occurs in State waters if a harvested stock occurs in both State and Federal waters. Not only was that question not before the Ninth Circuit, but requiring NMFS to manage in State waters through an FMP would violate the plain language of Magnuson-Stevens Act section 306(a), which provides that states retain management jurisdiction over fishing in state waters.

In fact, the Ninth Circuit explicitly recognized that the Cook Inlet EEZ constitutes a fishery, stating that ''the statute requires an FMP for a fishery, a defined term,'' and adding ''[n]o one disputes that the exempted area of Cook Inlet''—*i.e.* the Cook Inlet EEZ—''is a salmon fishery.'' 837 F.3d at 1064. The portion of Cook Inlet at issue in the litigation over amendment 12 was the Cook Inlet EEZ, not all of Cook Inlet. In this action, NMFS is complying with the Ninth Circuit's decision by incorporating the very ''fishery'' at issue in that case—the Cook Inlet EEZ salmon fishery—into the Salmon FMP.

Comment 2: NMFS's decision to limit the scope of Federal management to the Cook Inlet EEZ violates the plain language of the Magnuson-Stevens Act. The term ''fishery,'' as defined within section 3 of the Magnuson-Stevens Act, requires that amendment 16 include a definition of ''fishery'' that extends throughout the range of salmon in Cook Inlet, including State waters.

Response: NMFS disagrees that its definition of the ''fishery'' violates the Magnuson-Stevens Act. As explained in the preamble to the proposed rule and the response to *Comment 1,* the ''fishery'' that is subject to Federal management under amendment 16 are the salmon stocks harvested by the commercial and recreational fishing sectors within the Cook Inlet EEZ Area. Defining the fishery as geographically constrained to the Cook Inlet EEZ is consistent with the Magnuson-Stevens Act. Section 3 of the Magnuson-Stevens Act broadly defines a ''fishery'' as one or more stocks of fish that can be treated as a unit for purposes of conservation and management and which are identified on the basis of geographical, scientific, technical, recreational, and economic characteristics; and any fishing for such stocks.

NMFS has determined that salmon stocks in the Cook Inlet EEZ can be treated as a unit for purposes of conservation and management because they all fall within the geographical management area under NMFS's jurisdiction, the best scientific information available supports NMFS's determination that the EEZ has unique ecological characteristics due to the mixed stock nature of fishing in the EEZ, and fishing for these stocks in the EEZ has distinct technical and economic characteristics that distinguish it from State water fisheries, as discussed in the response to *Comment 55.*

The Magnuson-Stevens Act expressly limits the management authority of NMFS and the Council to the EEZ, with a narrow exception. Section 101(a) of the Magnuson-Stevens Act establishes the Nation's sovereign rights and exclusive fishery management authority over all fish and all Continental Shelf fishery resources within the EEZ. Section 3(11) of the Magnuson-Stevens Act defines the inner boundary of the EEZ as a line coterminous with the seaward boundary of each of the coastal States. Section 302(a)(l)(G) states that the Council has authority over the fisheries in the Arctic Ocean, Bering Sea, and Pacific Ocean seaward of Alaska. Because Alaska's seaward boundary is 3 nautical miles (nmi) (5.56 kilometers) from its coast (3-nmi boundary line), 43 U.S.C. 1301(b), the inner boundary of the EEZ, and therefore the Council's authority, starts 3 nmi (5.56 kilometers) from the Alaskan coast and extends to the outer boundary of the EEZ 200 nmi (370.4 kilometers) seaward of the coast of Alaska. In section 306, the Magnuson-Stevens Act expressly states that it shall not be construed as extending or diminishing the jurisdiction or authority of any State within its boundaries. Therefore, the Magnuson-Stevens Act does not contemplate the extension of Federal authority into State waters, except under the very limited circumstances described in section 306(b) (discussed further in the response to *Comment 4*). In sum, given the geographic limits placed on NMFS's authority to manage fisheries, it is necessary for the ''fishery'' to be geographically constrained to the EEZ.

Comment 3: NMFS's decision to define the fishery as geographically constrained to the Cook Inlet EEZ is arbitrary. There cannot be two adjacent management schemes for salmon; one in Federal waters and one in State waters, because one management scheme will always depend on the other. Salmon management depends on escapement goals. That means an FMP for just the EEZ will always depend on the State which sets the escapement goals.

Response: Defining the fishery as geographically constrained to the Cook Inlet EEZ is not arbitrary; it is required by the Magnuson-Stevens Act and is consistent with fisheries management throughout the EEZ off Alaska and throughout the U.S. Nearly all stocks harvested in the EEZ nationwide also occur in State waters, but as explained in the response to *Comment 2,* the Magnuson-Stevens Act explicitly left jurisdiction over state waters to the states.

Recognizing Federal and State jurisdictional boundaries is a foundational principle in the management of natural resources that straddle jurisdictions in the U.S. In mining, forestry, oil, gas, and fisheries, the location of the activity determines the applicable regulations, even if the relevant resource is also present in an adjacent jurisdiction. Furthermore, this is consistent with the management approach for other fisheries off Alaska. For example, in the GOA, the State manages fisheries for pollock and Pacific cod in State waters and NMFS manages pollock and Pacific cod fisheries in Federal waters. For these fisheries, the State determines when State waters will be open to fishing for pollock and Pacific cod, while the Council recommends and NMFS makes

those determinations for the EEZ, taking into account any anticipated harvest in State waters.

Similar to the Federal management of the Cook Inlet EEZ, the Pacific Fishery Management Council's Salmon FMP expressly limits Federal management to the fisheries in EEZ waters. That FMP covers salmon stocks caught in the EEZ off the coasts of Washington, Oregon, and California.

NMFS disagrees that a stock of anadromous fish cannot be successfully managed by different adjacent management regimes. NMFS and State management agencies regularly have separate fisheries that harvest the same stocks of fish. Management will be coordinated to the extent practicable. NMFS will establish catch limits for the Cook Inlet EEZ that are based on achieving escapement goals as defined in the Federal stock assessment, while accounting for both State and Federal expected harvests.

There are cooperative management arrangements where a single management agency can make decisions for both State and Federal waters. But these are dependent on a mutually accepted delegation of management authority or international treaties. For example, NMFS's management jurisdiction over the Bering Sea and Aleutian Islands king and Tanner crab fisheries is limited to the Bering Sea and Aleutian Islands Area EEZ, but because the Council recommended delegated management of the EEZ to the State through the Crab FMP—and NMFS determined State management was consistent with the FMP and the Magnuson-Stevens Act—the State executes delegated management actions for crab stocks in Federal waters while also managing these stocks within State waters. While there is often coordination between NMFS and the State to ensure that fishery management decisions achieve the common goal of sustainability, State and Federal authority remains constrained by jurisdictional limits.

Management of the Salmon FMP's East Area is different from the management of salmon in the Cook Inlet EEZ Area because of both the delegation of management authority to the State and the Pacific Salmon Treaty. Management of the salmon commercial troll and recreational fisheries in the East Area EEZ occurs across the State and EEZ boundary because the Council voted to delegate management of the salmon fisheries in the East Area EEZ to the State, the State was willing to accept such a delegation of authority, and NMFS determined State management was consistent with both the Salmon FMP and the Magnuson-Stevens Act. The Council and NMFS considered delegating management of the Cook Inlet EEZ to the State, similar to the arrangement in the East Area. However, the State refused to accept delegated management on two occasions and NMFS has no authority to compel a state to accept such delegation. As a result, there is no alternative to having separately managed salmon fisheries in Cook Inlet, and the State and Federal fisheries are separated along the jurisdictional EEZ boundary.

Comment 4: Even if states generally retain jurisdiction over state waters pursuant to Magnuson-Stevens Act 306(a), here Magnuson-Stevens Act 306(b) requires NMFS to preempt State management and assert management authority over salmon fishing in the state waters of Cook Inlet.

Response: NMFS disagrees that Magnuson-Stevens Act section 306(b) requires NMFS to assert management jurisdiction over the State waters of Cook Inlet and/or implement management measures for State waters through this FMP amendment.

Magnuson-Stevens Act section 306(b) includes two criteria that must both be met before NMFS can assert management authority over fishing in State waters: (1) the fishery must occur predominantly in the EEZ and (2) after notice and opportunity for a hearing, the Secretary must determine that a State is ''substantially and adversely'' affecting the carrying out of an FMP. Even when these criteria are met, Magnuson-Stevens Act section 306(b) explicitly states that NMFS cannot assert management authority over internal (fresh) waters, meaning the scope of Magnuson-Stevens Act section 306(b) is narrower than claimed by the commenter even when it does apply.

Historically, the State has managed salmon fishing in Cook Inlet as a single fishery with no distinction between State and Federal waters. Under State management, approximately 75 percent of total upper Cook Inlet salmon harvests occurred in State waters. NMFS has previously determined that the State-managed fishery did not occur predominantly in the EEZ, and thus for that reason alone it had no basis for asserting management authority over State waters under Magnuson-Stevens Act section 306(b)(1)(A). In addition, NMFS has consistently found that State management is consistent with Magnuson-Stevens Act requirements and the goals and objectives of the FMP. Thus, both criteria for preemption under Magnuson-Stevens Act section 306(b) have not been satisfied. As a result of litigation brought by drift gillnet fishermen, among others, status quo management as a single fishery by the State is no longer possible. NMFS acknowledges that amendment 16 will create a new fishery in Cook Inlet, which will occur entirely within Federal waters.

Even assuming the 306(b)(1)(A) criteria was met for the Cook Inlet EEZ salmon fishery after implementation of amendment 16—though total harvest of Cook Inlet salmon stocks will continue to occur predominantly within State waters—for NMFS to assert management jurisdiction over State waters it would also have to determine that State management ''substantially and adversely'' affects implementation of the Salmon FMP, after notice and opportunity for a hearing. The procedures and requirements for notice and the hearing at 50 CFR part 600, subpart G are prescriptive, none have occurred here, and NMFS has no basis to begin proceedings at this time. No fishing has yet occurred under amendment 16 to the Salmon FMP and this final rule, and NMFS has no information that suggests that State action or inaction will prevent the Council or NMFS from carrying out the management measures and management objectives specified in amendment 16. Thus, the criteria for preemption under Magnuson-Stevens Act section 306(b)(1)(B) has not been satisfied.

Comment 5: Every other FMP in Alaska sets management measures, including ACL and TAC, for the fishery in both State and EEZ waters. The King Crab closure around Kodiak Island does not allow the fishery in State waters to continue without direction, nor does the Pacific Cod TAC in the GOA apply for the EEZ waters only with the State waters fishery unregulated; the same is true for every other stock of fish except salmon. For the Salmon FMP, NMFS is trying to make us believe the rules governing this fishery are different, even after the Federal court decision that have determined they are not.

Response: NMFS disagrees. Federal ACLs and TACs are not established for State waters in other Federal FMPs. The BOF has established State managed fisheries in State waters, for example, the GOA Pacific cod fishery that the State manages by setting a guideline harvest level (GHL) outside the Federal harvest specifications process. For some fisheries, the BOF bases the GHL amount on a percentage of the Federal ABC. However, the GHL fishery is managed by the State. To comply with the Federal ACL regulations and National Standard 1 guidelines, NMFS manages Pacific cod in Federal waters to ensure the sum of all State waters and

Federal waters Pacific cod removals from the GOA do not exceed the Federal Pacific cod ABC (and therefore ACL) for the GOA. Accordingly, each year the Council recommends, and NMFS approves, a TAC in the GOA that is set at an amount to accommodate the State's GHL for the Pacific cod caught in State waters. This is consistent with the Magnuson-Stevens Act and National Standard guidelines that direct, as a fundamental component of sustainable fisheries management, that catch should not exceed the ACL and that all sources of mortality from fishing activities should be evaluated for stock status and specification of Federal harvest limits. If the State changed the applicable State waters GHL, there are no limits on the amount of Pacific cod that may be harvested in State waters, and NMFS would adjust the Federal TAC accordingly to ensure that total Pacific cod removals do not exceed the Federal Pacific cod ABC and ACL. In other words, as under amendment 16, the Federal TAC accounts for State water harvest but does not constrain or limit State water harvest.

The commenter also appears to reference the State Pacific cod parallel fishery. In this parallel fishery, some of the Federal TAC is harvested in State waters, under State regulations generally mirroring those used in Federal waters. NMFS does not establish a TAC for State waters or manage in State waters; rather, NMFS deducts catch in the parallel fishery from the Federal TAC per a longstanding arrangement that ensures this fishery does not create conservation concerns. The State originally developed and implemented parallel fisheries to provide fishing opportunities within State waters before the State had capacity and expertise to independently develop and manage State water groundfish fisheries (GHL fisheries). While the State has since developed State-managed groundfish fisheries, parallel fisheries have been maintained to address allocation issues with respect to vessel gear type, operation type, and size. The State opposes the Federal management approach for salmon in the Cook Inlet EEZ Area and has not expressed interest in either a delegation of management authority or taking State action to develop a parallel fishery for salmon. Therefore, NMFS must manage salmon fishing in the Cook Inlet EEZ in the same manner as it manages the vast majority of fish stocks off Alaska—by accounting for projected State water GHL harvest when establishing harvest limits for the EEZ, and debiting catch that occurs in the parallel fisheries against the Federal TAC during the fishing season.

In regards to the crab fisheries in the GOA, there are no federally managed crab fisheries in the GOA, and there is no GOA crab FMP. The king crab closure around Kodiak is a State management measure.

Comment 6: The proposed FMP violates both the letter and the spirit of the District Court's ruling in 2022, the Ninth Circuit's order in 2016, and the Magnuson-Stevens Act. NMFS's repeated failure to provide the relief requested has caused severe economic harm to the drift gillnet fleet. Amendment 16 violates nearly all of the National Standards and imposes a harvest plan that is both burdensome and inefficient. Do not approve this action.

Response: NMFS disagrees. NMFS developed amendment 16 to comply with the decisions of the Ninth Circuit and the District Court, the Magnuson-Stevens Act, and other applicable Federal law. NMFS considered all Magnuson-Stevens Act requirements for FMPs and balanced the competing demands of the National Standards when developing amendment 16. NMFS finds this final rule to be consistent with all 10 National Standards, as detailed in section 5.1 of the Analysis and further addressed in responses to comments under the National Standard headings below. Economic impacts are further addressed in responses to comments below.

Because the State refused to accept delegated management authority, amendment 16 must necessarily establish an entirely separate management jurisdiction and, therefore, results in decreased management efficiency relative to the status quo (management of all salmon fishing in Upper Cook Inlet by the State). Separate Federal management infrastructure and regulations must be established while all existing State management measures remain in place. In order to manage the fishery in the Cook Inlet EEZ Area, NMFS must begin collecting the data essential to manage the fishery and required by the Magnuson-Stevens Act. In particular, NMFS must know who is participating in the fishery, how many vessels are active, and where catch is occurring, and must be able to debit catch against established limits during the season to prevent overfishing, even though collecting this information will involve new recordkeeping, reporting, and monitoring requirements for participants that are separate from those required in State waters.

Comment 7: NMFS is effectively deferring to State management by managing conservatively, claiming that it is unprepared and procedurally limited in its ability to manage the fishery.

Response: NMFS disagrees that it is implicitly deferring to State management by managing conservatively. This will be the first year since Alaska Statehood that there will be a federally-managed salmon fishery in the Cook Inlet EEZ, and currently all data collection and management infrastructure are run by the State. In light of these realities, ''managing conservatively'' is a responsible approach to fishery management, ensuring that NMFS does not harm salmon stocks as it builds infrastructure and expertise, and begins collecting the data needed to manage a new Federal fishery. It is unreasonable and imprudent to expect that NMFS could greatly increase total harvests from the status quo in the first year of a new fishery, with less management flexibility, less information, and less management experience in Cook Inlet. The best available science suggests status quo harvest levels in the EEZ could not be significantly increased without reducing or eliminating the harvestable surplus for other users and further increasing the risk that stocks of lower abundance will not achieve spawning escapement goals (which have not always been achieved in all years even under status quo EEZ harvests). While NMFS's approach is necessarily precautionary, the proposed 2024 Cook Inlet EEZ Area harvest specifications (89 FR 25857, April 12, 2024) would establish TACs for all species except coho salmon (due to elevated conservation risks and high uncertainty) that are higher than the recent 10-year average estimated Cook Inlet EEZ Area harvest.

As described in the preamble to the proposed rule, this action contains all of the management measures required for NMFS to administer and manage all salmon fishing in the Cook Inlet EEZ Area consistent with the Magnuson-Stevens Act. No management decisions are deferred to the State and NMFS will not rely on the State—implicitly or otherwise—to achieve OY or prevent overfishing (one of the flaws the District Court identified with amendment 14).

Using the best scientific information available, each year NMFS will prepare a SAFE report and develop harvest specifications based on the recommendations from the Council's SSC. As described in the response to *Comment 5,* although NMFS must necessarily account for projected

removals from State-managed fisheries in setting the harvest levels for the Cook Inlet EEZ Area, and other Federal fisheries off Alaska, that is part of making decisions based on best scientific information available and consistent with National Standard 2. Accounting for State action is not the same as deferring to State action. The processes by which Federal reference points are independently developed and annually reviewed is described in the preamble to the proposed rule and amendment 16.

Although NMFS has not historically managed salmon fishing in the Cook Inlet EEZ, it has the ability to do so successfully. Acknowledging that the State has decades of institutional expertise and management tools that make it currently more capable of efficient administration (as described in the Analysis) is not an indictment of NMFS's management. Further, while Federal notice requirements limited the suite of management alternatives and options when developing amendment 16 and preclude rapid fishery openings and closings as occurs under State management, no procedural limitations will prevent NMFS from implementing amendment 16, which has been designed to comply with all Magnuson-Stevens Act requirements. NMFS is confident it can effectively manage this fishery.

Comment 8: Regulations for Cook Inlet should allow fishing 110 miles (177.03 km) out from the mouth of the fish spawning grounds. For sport fishing, regulations should allow snagging one mile (1.61 km) from the mouth of any rivers in the inlet.

Response: This final rule would allow recreational salmon fishing in all waters of the Cook Inlet EEZ Area. EEZ waters of the West Area (3–200 nmi (5.56–370.4 km) off Alaska) outside of the Cook Inlet EEZ Area remain closed to commercial salmon fishing, as under the status quo, but recreational salmon fishing is authorized. Waters within 3 nmi (5.56 km) of shore are State waters and not subject to this action.

Comment 9: Several commenters suggested it would be best if all salmon fishing in Cook Inlet was managed by ADF&G. Some commenters expressed skepticism about the track record of Federal fisheries management (*e.g.,* halibut fishery declines and salmon bycatch concerns) and other Federal resource management in Alaska. Other commenters noted that the State has more expertise and better flexibility to manage salmon, which is desirable given the complexity and challenge of salmon management in Cook Inlet. One commenter noted that Federal management may prioritize non-Alaskan constituencies.

Response: NMFS acknowledges the complexity and challenges of salmon management in Cook Inlet. The challenges associated with Federal management are identified sections 2.4 and 2.5 of the Analysis. NMFS developed amendment 16 to address these challenges to the extent practicable.

NMFS is required to implement Federal management of salmon fishing in the Cook Inlet EEZ. The Ninth Circuit held that section 302(h)(1) of the Magnuson-Stevens Act requires a Council to prepare and submit FMPs for each fishery under its authority that requires conservation and management. *United Cook Inlet Drift Ass'n* v. *NMFS,* 837 F.3d 1055, 1065 (9th Cir. 2016). Because NMFS determined that the Cook Inlet EEZ salmon fishery requires conservation and management, the Ninth Circuit ruled that it must be included in the Salmon FMP. Because of this litigation and the State's subsequent decision not accept a delegation of management authority for the Cook Inlet EEZ, management of all salmon fishing in Cook Inlet by the State is not possible at this time. Additional discussion of Federal jurisdiction is provided in the response to *Comment 3.*

Further, this rule will not prioritize any constituency. Consistent with National Standard 4, amendment 16 does not discriminate between residents of different states in allocating fishery resources and is fair and equitable to all fishermen. Consistency with National Standard 4 is discussed further below.

National Standard 1

Comment 10: The Magnuson-Stevens Act requires that NMFS set MSY and OY for fishing that occurs in both Federal and state waters. Only by doing so can NMFS ensure that the State's action in the State waters fishery does not interfere with NMFS's obligation to follow the Magnuson-Stevens Act in the Federal-waters fishery and achieve OY. NMFS should define OY for both State and Federal waters so as to prevent the overescapement caused by State management decisions.

Response: NMFS disagrees that it must set MSY and OY for fishing that occurs in both State and Federal waters. As discussed in the preamble to the proposed rule, MSY is a reference point, informed by the best available scientific information. The Magnuson-Stevens Act and National Standard 1 guidelines require that every FMP include an estimate of MSY for the stocks and stock complexes that require conservation and management (§ 600.310(e)(1)). MSY is defined as the largest long-term average catch or yield that can be taken from a stock or stock complex under prevailing ecological, environmental conditions and fishery technological characteristics (*e.g.,* gear selectivity), and the distribution of catch among fleets (§ 600.310(e)(1)). Thus, under National Standard 1, NMFS acknowledges that MSY should be defined for a stock or stock complex, regardless of where fishing occurs, and thus it is not set for State waters or Federal waters. Because MSY is not a management target, it does not depend on any management actions. Rather, it describes the capacity of a stock to be harvested sustainably, regardless of who manages fishing or how harvest is authorized. Only by accounting for catch wherever it occurs can NMFS understand the largest long-term average catch or yield that can be taken from the entire stock or stock-complex. Amendment 16 provides that, for salmon stocks harvested in the Cook Inlet EEZ Area, MSY is defined at the stock or stock complex level (as described below), consistent with National Standard 1 guidelines for establishing MSY. Because MSY must be defined in terms of stocks or stock complexes, this definition of MSY does not subdivide between State and EEZ waters in Cook Inlet.

NMFS disagrees that OY should be established for fishing occurring in both State and Federal waters. In contrast to MSY, OY may be established at the stock, stock complex, or fishery level (§ 600.310(e)(3)). With respect to the yield from a fishery, the Magnuson-Stevens Act defines ''optimum'' as the amount of fish that will provide the greatest overall benefit to the Nation. Under amendment 16, the fishery is properly defined as all harvest of co-occurring salmon stocks in the Cook Inlet EEZ for the reasons stated in *Comments 1, 3, 4,* and *29.* Because there is limited ability to target individual stocks of salmon in the Cook Inlet EEZ Area, stocks of varying abundance are inevitably all harvested in the same fishing trip. The amount of harvest that will provide the greatest overall benefit to the Nation in this highly mixed stock fishery where vessels operating in the EEZ cannot discriminate between stocks of varying abundance is very different from the amount of harvest that may be optimum for stocks or fisheries in State waters where vessels are better able to target individual stocks of fish near their natal streams. Thus, OY is better defined for the Cook Inlet EEZ fishery rather than at the stock or stock complex level, taking into account the

interactions among various stocks in the EEZ.

Furthermore, by defining OY at the level of the Cook Inlet EEZ fishery under Federal jurisdiction, NMFS ensures that OY is entirely within its purview and control to achieve on a continuing basis. In vacating amendment 14, the U.S. District Court for the District of Alaska found that NMFS had impermissibly deferred too much management authority to the State, stating ''hinging federal management targets on the changing landscape of state decisions is an improper delegation of management authority to the State.'' *United Cook Inlet Drift Ass'n* v. *Nat'l Marine Fisheries Serv.,* No. 3:21–cv–00255 at *28 (D. Alaska, June 21, 2022). In developing amendment 16, NMFS took a different approach. For the first time since Alaska Statehood, there will be two salmon fishery management jurisdictions in Cook Inlet. To avoid relying on the State to achieve any Federal management targets under amendment 16, NMFS has established OY for the Cook Inlet EEZ fishery and developed a harvest specifications process that will achieve that OY on a continuing basis while preventing overfishing of any of the salmon stocks of varying abundance that co-occur in the EEZ.

Comment 11: Amendment 16 addresses the complexities of a mixed stock fishery, with the added burden of separate adjacent jurisdictional authorities. The proposed rule addresses MSY and OY, the jurisdictional issues, and notes reliance on the State's scientific knowledge and management authority but does not describe what triggers fishing in the Cook Inlet EEZ Area. Because the State did not accept delegated management and because NMFS lacks management expertise, amendment 16 implements Federal management that is not reliant on State input. However, because the State frequently develops the best scientific information available for Cook Inlet salmon stocks, amendment 16 should be modified to provide that NMFS authorize EEZ fishing only after receiving notice from the State that doing so will not negatively impact the State's management goals and strategies.

Response: NMFS acknowledges the jurisdictional complexity related to this action, and the State's expertise in salmon management. This action is intended to establish a Federal salmon management framework that is not dependent on the State and has the flexibility to adapt to changing conditions. The annual status determination criteria, harvest specifications, and inseason management will be dependent on the best scientific information available and the circumstances present in each fishing year.

NMFS expects that it will develop management expertise and strengthen cooperative relationships with various Agency partners related to management of the Cook Inlet EEZ Area over time. NMFS acknowledges that the mixed stock nature of and status of weaker salmon stocks within the fishery can make it difficult to harvest all of the surplus yield for all component stocks and that the interaction between stocks must also factor into the definition of OY.

NMFS disagrees that the FMP should include language requiring approval from the State prior to opening salmon fishing in the Cook Inlet EEZ Area. Consistent with the direction of the District Court, NMFS has implemented management measures including a fishing season, fishing periods, and TACs to ensure that OY can be achieved without relying on the State.

Comment 12: Under the State's management and based on the State's preliminary numbers, the overescapement of sockeye in just two rivers in Upper Cook Inlet exceeded the total commercial harvest of sockeye for the entirety of Upper Cook Inlet and likely exceeded the escapement necessary for all other rivers in Cook Inlet. According to NMFS's own scientific information included in its analysis, overescapement is problematic because it results in ''foregone yield in the current'' year and ''may be expected to result in reduction in future recruitment,'' (*i.e.,* reduction in long-term yield). To further put these numbers in perspective, overescapement of sockeye in the Kenai and Kasilof in 2023 was more than NMFS's OY range—approximately 291,631 to 1,551,464—for the entire Cook Inlet EEZ salmon fishery for all species of salmon in Upper Cook Inlet. There is no discussion in proposed amendment 16 of how NMFS's management measures for the Cook Inlet EEZ salmon fishery will address and prevent rampant overescapement by the State and the resulting unutilized waste to ensure compliance with National Standard 1. Amendment 16 focuses only on the concept of avoiding overfishing, without making any meaningful effort to simultaneously prevent drastic underfishing by optimizing yield.

Response: NMFS acknowledges that Kenai and Kasilof sockeye salmon stocks have exceeded escapement goals in recent years, resulting in foregone yield. As described in the preamble to the proposed rule, salmon fishing in the Cook Inlet EEZ necessarily targets mixed stocks of salmon. Conservation measures to prevent overfishing on less abundant co-occurring salmon stocks are a primary driver of this foregone yield as they limit a complete harvest of the most abundant sockeye salmon stocks to prevent overfishing on less abundant salmon stocks. As referenced within the 2024 SAFE report, which was reviewed by the SSC, during recent years when Kenai and Kasilof river sockeye salmon escapement goals were exceeded, some sockeye, coho, and Chinook salmon escapement goals in Cook Inlet were not achieved at the status quo level of salmon harvest; thereby highlighting the difficulty of managing mixed stock fisheries to enable the harvest of potential yield while also achieving conservation objectives. Management measures that are required to prevent overfishing on all stocks are consistent with the Magnuson-Stevens Act.

As described in the response to *Comments 18, 25,* and *55,* Cook Inlet is a mixed stock fishery within which there are weak stocks (*i.e.,* stocks of relatively low abundance). This situation requires management decisions that can result in overescapement of abundant stocks, such as Kenai and Kasilof sockeye salmon. Providing for greater harvest of the more abundant stocks in the EEZ would create a significant risk of not meeting escapement goals for less abundant stocks and reducing or eliminating the harvestable surplus of these stocks available to all other salmon users. As noted above, NMFS has evaluated historical EEZ harvest levels and found that harvest in the EEZ could not be increased to fully harvest surplus Kenai and Kasilof salmon without causing serious impacts to other salmon harvesters and major conservation problems for other stocks. Whether management in State waters could be modified to increase harvest of these stocks closer to their natal streams without increasing pressure on the stocks of lower abundance in the EEZ is outside the scope of this action, as NMFS has no jurisdiction over State waters (as described in the response to *Comment 10*). The potential for overescapement to reduce future yields is addressed in the response to *Comment 18.*

The Magnuson-Stevens Act has no prohibition against foregone harvest, and in fact suggests foregone harvest is necessary when additional harvest of an abundant stock would also result in bycatch of species for which there is a conservation concern. In contrast, the

Magnuson-Stevens Act explicitly mandates that NMFS prevent overfishing. Therefore, in defining OY for a mixed stock fishery, NMFS cannot look at the strongest stocks in isolation. Here, OY is appropriately limited to EEZ waters and defined so as to identify the amount of cumulative harvest of all co-occurring EEZ stocks that provides the greatest net benefit to the Nation while preventing overfishing. This is consistent with NMFS's approach to salmon management on the West Coast where ''weak stock'' management is required to avoid exceeding limits for the stocks with the most constraining limits. Each year when setting harvest specifications, NMFS will evaluate the maximum potential harvest available in the Cook Inlet EEZ Area and will work to provide harvest opportunities to the extent possible, subject to the constraints of scientific and management uncertainty. As the information available to NMFS to manage salmon fishing in the Cook Inlet EEZ Area improves through implementation of this new Federal fishery management regime, it is possible that harvest levels could increase.

The State's management decisions prior to NMFS implementing amendment 16 regarding allocations among fishery sectors under State jurisdiction are State decisions that are outside the scope of this action.

Comment 13: This definition of OY is inconsistent with a 2018 NMFS legal memorandum describing that OY should not be subdivided between State and Federal waters.

Response: NMFS disagrees that amendment 16's definition of OY is inconsistent with the 2018 NMFS legal memorandum filed in *UCIDA* v. *NMFS.* The relevant portion of the legal memorandum stated, ''because the fisheries take place in the EEZ and State waters without formal recognition of the boundary between these two areas, the OY should not and cannot be subdivided into separate parts for the EEZ and State waters.'' At that time, management of Cook Inlet had never been divided into separate State and Federal management regimes under the FMP. As such, it was assumed that continued State management over the drift gillnet fishery throughout both Federal and State waters would continue through delegation under Magnuson-Stevens Act section 306(a). Delegation of certain Federal management authorities to the State would have maintained a single fishery that could operate without specific regard for the EEZ boundary, but the State declined delegation. Therefore, under amendment 16, which will create separate Federal and State fisheries, it is appropriate to define OY for the specific fishery under NMFS's jurisdiction—the Cook Inlet EEZ salmon fishery.

Comment 14: If NMFS could acknowledge that achieving OY/MSY escapement goals should be the driving factor in developing its FMP, then much of the complication built into amendment 16 would go away.

Response: NMFS acknowledges that an FMP must contain conservation and management measures, including ACLs and accountability measures, to achieve OY on a continuing basis and provisions for information collection that are designed to determine the degree to which OY is achieved. As stated above, here OY is defined for the fishery—which currently includes seven stocks or stock complexes of varying abundance—and accounts for the mixed stock nature of the salmon fishery in the EEZ and the needs of multiple user groups in identifying the harvest levels that will produce the greatest net benefit to the Nation across a variety of run sizes. The FMP's management measures are explicitly designed to achieve OY on a continuing basis while preventing overfishing, consistent with National Standard 1.

NMFS does not agree that achieving MSY or MSY escapement goals are its mandates. MSY is not a management target, as described above, and MSY identifies the maximum sustainable harvest level an individual stock could theoretically support if it was possible to target that stock in isolation and without uncertainty. OY is prescribed on the basis of MSY, as reduced by any relevant economic, social, or ecological factors. Here, for Tier 1 and 2 salmon stocks, MSY in the Cook Inlet EEZ represents all salmon in excess of the stock's escapement goal in a given year. For Tier 3 stocks, which have no reliable estimates of escapement, maximum catch over a recent range of years that are representative of current biological and environmental conditions is used as a proxy for MSY. But because it is not possible to target individual stocks of salmon in the EEZ, it is not possible to design conservation and management measures intended to fully harvest MSY for each stock, as such harvest levels would result in overfishing of the least abundant stocks. Instead, OY is defined for the fishery on the basis of MSY—in that it aims to achieve as much surplus yield for each stock as possible—but is reduced from MSY to account for interactions between stocks (ecological factors) and identify the harvest levels that will continue to support multiple active fishery sectors without resulting in any one stock routinely missing its escapement goal (*i.e.,* likely overfishing) or any user group losing access to the resource (economic factors). Fully harvesting MSY for Kenai late run sockeye in the EEZ, for example, could decimate co-occurring populations of salmon bound for Northern Cook Inlet, completely eliminating fishing opportunities for other users. Such an outcome would benefit one user group to the exclusion of all others and thus would not produce the greatest *net* benefit to the Nation. Here, NMFS has defined OY by carefully considering net benefits, the competing demands of the numerous stakeholders and tribes who rely on Cook Inlet salmon stocks, and the fundamental characteristic of co-occurring, mixed stocks in the Cook Inlet EEZ. NMFS concludes the management measures in this final rule will achieve OY as defined in amendment 16 on a continuing basis.

Comment 15: Federal oversight of this fishery is a must to obtain maximum harvest and sustainable yield.

Response: The Magnuson-Stevens Act mandates that Federal fishery management measures shall prevent overfishing while achieving OY, which is different from achieving maximum harvest or MSY. To the degree that the commenter is suggesting that Federal management will result in harvests equal to MSY, NMFS disagrees. To the contrary, many stocks of fish in the EEZ are harvested at levels well below their MSY because of the complex interactions between stocks; achieving MSY for certain stocks would result in overfishing of other stocks, which would be inconsistent with the first mandate of National Standard 1. Instead, Federal fishery management measures must achieve OY on a continuing basis. OY is defined as the amount of fish that:

(1) Will provide the greatest overall benefit to the Nation, particularly with respect to food production and recreational opportunities, and taking into account the protection of marine ecosystems;

(2) Is prescribed as such on the basis of the maximum sustainable yield from the fishery, as reduced by any relevant economic, social, or ecological factor; and

(3) In the case of an overfished fishery, provides for rebuilding to a level consistent with producing the maximum sustainable yield in such fishery (16 U.S.C. 1802(33)).

Comment 16: Using historical catch data from 1999–2021 is incorrect as a proxy for MSY and OY. This period begins after the State increased

escapement levels, resulting in large overescapements of sockeye in the Kenai and Kasilof Rivers and under-harvest of coho, pink and chum salmon. Because the State has not been managing the fishery on the basis of MSY, this historical catch data has no relationship with MSY. This continues poor State management practices in Federal management. NMFS should include harvest data from the 1980s.

Response: NMFS disagrees. To start, historical catch is not used as a basis for establishing MSY in this action for any stocks or stock complexes with escapement goals or estimates of total run size (Tier 1 and Tier 2 stocks). Rather, MSY represents the maximum potential harvest of a run in excess of the spawning escapement goal. The annual SAFE reports will review the best scientific information available regarding escapement goals and estimated run sizes. For Tier 3 stocks with no data on run size or total escapement, maximum catch over a recent range of years that is representative of current conditions is used as a proxy for MSY because it represents the best scientific information available to estimate MSY. In prescribing OY on the basis of MSY, NMFS used the best scientific information available to identify the range of harvest levels in the EEZ that will provide the greatest net benefit to the Nation by ensuring all stocks harvested in the EEZ can meet their escapement goals and the greatest number and diversity of stakeholders and fishery sectors will retain access to the resource. In other words, NMFS defined OY as the harvest levels that are expected to capture as much yield in excess of escapement goals as possible in the EEZ without any individual stock routinely not achieving these escapement goals and risking overfishing, thereby maintaining a harvestable surplus for all other salmon users.

The best scientific information available regarding the appropriate harvest levels in this mixed stock fishery are currently estimates of historic catch in years of high and low abundance across stocks from 1999–2021. As explained in the Analysis, the 1999–2021 time period was chosen due to the advent of the current abundance-based approach to management of salmon in Upper Cook Inlet. In addition, this time series represents the recent range of salmon productivity conditions that are representative of reasonably foreseeable future conditions, reflects a range of time when management measures both increased and decreased fishing opportunity in EEZ waters, and captures a range of different social and economic conditions within fishing communities. Furthermore, this period also reflects the time for which high quality and comparable data for nearly all fisheries and fishing communities throughout Cook Inlet are available. The OY range considers but does not include the 1980s because there was a different ecological regime in place in the North Pacific (highly productive for salmon stocks), seafood markets for salmon were significantly different (strong Asian demand and less competition from farmed salmon), and the regional population was significantly smaller. These factors all influence NMFS's consideration of the greatest net benefit to the Nation, including consideration of food production and recreational opportunities and taking into account the protection of marine ecosystems.

The harvest levels from 1999–2021 have resulted in numerous viable fisheries while preventing stocks from becoming overfished. While it may be possible to develop better information in the future as NMFS collects more data specific to the EEZ—and section 302(h)(5) of the Magnuson-Steven Act requires the Council to review OY on a continuing basis—at present, historic catch is the best scientific information available. Therefore, ranges of catch in years of high and low salmon abundance is an appropriate method to determine OY.

This action establishes a Federal management framework that accommodates varying levels of harvest over time as the information available to inform harvest specifications and both relative and absolute abundances of salmon change each year. NMFS reviewed fishery data dating back to 1966 when developing a definition for OY. Harvests by the drift gillnet fleet, and all other salmon users in Cook Inlet, have fluctuated dramatically over time based on both salmon abundance cycles and management decisions. Ultimately, as explained above, NMFS determined that the best scientific information available for prescribing OY is currently the estimates of historic catch in years of high and low abundance across stocks from 1999–2021.

Comment 17: The proposed calculation of MSY, OY, and TAC includes 3 years, 2018, 2020 and 2021, which were declared economic disasters by the Secretary of Commerce. This data should be omitted from all analyses of historic harvest.

Response: This action does not use historical catch data to define MSY or to set TACs, as explained above.

For the reasons explained in response to *Comment 16,* the best available science for developing OY includes historic catch data. Of the 2018, 2020, and 2021 fishery disaster determinations referenced by the commenter, only the 2020 disaster determination applied to the drift gillnet fleet. The 2018 and 2021 determinations only applied to the East Side set net fishery sector. The East Side set net fishery does not operate in EEZ waters. Further, NMFS disagrees that disaster and low harvest years should be omitted from consideration in defining OY, as they represent part of the range of conditions experienced in the fishery. In defining the lower bound of OY for the Cook Inlet EEZ Area, the three lowest EEZ harvests are averaged together, and this number identifies what optimum harvest levels might be in years when low stock abundance reduces harvest opportunities.

It should be noted that OY is not an annual management target but is a long-term objective. Harvests may fall above or below the OY range in some years. Furthermore, OY may appropriately encompass very low harvests when that is what is required to prevent overfishing on all stocks. For example, in the GOA groundfish FMP, the lower bound of the OY range is defined by the year with the absolute lowest fishery harvest in the time series and in the BSAI King and Tanner Crab FMP, the lower bound of the OY range is zero.

Comment 18: Multiple commenters expressed concern about overescapement reducing future yields of Cook Inlet salmon stocks. Commenters stated that underfishing (too little harvest) can jeopardize the capacity of a salmon stock to produce MSY on a continuing basis by allowing too many salmon to enter the stream to spawn and exceeding the carrying capacity of the spawning and rearing habitat, thereby reducing future runs. ADF&G data indicates all the salmon stocks in Cook Inlet are underfished, and with such low exploitation rates, we cannot be overfishing. The commenters stated that most salmon stocks in Cook Inlet are underfished with returns that have exceeded escapement goals. For example, Kenai and Kasilof River sockeye salmon have consistently exceeded escapement goals, sometimes by over a million fish. This action will continue or increase overescapement and result in overcompensation. Management practices that jeopardize the long-term health of the salmon resource reduce opportunities for harvesters and processors and harm the economies of fishing communities.

Response: NMFS disagrees that all salmon stocks in Cook Inlet are

underfished, that overfishing cannot occur in Cook Inlet, and that amendment 16 will jeopardize the long-term health of the salmon resource if the stocks of highest abundance exceed their escapement goals when harvest restrictions are required to protect stocks of lower abundance. As discussed in the 2024 SAFE report, escapements for some stocks of sockeye, coho, and Chinook salmon have been below spawning escapement goals during recent years when Kenai and Kasilof sockeye salmon have exceeded the upper bound of their escapement goals.

As discussed in section 3.1 of the Analysis, the need to conserve weaker stocks by reducing fishing effort sometimes results in foregone yield from more productive stocks. For salmon, this can result in escapement goals being exceeded, which is sometimes referred to as overescapement. NMFS has evaluated the best available science on overescapement. Appendix 14 of the Analysis is an independent analysis of the potential for overcompensation (reduced yield as a result of overescapement) in Kenai and Kasilof river sockeye salmon stocks. The SSC reviewed this analysis, which found that ADF&G's escapement goals were established within the range expected to produce MSY for those stocks, that ADF&G's point estimates of MSY were accurate, and that there is limited evidence for overcompensation across the observed range of escapements for Kenai and Kasilof sockeye salmon. Thus, while instances of overescapement will result in foregone yield in the current year, existing spawner-recruitment information does not indicate that overescapement has resulted in substantial reductions in recruitment and yield for the primary stocks harvested by the drift gillnet fleet in Cook Inlet. In other words, though the Kenai and Kasilof sockeye salmon stocks have recently exceeded their escapement goals, this has not resulted in a conservation problem for those stocks and available data does not indicate that overescapement has resulted in a reduction in future yields. NMFS concludes that increased fishing effort in the EEZ to fully harvest the available yield for Kenai and Kasilof sockeye salmon would result in serious conservation concerns for stocks of lower abundance, which would fail to achieve their escapement goals.

For Cook Inlet salmon stocks without escapement goals, information is not available to analyze overescapement or its potential impacts on future yields. In the absence of specific stock information, conservative management using suitable proxies while following the precautionary principle is consistent with the National Standard 1 guidelines for dealing with data-poor stocks (§ 600.310(e)(1)(v)(B) and (h)(2)). The guidelines provide flexibility in setting MSY and other reference points based on insufficient data and in consideration of stocks with unusual life history characteristics, including salmon. The risk of overfishing as a result of harvest rates that are too high is much greater than the uncertain and speculative risk of underharvest or overescapement. Therefore, precautionary management is appropriate for data-poor fish stocks.

From a practical perspective, it is not possible to manage the mixed stock salmon fishery in the Cook Inlet EEZ Area by harvesting surplus yield on all stocks because the composition, abundance, and productivity of stocks and species in the fishery vary substantially. Overescapement occurs in Cook Inlet, as noted in section 3.1 of the Analysis. Overescapement usually results from (1) a lack of fishing effort, (2) unexpectedly large salmon runs, or (3) management or economic constraints on the fishery. In this instance, management must constrain harvest of the largest, most productive salmon stocks to protect less abundant salmon stocks and species.

Comment 19: The Exxon Valdez litigation had documented damage to the Kenai River due to overescapement and the Exxon Valdez Oil Spill Trustees Council funded ADF&G research on damage from Kenai Sockeye overescapement and plaintiffs' compensation in part was for damage to future runs caused by overescapement. Now the State is managing the sockeye fishery in a manner that results in substantial overescapement, similar to what occurred after the oil spill.

Response: The response to *Comment 18* explains that the best scientific information available indicates that large escapements of sockeye salmon to the Kenai River have not resulted in reduced future yields and are not a conservation concern compared to the clear risks of overfishing and/or stocks failing to meet the lower bound of escapement goals. The claims and damages paid to plaintiffs in the decades of litigation arising from the Exxon Valdez oil spill are beyond the scope of this action.

Comment 20: The result of the overescapement on the Kenai and Kasilof rivers caused by commercial fishery restrictions wastes a food resource that belongs to the whole nation (see the Supreme Court's case of *Hughes* v. *Oklahoma* which reversed *Greer* v. *Connecticut*). It is in the whole Nation's interest as to what happens to salmon in Alaska. When Alaska became a state, the State compact with Congress was for the State to manage its fish and wildlife in the national interest. The State created ADF&G to manage fish and game in the national interest. It is no longer doing that. This is the reason for the involvement of NMFS and the Department of Commerce.

Response: The U.S. Supreme Court in *Hughes* v. *Oklahoma,* 441 U.S. 322, 338 (1979), held that a State could not prohibit transporting fish out of state for sale once caught. *Hughes* v. *Oklahoma* is not relevant to this action.

NMFS has determined that this action would achieve OY for the Cook Inlet EEZ Area and, in doing so, will result in the greatest overall net benefit to the Nation. The National Standard 1 guidelines provide that OY means the amount of fish that will provide the greatest overall benefit to the Nation, particularly with respect to food production and recreational opportunities, and taking into account the protection of marine ecosystems. This means NMFS must look at the impacts of its harvest management on all salmon stocks and stakeholders and cannot look at the interests of the drift gillnet fleet alone.

As noted in the preamble to the proposed rule, amendment 16 defines OY as the average range of target EEZ harvest across all species that maximizes fishing opportunities while preventing overfishing on any one stock. This OY range provides the greatest overall net benefits to the Nation because it ensures sustainable stock levels throughout the ecosystem, preserves multiple viable commercial fishery sectors for continued food production, and maintains a viable recreational fishing sector that attracts participants from throughout the Nation.

This OY range is expected to result in drift gillnet harvests near historic levels, protect less abundant salmon stocks transiting to Northern Cook Inlet, and ensure other commercial and non-commercial stakeholders in Cook Inlet continue to have access to salmon resources. Any management plan designed only to prevent overescapement in the Kenai and Kasilof rivers by increasing EEZ harvest would upset this balance, preempting other users, and likely causing stocks of lower abundance—particularly in Northern Cook Inlet—to more regularly miss their escapement goals, ultimately resulting in overfishing.

Comment 21: Use the flexibility within the National Standard 1 guidelines (§ 600.310(h)(2)) to adopt an escapement-based inseason management methodology similar to the State. If the State is allowing too much harvest in its jurisdiction, it will be reflected in too low escapement numbers, and Federal managers will know to restrict fishing. Likewise, if the State is not providing for enough harvest, daily escapement numbers will indicate a higher than acceptable final escapement, and Federal managers will know to allow more fishing time. One commenter noted that an alternative approach is needed for salmon because of the following: (1) unlike groundfish stocks, salmon reproduce only once; (2) the harvestable surplus is entirely new recruits and the catch comprises almost exclusively mature salmon; (3) productivity of a specific year class cannot be improved by limiting harvest in subsequent years; (4) foregone harvest cannot be recaptured in future years; and (5) abundance cannot be estimated effectively in advance. Therefore, inseason estimates of abundance using contemporaneous data, with appropriate management actions taken to assure escapement and optimum production in future years, is the most effective way to avoid the risk of overfishing.

Response: As set forth under section 301 of the Magnuson Stevens Act, National Standard 1 provides that conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry. Section 303(a)(15) of the Magnuson Stevens Act requires that each FMP establish mechanisms for specifying ACLs to prevent overfishing and include accountability measures to prevent ACLs from being exceeded and to correct overages of the ACL if they do occur. The National Standard 1 guidelines at § 600.310(h)(2) contemplate limited circumstances in which alternative approaches to establishing ACLs may be appropriate, and specifically cite Pacific salmon as an example of stocks that may require an alternative approach to ACLs. However, while § 600.310(h)(2) provides NMFS some flexibility to consider alternative means of establishing ACL mechanisms and accountability measures in FMPs, the National Standard 1 guidelines do not provide discretion to consider alternative means of establishing other reference points, like OFL or ABC. And any alternative approach to establishing ACLs must be consistent with the Magnuson-Stevens Act.

The primary function of status determination criteria, ACLs, and related requirements is to ensure that a scientifically-based approach is used for controlling catch to maintain stock abundance at the level necessary to prevent overfishing, ensure no stocks become overfished, and achieve OY in the fishery. Therefore, an alternative approach that is consistent with the Magnuson-Stevens Act must document how the alternative management measures would limit catch and explain how such measures would rely on the best scientific information available.

When the Council was developing the alternatives for analysis, the Council and NMFS considered using the State's salmon escapement goal management as an alternative approach for satisfying the ACL requirements of the Magnuson-Stevens Act under delegated management to the State (Alternative 2). Under amendment 12, the Council recommended this alternative approach for ACLs in the East Area. Escapement goals are specified annually, in terms of numbers of fish. The biology of salmon is such that escapement is the point in the species life history best suited for routine assessment and long-term monitoring. Using spawning escapement goals is consistent with the long-standing practice of using spawning escapement to assess the status of salmon stocks.

Under this alternative approach (not adopted in amendment 16), the mechanisms for specifying ACLs salmon stocks would be the State's scientifically-based management measures used to determine stock status and control catch to achieve the number of spawners necessary to produce MSY. The State's salmon management program is based on scientifically defensible escapement goals and inseason management measures to prevent overfishing. Accountability measures would include the State's inseason management measures and the escapement goal setting process that incorporates the best scientific information available on stock abundance.

Using the State's inseason management approach as an alternative approach to establishing ACLs is not possible under Federal management of a new fishery in the EEZ that will be managed separately from fishing in State waters. NMFS currently has no infrastructure for collecting escapement information in Cook Inlet and there is no guarantee NMFS managers would have access to information collected by the State quickly enough to make real time management decisions. Additionally, escapement information is not available from any source for many salmon stocks in Cook Inlet. The responses to *Comments 23* and *28* provide additional discussion of the procedural challenges of implementing escapement-based inseason management in this situation.

For management of the Cook Inlet EEZ Area as an entirely separate jurisdiction, using escapement-based inseason management as an alternative approach for ACLs may have additional limitations. Because there is a lag of multiple days (or longer for the Northern District salmon stocks currently with the greatest conservation risks) between encountering EEZ fisheries and being counted at escapement monitoring stations, that data may not be timely for the current management situation. This lag between receipt of data and action can have huge consequences in a fishery where a single opening can harvest well over 300,000 salmon per day. Further, just because one stock has reached an escapement goal and can sustain additional harvest that does not mean that all of the other stocks, which are highly mixed in EEZ waters, can support additional harvest. This issue is compounded by fishing in EEZ waters occurring before all other users. Basing management solely on escapement would make it more difficult to ensure there was at least some harvestable surplus available to all salmon users in Cook Inlet across all jurisdictions when cooperation is not guaranteed through established agreements.

During the development of this action—first at the Council, then as a Secretarial FMP amendment after the Council failed to recommend any management measures—no one identified any alternative means of specifying ACLs for the Cook Inlet EEZ Area that would be consistent with the Magnuson-Stevens Act, rely on the best scientific information available, and limit catch to ensure no overfishing occurred. Therefore, amendment 16 uses the default ACL approach described in the National Standard 1 guidelines—establishing preseason harvest limits based on the best scientific information available at the time stock assessments are drafted and harvest specifications are recommended. This is similar to how ACLs are set for salmon along the US West Coast and how the 2019 Pacific Salmon Treaty Agreement establishes pre-season limits on Chinook harvest under the Treaty.

Comment 22: The State, several regional sportfishing organizations, and

stakeholders in the Northern District believe amendment 16 will disrupt conservation and management benefits realized by the State's management plans, which these commenters have found to successfully balance the complexity and challenges of managing multiple user groups in a highly populated area. They emphasize that the State's management plans were developed by the BOF to ensure long-term sustainability of both strong and weak salmon stocks, optimize yields and opportunities of the diverse fisheries, and allocate benefits among user groups. They feel this action will result in overfishing of weak salmon stocks, produce suboptimum yields, and confound the State's effective in-season management. This is not consistent with the Magnuson-Stevens Act or National Standard 1.

Response: NMFS recognizes the complex and challenging nature of Cook Inlet salmon fisheries. NMFS disagrees that amendment 16 will undermine the State's Central District Drift Gillnet Fishery Management Plan, result in overfishing, or produce suboptimal yields.

As described in the preamble to the proposed rule, NMFS recognizes that salmon harvest in the Cook Inlet EEZ occurs first and can impact the amount of salmon available to upstream users and to meet spawning escapement goals. In developing this final rule, NMFS considered the management measures implemented by the BOF and worked to balance competing interests and provide opportunity for all users of salmon throughout Cook Inlet.

NMFS acknowledges that, in some years, this action may allow for more days of drift gillnet fishing in the Cook Inlet EEZ Area relative to previous State management plans. NMFS will use TACs that account for uncertainty and harvest in other fisheries in order to prevent overfishing on any less abundant salmon stocks transiting through the Cook Inlet EEZ Area. As described in section 2.5.2.1 of the Analysis and the response to *Comment 25,* TACs will account for stocks of lower abundance and prevent overfishing on weak stocks. The TACs are expected to result in total harvests fairly consistent with the status quo. NMFS will have inseason management authority to adjust TACs and close or reopen the fishery as needed to account for inseason conditions. NMFS and the Council will use the best scientific information available and work to improve salmon monitoring and assessment where possible/practicable, and will coordinate with the State to the extent possible. Further, as discussed in the section on changes from the proposed to final rule, NMFS is reducing the number of open fishing periods from two to one from July 16 to July 31 to directly respond to the comments from users in Northern Cook Inlet who said they depend on the conservation corridor established under State management.

NMFS expects that this final rule will continue to provide for a harvestable surplus for all Upper Cook Inlet salmon fishery sectors in both State and Federal waters. NMFS anticipates that under this final rule all Cook Inlet salmon fisheries will remain viable and produce economic benefits commensurate with the status quo.

Status Determination Criteria and Annual Catch Limits

Comment 23: Many commenters raised concerns about using TACs for salmon harvest in the EEZ, including the following perspectives.

Use of a TAC established on preseason projections will result in inappropriate catch. While uncertainty may be accounted for when setting ABC and OFL, it lacks the benefit of inseason information on run strength, weak stocks, harvests, and other important factors. Cook Inlet salmon run sizes and timing are variable and unpredictable, especially in recent years. Establishing a TAC increases the likelihood of either overfishing or underfishing and reduces the likelihood of remaining within the escapement goal range for those stocks with goals. Further, if there are deviations from forecasted run size, procedural constraints on Federal management may exacerbate the resulting problems. These issues combined could jeopardize sustainability, especially for weak stocks, and could result in overfishing of weak stocks.

Commenters from the drift gillnet fleet emphasized that forecasts will be inaccurate, management objectives will not be met, harvest will be unnecessarily reduced, MSY and OY will not be achieved, and this action will cause adverse economic impacts.

Other commenters voiced concerns that a TAC would not be conservative enough given that this action sets TACs for a first-in-line fishery, which would require the State to reduce State water fisheries harvest if the pre-season forecasts are not realized. Commenters from other commercial and recreational salmon fishery sectors in Upper Cook Inlet, as well as associated communities, were significantly concerned that TACs would not be precautionary enough and EEZ harvests would reduce or eliminate the harvestable surplus available to other users. Some commenters cited unpredictable escapement data that would require unexpected fishery closures.

Response: Under section 303(a)(15) of the Magnuson-Stevens Act, the FMP must include a mechanism for specifying ACLs at a level that overfishing does not occur in the fishery, including measures to ensure accountability. NMFS is therefore required to have ACLs and management measures to implement them, and amendment 16 includes these required elements. TACs (*i.e.,* preseason catch limits) are established to ensure fishery harvests remain below ACLs. Because salmon of the same species originate from separate stocks but cannot be visually distinguished, in amendment 16, TACs are set at the species level based on the cumulative estimated contribution by stock, at least until inseason genetic information becomes available. There is uncertainty inherent to forecast-based catch limits. In establishing TACs, NMFS will take into account management uncertainty and public comment, just as NMFS and the SSC will consider scientific uncertainty in setting OFL and ABC (and therefore ACL since ACL equals ABC) each year. OFL and ABC are specified for each stock or stock complex. TACs are established for species rather than stocks or stock complexes because inseason it is not currently possible to differentiate among stocks of the same species. TACs for each species are set based on the aggregate ABC for each component stock and stock complex and account for the assumed contribution of each stock or stock complex to total catch to ensure ABC is not exceeded for any one component stock. NMFS will monitor the fishery daily and use inseason management measures and adjust the TAC, if practicable, to ensure that catch amounts are appropriate for the realized run strength. And NMFS expects that TACs set for the Cook Inlet EEZ will be suitably precautionary to avoid overfishing.

Establishing TACs is consistent with the NMFS's management approach for salmon stocks in ocean fisheries on the West Coast with an ACL requirement (*e.g.,* stocks that are not subject to a tribal/international treaty or ESA exception). The Pacific Salmon Treaty also establishes pre-season catch limits for Chinook salmon covered by the Treaty. NMFS considered alternative approaches to establishing ACLs as described in the response to *Comment 21.*

NMFS will consider all available information about Cook Inlet salmon

run strength and coordinate with the State to the extent practicable when making management decisions for the Cook Inlet EEZ Area. However, this action establishes Federal reference points and harvest specifications for the Federal fishery, as required by the Magnuson-Stevens Act, which are different from existing State management measures.

NMFS acknowledges that the ACL requirement and additional Federal notice requirements—mandated by the Magnuson-Stevens Act and the APA—are less flexible in adjusting fishing opportunity based on inseason information about run size when compared to managing by monitoring escapement goals and exercising emergency order authority pursuant to State law, as under State management. This is described in section 2.5.2.6 of the Analysis. NMFS also acknowledges that fishing in the Cook Inlet EEZ Area takes place before all other salmon fisheries in upper Cook Inlet and that it can impact salmon escapement for each stock as well as the harvestable surplus available to all other subsequent salmon users. NMFS acknowledges the uncertainty inherent to forecast-based catch limits. However, NMFS designed the harvest specification process and management framework implemented by this action to account for the inherent uncertainty in preseason estimates and the need for inseason management, as well as the mixed-stock, first-in-line nature of the Cook Inlet EEZ Area fishery, consistent with the Magnuson-Stevens Act and the APA.

Comment 24: Appropriate harvest rates are not considered when determining what should be harvested in the Cook Inlet EEZ Area. The 2002 ADF&G mark-recapture population estimate study (Regional Information Report 2A03–20, published 2003) on coho, pinks, and chums found that the commercial fishery harvest rates on coho were about 10 percent, pinks were around 2 percent, and chums were around 6 percent. These harvest rates were the results of State management policies that were in effect at that time. To further skew the harvest rates since 2002, when the study was done, the commercial fishery was even more restricted by State salmon management plans that continue to fail to meet the requirements of Magnuson-Stevens Act. All harvest rates should be based on 81 percent overfishing exploitation rate and a 65 percent MSY exploitation rate. MSY exploitation rates should be 63 percent for coho, 53 percent for pinks, and 56 percent for chums to achieve MSY on these stocks over the long term.

Response: Harvest rates (exploitation rates) could not be considered for the Federal management of stocks of pink, chum, and coho salmon in Upper Cook Inlet because there are not sufficient data available to estimate such harvest rates. The mark-recapture studies cited by the commenter are now more than 20 years old, and salmon populations are not stable over time. Rather, as cited in the Analysis and the SAFE report, a variety of publications, including State of Alaska escapement goal reports, annual management reports, and stock assessments, indicate that Alaska's salmon populations experience substantial year-to-year fluctuations in abundance over time. Population estimates from a given year are not indicative of the population abundance during other years. There are no contemporary estimates of total run size or overall spawning escapement for stocks of coho, pink, and chum salmon for all of Upper Cook Inlet, and historical estimates are highly uncertain. As such, exploitation rates have not been estimated during recent years and therefore, it is not possible to precisely estimate MSY for these stocks based on current assessment methods. Moreover, there are no estimates of population abundance for these stocks to inform preseason harvests specifications. NMFS will use the best available scientific information to inform harvest specifications and management decisions for the Cook Inlet EEZ Area.

Comment 25: Several commenters, including Alaska Native tribes in the region, emphasized the importance of precautionary salmon management and felt that amendment 16 was not suitably precautionary given large potential harvests by the drift gillnet fleet, which includes a mixture of strong and weak stocks.

One commenter noted that many Northern District salmon stocks lack estimates of annual escapement, escapement goals, and numeric data (historic or current). Cook Inlet salmon fisheries harvest mixed stocks and need to be managed to account for this. Precautionary management would help meet escapement goals. NMFS should fund genetic data collection and more escapement monitoring.

Another commenter suggested setting conservative TACs for the first 6 years. One commenter generally suggested that management measures in addition to TACs would be needed. Another commented stated that NMFS must develop a plan for pre-season commercial fishing closures as well as in-season commercial fishing closures based on in-season escapements.

Response: NMFS acknowledges the importance of precautionary fishery management and avoiding overfishing on all salmon stocks. Furthermore, NMFS acknowledges that some Cook Inlet salmon stocks are highly abundant and may support additional harvests while other salmon stocks are a major conservation concern and can support little or no harvest. Over time, NMFS will work to expand the scientific information available to manage Cook Inlet salmon stocks. Amendment 16 includes accountability measures, and NMFS can implement additional accountability measures if needed to avoid exceeding ACLs.

NMFS must establish harvest specifications before fishing begins. NMFS agrees that there is a need for precaution when there is significant scientific or management uncertainty associated with salmon management in Cook Inlet. Drift gillnet fishing in Cook Inlet harvests mixed stocks of salmon. The best scientific information available will be used to assess the status of each salmon stock in Cook Inlet and set harvest limits each year. The harvest limits set for each species will consider the proportional contribution of each salmon stock to total catch, when known. Species-level TACs may also be reduced from combined ACLs to protect weak stocks when there is uncertainty about catch composition (a key type of management uncertainty). Furthermore, NMFS will close commercial fishing for all salmon species in the Cook Inlet EEZ when catch limits for one or more stocks are met or exceeded, or if other information becomes available that indicates overfishing is likely. This will help ensure that overfishing does not occur on any one stock.

NMFS disagrees that the management framework established by this action is not sufficiently precautionary. As described in the preamble to the proposed rule, every year the Council's SSC will establish ABCs for each Cook Inlet salmon stock, accounting for scientific uncertainty by reducing ABC from OFL. TAC would then be set for each salmon species to account for management uncertainty to ensure that total catch does not exceed the ABC for any stock and may also include additional reductions to account for social, economic, and/or ecological factors. As noted in the changes from proposed to final rule section, this action reduces the number of fishing periods per week in the Cook Inlet EEZ Area to one opening per week from July 16–July 31 to allow salmon stocks of lower abundance to migrate northward. To further address mixed-stock conservation needs, drift gillnet fishing

in the Cook Inlet EEZ area will be closed after a TAC for a single species is reached or would be exceeded by another opening because drift gillnet gear catches all stocks present in the EEZ and the fleet could not focus harvest on only those species for which there is remaining TAC.

NMFS acknowledges that there is some uncertainty in estimated EEZ harvests but recognizes it as the best scientific information available. Forecasted salmon abundance and associated uncertainty will be considered each year to set harvest specifications that are appropriately precautionary. After implementation of this action, NMFS will collect high quality data to determine total EEZ harvests.

For further explanation of NMFS's approach to management of this mixed stock fishery, see the response to *Comment 55.*

Comment 26: The State cannot commit to adjusting the work schedule and timing of Cook Inlet salmon management and science products to accommodate the proposed Federal harvest specification process. Salmon scales take time to read and age, data takes time to analyze, and models take time to run and fact check. Expediting these processes could result in errors. We already anticipate that this action will increase the volume and complexity of information requests that ADF&G receives from fishery participants, increasing staff workload.

Response: Nothing in this action requires the State to change the timing of their reports, publications, or other work products. However, as described in sections 4.7.3.2 and 4.8 of the Analysis, NMFS acknowledges that this action will increase costs and burden to State and Federal fishery management agencies. NMFS acknowledges the timing, logistical challenges, and costs associated with fishery data collection, analyses, and the timing requirements of the Federal process for the SSC and Council to recommend harvest specifications and for NMFS to implement them by publishing proposed and final harvest specifications in the **Federal Register**.

NMFS and the Council will use the best scientific information available at the time that harvest specifications must be developed or other fishery management decisions made. This may include information from the State or other sources, and NMFS will work with the State to the extent practicable. NMFS, the Council, and the SSC will evaluate the level of uncertainty in available data and information and adjust harvest specifications and other management measures accordingly.

Comment 27: To establish a reliable TAC based on the proportional contribution of each stock to this fishery, better data must first be established including in-season genetics and escapement information for Northern Cook Inlet salmon stocks. Test fisheries need to take place where northern-bound fish are most easily differentiated from Kenai-bound fish. Using averages of previous years to establish the TAC is no substitute for timely in-season management. NMFS may want to support the State's test fishery or establish another test fishery to monitor salmon numbers, species, and stocks entering upper Cook Inlet. Timely genetic analysis from test fisheries could provide better real-time abundance information for management.

Response: NMFS acknowledges that there are incomplete genetics and escapement data for Cook Inlet salmon stocks, as described in section 2.5.2.2 of the Analysis. However, NMFS will use the best scientific information that is available, including information from test fisheries and historical data on genetic stock composition to manage salmon fishing in the Cook Inlet EEZ Area. Any uncertainties in the available scientific information will be accounted for, and management measures will be adjusted based on the level of precaution warranted. As discussed in the response to *Comment 28,* NMFS will monitor the fishery and make management decisions on a daily basis depending on currently available information on realized salmon abundance.

NMFS will work to improve the level of information available to manage the fishery and may consider other management tools including Federal test fisheries and genetics sampling to address future management needs.

Inseason Management

Comment 28: Daily management of the fishery must take place like all other State salmon fisheries.

Response: NMFS will monitor catch from each Federal fishing day, catch in other fisheries, and any other information available about inseason salmon abundance to make management decisions for the Cook Inlet EEZ Area on a daily basis. NMFS may close the fishery, reopen it, or—potentially—adjust the TAC amounts to account for emerging inseason conditions. However, unlike the State and as described in the proposed rule, NMFS must comply with the APA when implementing any fishery management decision. The need to comply with the APA's notice requirements for all inseason actions, and the Magnuson-Stevens Act requirement to establish ACLs, make it infeasible to implement an escapement-based salmon management approach like that used by the State.

Comment 29: Catch per unit effort (CPUE) should be used instead of a TAC to manage salmon fishing in the Cook Inlet EEZ Area.

Response: NMFS disagrees that CPUE should be used to manage salmon fishing in the Cook Inlet EEZ Area as CPUE data alone would be insufficient to meet Federal Magnuson-Stevens Act and National Standards requirements. CPUE data would provide managers with the information about catch rates of salmon in the fishery, but not about the specific stocks caught. Even with stock specific catch information, CPUE data for salmon harvests may not correspond to overall run size or numbers of fish necessary to meet spawning escapement goals. As described in section 2.4.4 of the Analysis, methods that use CPUE (*e.g.,* catch per delivery) would likely not provide sufficient information to judge whether catches had exceeded a level thought to cause overfishing for a stock. NMFS does agree that CPUE can, under some circumstances, provide useful inseason information for fishery managers.

Comment 30: The proposed TAC does not discuss the criteria that will be used to close the fishery. The only criterion that is presented is a salmon harvest of 291,631. This single criterion of 291,631 salmon does not meet Magnuson-Stevens Act and the National Standards requirements.

Response: This final rule does not establish a TAC of 291,631 salmon. NMFS will establish TACs in a separate proposed and final harvest specifications process.

The preamble to the proposed rule for this action comprehensively describe how TACs for each salmon species would be established according to the process laid out in the Harvest Specifications and Annual Processes section, while the criteria for closure are described in the Inseason Management section. This action establishes the lower bound of the OY range at 291,631 salmon. The OY range is not used to establish harvest specifications or close salmon fishing. The OY range is a long-term average amount of desired yield from the fishery, not an annual management target, and thus 291,631 represents the lower bound of the desired long-term average yield from the fishery. As described in the response to *Comment 10,* the OY range specified by this action is consistent with the

Magnuson-Stevens Act and the National Standards.

Cook Inlet EEZ Commercial Salmon Fishing Management Measures

Comment 31: Several commenters objected to the prohibition on drift gillnet fishing in State and Federal waters on the same calendar day. They indicated this will be inefficient, have adverse economic impacts, decrease flexibility to harvest salmon as migration paths and run timing vary, and be inconsistent with National Standard 6. Another commenter noted that there is not a similar prohibition on recreational fishing in both State and Federal waters on the same day. Some commenters also suggested these requirements are intended to be punitive against members of the drift gillnet fleet.

Response: This final rule provides that it is unlawful for commercial fishery sector participants to:

- Set drift gillnet gear within, or allow any portion of drift gillnet gear to enter, State waters on the same calendar day that drift gillnet gear is also deployed in the Cook Inlet EEZ Area while commercial fishing for salmon in the Cook Inlet EEZ Area (§ 679.117(b)(1)(v));
- Use a vessel named, or required to be named, on an SFFP to fish for salmon in the Cook Inlet EEZ Area if that vessel fishes for salmon in Alaska State waters on the same calendar day (§ 679.117(b)(1)(vii));
- Possess salmon, harvested in Alaska State waters, on board a vessel commercial fishing for salmon in the Cook Inlet EEZ Area or to have salmon on board a vessel at the time a fishing trip commences in the Cook Inlet EEZ Area (§ 679.117(b)(1)(viii) and (ix)); and
- Land salmon harvested in Alaska State waters concurrently with salmon harvested commercially in the Cook Inlet EEZ Area'' (§ 679.117(b)(1)(xii)).

As noted in the preamble to the proposed rule (Other Commercial Fishery Management Measures and Prohibitions section), NMFS has determined that there is a need to restrict vessels from fishing in both State and Federal waters during the same calendar day. The Cook Inlet EEZ Area is managed separately from adjacent waters managed by the State. NMFS must be able to accurately account for harvest in the Cook Inlet EEZ to avoid exceeding the Federal TAC, prevent overfishing, and accurately manage to the established Federal reference points, as required by the Magnuson-Stevens Act, which NMFS would be less able to do if catches from State and Federal waters were mixed on a vessel during a single fishing trip.

If vessels could fish in both State and Federal waters on the same calendar day, landings could contain a mix of salmon harvested in both the State and Federal fisheries. Some method to attribute a proportional amount of catch to Federal waters would be needed. This would embed assumptions about the correct proportions and thus would substantially increase uncertainty for Federal managers and would likely require significantly more conservative management decisions for the Cook Inlet EEZ Area. This could also create an incentive for fishermen to over-report State waters catch to keep the Cook Inlet EEZ open to commercial salmon fishing longer, which would necessitate additional monitoring, recordkeeping, and reporting measures. In short, NMFS could not accurately monitor EEZ harvests and ensure the fishery complies with all Magnuson-Stevens Act requirements if vessels could move between State and Federal waters on the same day and land fish caught in both jurisdictions.

As described in the response to *Comment 37,* these prohibitions do allow vessels to choose whether to fish in State or Federal waters on each calendar day. This allows vessels to operate where catches are highest or efficiency is maximized depending on their port location or any other factor.

Also as described in the response to *Comment 37,* NMFS did consider management that would schedule the Federal drift gillnet fishery on separate days to alleviate the catch accounting concern but chose not to implement this approach due to significant uncertainty about the total number of drift gillnet fishing days in Cook Inlet that would result in highly unpredictable effort and catch.

NMFS acknowledges that there is not a prohibition on recreational (sport) salmon fishing in State and Federal waters on the same day. As described in section 4.5.2.2 of the Analysis, fewer than 70 salmon per year are estimated to be harvested by recreational salmon fishing in the Cook Inlet EEZ Area. Furthermore, recreational anglers are not allowed to harvest additional salmon by fishing in either or both areas—the same bag limit applies in State and Federal waters and anglers are prohibited from catching or possessing a bag limit for both State and Federal waters on the same day. Therefore, there is no identified management need to prohibit recreational fishing in State and Federal waters on the same calendar day. If recreational salmon harvests in the Cook Inlet EEZ Area increase in the future, the Council may recommend and NMFS may choose to implement additional restrictions on recreational salmon fishing as needed.

Comment 32: If NMFS implemented escapement-based management rather than a TAC, then there would be no need to prohibit vessels from fishing in State and Federal waters in the same trip.

Response: Escapement-based management was considered during the development of this action under Alternative 2, which would have delegated management authority to the State. Delegated management under Alternative 2 would not have included a prohibition on fishing in both State and Federal waters on the same calendar day and provided for the State's use of their escapement-based tools to achieve Federal reference points. However, the State refused to accept delegated management. The response to *Comment 21* describes why escapement-based management as currently conducted by the State could not be implemented by this action.

Comment 33: Opening the whole EEZ and drift gillnet Area 2 will spread out the small drift gillnet fleet (less than 300 boats in recent years), reducing pressure on returning non-sockeye stocks and allowing maximum harvest of abundant sockeye stocks.

Response: Under this final rule, the entire Cook Inlet EEZ Area will be open to drift gillnet salmon fishing during established fishing periods. Because this is similar to historical State management of the Area, as described in the response to *Comment 25,* NMFS remains concerned about mixed-stock harvests and impacts to less abundant stocks and will manage salmon fishing within the Cook Inlet EEZ to prevent overfishing on all stocks through the use of TACs and inseason information.

While there have been fewer participants in recent years, this trend could reverse and over 200 additional latent permits could reenter the fishery, which must be considered in this long-term management framework.

Drift gillnet Area 2 is entirely within State waters and will continue to be managed by the State and is outside the scope of this action.

Federal Commercial Fishing Season and Fishing Periods

Comment 34: Many commenters expressed concern about the amount of fishing that this action will allow between July 15 and August 15, when certain stocks are migrating north through the Cook Inlet EEZ. Fishing by the drift fleet in EEZ waters from July 16 through July 31 is highly impactful

due to large catches and mixed stocks. Commenters noted that currently the drift gillnet fishery can only fish once per week during this critical period for migrating stocks and additional openings from July 16 through July 31 are authorized only under certain conditions and in limited areas. Multiple regional tribes, Northern district communities, and regional sportfishing organizations recommended that NMFS allow only one EEZ opening per week between July 15 and July 31, or until the season closure date. The State and one other commenter proposed that NMFS close the Cook Inlet EEZ to fishing after July 15.

Response: Upon reviewing the significant public comment received regarding the number of fishing periods in the proposed rule for this action and the importance of Cook Inlet salmon resources to all salmon users throughout Cook Inlet, NMFS agrees that it is prudent for conservation of Cook Inlet salmon stocks to reduce the number of commercial fishery openings in the Cook Inlet EEZ Area to one per week in late July. The reason for this change is discussed in detail above in the section on changes from the proposed to final rule and briefly summarized here.

In addition to establishing TACs that are suitably precautionary in light of uncertainty, the other primary means by which NMFS prevents overfishing and ensures all stocks are able to meet their escapement goals is by managing the amount and timing of scheduled fishing periods. In this final rule, NMFS has decided to decrease the number of commercial fishing openings between July 16 and July 31 from two to one per week. This more closely aligns with the number of openings under the status quo and is responsive to the significant public comments received on the importance of this time period to Northern Cook Inlet salmon stocks that transit through the EEZ to spawning grounds. From June 19 until July 15, and from August 1 to August 15, there will still be two drift gillnet fishery openings per week, unless otherwise closed. NMFS expects that when there are high salmon abundances, and no constraining stocks, this management framework will allow for harvest of TACs in the Cook Inlet EEZ Area.

Decreasing the number of fishing periods in the second half of July may also have other important conservation and management benefits. First, it allows for more even utilization of the beginning, middle, and late returning components of each salmon stock. Second, it may decrease the risk of a smaller TAC for one salmon species being reached and resulting in a closure of the fishery before the larger, high value sockeye salmon TAC can be fully achieved. For example, while Chinook salmon are not harvested in large quantities by the drift gillnet fleet in the Cook Inlet EEZ Area, declines in Chinook salmon abundance have, in some cases, entirely eliminated the harvestable surplus of Chinook (*i.e.,* escapement goals cannot be achieved even if no fish are harvested). As a result, the Chinook salmon TACs established for the Cook Inlet EEZ Area are likely to be relatively small. Although very few Chinook have historically been caught after August 1, significant numbers have been caught in the second half of July. Reducing fishing time in the second half of July makes it less likely that a Chinook TAC will be reached, triggering a closure before the sockeye salmon TAC has been harvested.

As described in the preamble to the proposed rule, NMFS considered but rejected other management measures that would provide fewer drift gillnet fishing periods per week in the Cook Inlet EEZ Area. NMFS determined that allowing only one 12-hour drift gillnet fishing period per week in the Cook Inlet EEZ Area throughout the entire season may not allow for adequate harvest opportunities in the Cook Inlet EEZ Area in years when salmon abundances are higher. Similarly, a fixed July 15 closure would be expected to unnecessarily limit harvest in the Cook Inlet EEZ Area to less than half of its historical amount.

Comment 35: The State objected to the drift gillnet fishing season ending on August 15, as it stated that allowing fishing in the Cook Inlet EEZ during the August 1 to August 15 time period conflicts with its 1 percent rule. Under that State regulation, from August 1 to August 15, if less than 1 percent of the season's total drift gillnet sockeye salmon harvest has been taken per fishing period for two consecutive fishing periods in the drift gillnet fishery, the fishery is restricted to the west side of Upper Cook Inlet where the fleet is less likely to catch salmon from weak stocks or those needed to provide a harvestable surplus to other users. These area restrictions are also implemented if the East Side Set Net fishery is closed. The State stated that the proposed closure date of August 15 rule is not based on conservation objectives and fails to coordinate with the existing Cook Inlet allocation processes.

Response: NMFS chose not to implement a regulation similar to the State's 1 percent rule for the Cook Inlet EEZ Area. NMFS expects that the season closure date of August 15 combined with the TAC will be sufficient to address conservation and management of coho salmon stocks in Cook Inlet. In most Federal fisheries, a TAC-based closure occurs before a season closure date. NMFS does not anticipate that drift gillnet fishing in the Cook Inlet EEZ Area will be open through August 15 in all years. NMFS will close the fishery when necessary to prevent exceeding a TAC. However, in years when salmon abundance supports higher TACs, two fishery openings per week for all of the season besides July 16–July 31 is expected to provide sufficient opportunities to harvest the available TAC by August 15 without creating conservation concerns for stocks of lower abundance.

Comment 36: Consider opening drift gillnet fishing in the Cook Inlet EEZ and Area 2 for two or three 12-hour periods a week. When the Kenai River reaches the lower end of the sockeye escapement goal, the commercial fleet should get additional openers to maximize harvest to protect the river from overescapement.

Response: As described in the preamble to the proposed rule and above, NMFS carefully considered the number of weekly commercial drift gillnet fishing periods. As described in the response to *Comment 2,* management of the Cook Inlet EEZ Area must balance utilization of abundant salmon stocks with protecting less abundant stocks from overfishing and ensuring stocks important to users other than the drift gillnet fleet continue to meet their escapement goals. While two 12-hour openings per week was proposed by NMFS, public commenters identified significant potential conservation concerns associated with increasing Cook Inlet EEZ Area commercial fishing time from the status quo. Opening the Cook Inlet EEZ Area to commercial fishing for three 12-hour periods per week would represent a major increase in fishing time and could significantly exacerbate the conservation concerns identified in this final rule. Kenai sockeye salmon reaching their escapement goal does not provide information to managers that other salmon stocks (*e.g.,* other sockeye, coho, and Chinook salmon) can also support additional harvest at that time.

There are also potential procedural challenges associated with significant inseason changes or adjustments. Sections 2.5.2.6 and 2.5.13 of the Analysis detail the constraints of the harvest specifications (*i.e.,* the TAC amounts) that it must publish prior to the fishing season. If there are

unexpectedly large salmon returns, fishing may continue for the remaining days for the season until any TAC amount is reached. If a TAC amount is reached and the fishery closes, but the best scientific information available indicates there is still a harvestable surplus, NMFS may adjust the TAC and reopen the fishery until August 15, or the revised TAC amount(s) is reached, whichever comes first. In addition, the Federal reference points established by this action and required by the Magnuson-Stevens Act are not directly equivalent to State escapement goals.

Drift gillnet Area 2 is entirely within State waters and will continue to be managed by the State and is outside the scope of this action.

Comment 37: Do not conduct Federal openings on the exact same schedule as State openings. Combining the two on the same day will result in nothing more than lost opportunity and inefficiency of effort and cost.

Response: This final rule at § 679.118(e) provides that the Cook Inlet EEZ will be open to drift gillnet fishing for two, 12-hour periods each week, from 7 a.m. Monday until 7 p.m. Monday, and from 7 a.m. Thursday until 7 p.m. Thursday from the later of the third Monday in June or June 19 until July 15, and from August 1 to August 15, and one, 12-hour fishing period on Thursdays from July 16 to July 31, until either (1) the TAC is reached, or (2) August 15, whichever comes first.

As discussed in the proposed rule and sections 2.5.9 and 4.8 of the Analysis, NMFS considered whether to open the Cook Inlet EEZ Area to drift gillnet fishing on different days than when State waters are open. NMFS chose to open the Cook Inlet EEZ Area on the same days to avoid unpredictable impacts to Cook Inlet salmon stocks, as additional days of fishing in a week would put additional pressure on stocks of lower abundance, allowing those stocks less opportunity to pass through the EEZ with sufficient abundance to both meet escapement goals and provide a harvestable surplus to all other users. If the EEZ were open on days when adjacent State waters were closed, and the State maintained its existing management plan, it is likely there would be a significantly increased number of total drift gillnet fishing days in upper Cook Inlet. This would increase the likelihood of harvests that are too high (the drift gillnet fleet has the potential to harvest over 300,000 salmon per opening) and it may not be possible to mitigate the impacts of additional fishing days each week in Cook Inlet, even with severe restrictions or closures of later occurring fishery sectors. Further, to achieve OY while preventing overfishing in salmon fisheries, an important consideration is balancing harvest and escapement over the period salmon are returning. Providing regular periods when fishing is closed allows early, middle, and late returning components of each salmon stock to move up Cook Inlet to their natal spawning streams. By largely maintaining the existing fishing schedule, these migratory periods where fishing is closed—and which have largely been successful in allowing Northern District stocks to meet their escapement goals—are maintained.

Fishery participants may select whether to fish in State or Federal waters each day to maximize their harvest opportunities as salmon stocks move up Cook Inlet. NMFS acknowledges that, within a single fishing day, this may decrease efficiency and increase costs during times when salmon abundance may be unpredictably concentrated on the State/EEZ boundary. Across years, there is a high level of variability in the spatial and temporal distributions of salmon stocks migrating through Cook Inlet waters, including the Cook Inlet EEZ Area, due to changes in wind, tide, water temperature, and other factors. Therefore, it is very difficult to predict with accuracy any change in efficiency that may result from this rule.

Comment 38: Several drift gillnet stakeholders requested that the commercial fishing season start several weeks early (June 1) and finish later (September 15) to increase harvests of all salmon species, including pink and chum salmon.

Response: As described in the preamble to the proposed rule, historically drift gillnet fishing in Cook Inlet has not occurred prior to the third week in June as sockeye, coho, chum, and pink salmon are not present in commercially significant quantities in the Cook Inlet EEZ. The start date is based on this history of commercial fishing in the EEZ area. Further, as discussed in the preamble to the proposed rule, NMFS has concerns about additional impacts from the drift gillnet fleet to Chinook salmon that are present in the Cook Inlet EEZ before June 19. Opening after mid-June helps avoid potential additional impacts to early-run Cook Inlet Chinook salmon stocks. These stocks migrate through upper Cook Inlet in May and early June. For these reasons, NMFS did not choose to open drift gillnet fishing within the Cook Inlet EEZ prior to the third week in June.

NMFS has concerns that additional fishing time after August 15 could result in disproportionate impacts to coho salmon stocks in Cook Inlet. Fishing in the Cook Inlet EEZ after August 15 would be expected to primarily increase harvests of this species. Based on recent indices of spawning escapements, additional harvests of coho salmon may result in a failure to achieve spawning escapement goals. The EEZ is relatively far from Northern District streams and associated weirs where escapements are monitored. As such, fishery openings targeting coho salmon (which have an elevated conservation concern) in the EEZ carry the largest risk in terms of potential harvest on Northern District stocks prior to information about the achievement of spawning escapement goals. In contrast, State waters are closer to natal streams and can be prosecuted more precisely on target stocks and during a time when escapement data is more likely to be available since there is significantly less travel time between the State fishery and weirs. This action does not modify management of State waters, and it is expected that the majority of coho salmon harvests, which occur in State waters after August 15, will be unaffected by this action.

NMFS disagrees that closing the fishery later than August 15 would increase pink and chum salmon harvests. Historically, by August 15, over 99 percent of the average Chinook, sockeye, pink, and chum salmon harvest has been completed in both State and EEZ waters as those salmon species have largely moved through Cook Inlet EEZ waters and up into Cook Inlet State marine and fresh waters by that time (section 4.5.1.2.1. of the Analysis). Therefore, additional Cook Inlet EEZ Area fishing time after August 15 would be expected to impact only coho salmon, for which there are conservation concerns.

Comment 39: With amendment 16, NMFS's inseason management authority to close the fishery should be based on best available science and salmon escapement goals. NMFS needs more access to funding and resources to carry out these goals.

Response: NMFS will use the best scientific information available when making any inseason management decisions. NMFS will consider all sources of information when determining what constitutes the best scientific information available. However, for the reasons explained in *Comment 23,* NMFS inseason management decisions are based on TACs. NMFS will consider the escapement goals and the best scientific information available regarding

projected run sizes for an upcoming fishing season during the stock assessment and harvest specifications process. The SSC and NMFS will account for scientific uncertainty in these projections when setting ABC, and the Council and NMFS will also consider management uncertainty in recommending and establishing TACs. Inseason closures before the end of the season are most likely to be based on information suggesting an additional opener would result in exceeding a TAC for any species or could result in overfishing of any stock. NMFS will consider available spawning abundance information inseason (*i.e.,* progress toward meeting escapement goals) to ensure the abundance assumptions underlying the TACs are appropriate and will identify any potentially needed management changes.

NMFS will strive to make timely and efficient inseason management decisions, consistent with the APA, Federal regulations, and other applicable law. NMFS will work to build capacity and resources for salmon management in the Cook Inlet EEZ Area over time, however NMFS has determined that it can successfully implement amendment 16 at this time.

Comment 40: Pacific salmon evolved into the species we know today. Today, various stocks of salmon are considered threatened or endangered under the Endangered Species Act (ESA). Originally, indigenous people developed a social custom that delayed the start of salmon fishing and allowed salmon to reach their spawning grounds and complete their lifecycle, and this has been continued by government regulators. Flexibility in the opening and closing dates is needed to account for variations in run timing and migration patterns, especially under climate change, to avoid adversely affecting sport and subsistence fishers. The proposed new date of the third (or possibly fourth) Monday in June allows more flexibility.

Response: NMFS recognizes the evolution of conservation and management measures for salmon stocks as jurisdictions have changed over time. No salmon stocks spawning in Alaska are listed under the ESA. As described in the response to *Comment 38,* NMFS established the fixed season start and end dates to maintain historical harvest patterns and avoid adverse impacts to non-target salmon stocks within the Cook Inlet EEZ Area. However, NMFS does agree that flexibility is important to account for variations and contingencies and expects that the TACs and associated inseason actions will ensure that harvest is adjusted to the specific conditions experienced during each fishing season to provide harvest opportunity and prevent overfishing, within the established commercial fishery season dates (approximately June 19 to August 15). NMFS may close and reopen fishing during the season to account for run conditions.

Comment 41: The season ending date needs to reflect the size of the return, which is not known until the very end of a salmon run or shortly thereafter.

Response: NMFS acknowledges that the realized run size of a stock is not fully known until the end of the fishing season, but has selected a fixed season closure date that falls after nearly all EEZ harvest has historically taken place and avoids potential new impacts on coho stocks of lower abundance. However, NMFS will use its inseason management authorities specified at § 679.25 to adjust the closure of the fishery based on TAC or other scientific information each year—up to August 15—including available indices of abundance (*e.g.,* test fishery data and spawning escapements).

Monitoring, Recordkeeping, and Reporting Requirements

Comment 42: ADF&G supports the monitoring, recordkeeping, reporting, legal gear, and prohibitions proposed for the commercial salmon fishery in the Cook Inlet EEZ Area. These requirements are necessary to minimize conflicts between fisheries in State and Federal waters, ensure accurate catch accounting, and facilitate enforcement of Federal regulations. The proposed prohibitions on fishing in both State and EEZ waters on the same day and having on board or delivering fish harvested in both State and EEZ waters are particularly important to meeting these objectives and the State supports including them in the final rule. We also support the proposed prohibitions on landing or otherwise transferring salmon that is caught within the Cook Inlet EEZ Area in the EEZ to ensure that harvesting vessels delivering to a tender vessel do so within State waters.

Response: NMFS acknowledges the support for these fishery management measures. NMFS agrees that the measures in this final rule are necessary to minimize conflicts between fisheries in State and Federal waters, ensure accurate catch accounting, and facilitate enforcement of Federal regulations.

Comment 43: ADF&G supports the proposed monitoring requirements to enforce the prohibitions on drift gillnet fishing in State and Federal waters on the same day, including requirements for commercial salmon fishing vessels in the Cook Inlet EEZ Area to operate a VMS and complete a Federal logbook. NMFS may wish to consider onboard monitoring requirements such as electronic monitoring or observers to ensure adequate total catch accounting.

Response: NMFS acknowledges the support for the VMS and Federal logbook management measures described in the proposed rule and required by this final rule. As discussed in sections 2.5.6 and 4.7.2.2 of the Analysis, NMFS considered but did not require electronic monitoring or observers due to high costs and limited additional management utility beyond the measures contained in this final rule.

Comment 44: NMFS received comments that a VMS requirement is not necessary. These comments indicated that the drift gillnet fishery has minimal or no bycatch of marine mammals, sea birds, or protected fish stocks; there are no closed economic zones nearby; and that there is no VMS requirement in salmon fisheries in the East and West Areas of the EEZ, where ADF&G reporting requirements are deemed sufficient. Commenters also asserted that NMFS did not provide a legitimate or sufficient justification for the VMS requirement. Several commenters also said that they felt NMFS was imposing it as a punishment. One commenter asked if other forms of electronic monitoring are required. Commenters also noted that the VMS devices cost 3,000 dollars, which can be a significant portion of their gross earnings in seasons when there is a declared fishery disaster, and require additional monthly fees to operate.

Response: The final rule at § 679.117(b)(1)(xiv) prohibits a vessel named, or required to be named, on an SFFP from operating in the waters of Cook Inlet with drift gillnet gear on board any day the Cook Inlet EEZ Area is open to commercial salmon fishing without a functioning VMS as described in § 679.28(f). Regulations at § 679.28(f)(6)(x) requires a vessel named, or required to be named, on an SFFP issued under § 679.114 to use VMS when operating in the waters of Cook Inlet with drift gillnet gear on board on any calendar day the Cook Inlet EEZ Area is open to commercial salmon fishing. NMFS has determined that use of a VMS is necessary to effectively and efficiently manage the fishery. A VMS requirement is not punitive, it is not based on assumed bycatch of protected species nor intended to reduce bycatch, and NMFS disagrees that there are no closed fishing areas adjacent to the Cook Inlet EEZ Area. NMFS relies on VMS for most Federal fisheries off Alaska, particularly

when fishing vessels must comply with area restrictions. Vessels drift gillnet fishing for salmon in the Cook Inlet EEZ Area are prohibited from fishing in the adjacent EEZ waters south of the Anchor Point line at all times and, on the same calendar day, in the State waters directly adjacent to the eastern, western, and northern boundaries of the Cook Inlet EEZ Area. As stated above, for the purposes of catch accounting and enforcement it is critical for NMFS to understand where a vessel has been fishing—in State or Federal waters. Drift gillnet vessels that are fishing for salmon in the Cook Inlet EEZ are therefore subject to closed areas, and VMS is a standard technology used to monitor compliance with these regulations.

NMFS acknowledges that VMS is not a requirement in the East Area commercial troll salmon fishery. However, management of the East Area is delegated to the State, which allows fishing to occur seamlessly across the EEZ boundary. The State has well-established monitoring and enforcement infrastructure as well as other regulations to manage the fishery without the use of VMS. Similarly, the delegated management approach proposed for the Cook Inlet EEZ Area under Alternative 2 (section 2.4.8.1 the Analysis) was not expected to include a VMS requirement given the State's existing management tools and expertise. However, the State would not accept delegated management authority, and therefore under this final rule VMS is needed to enforce the prohibition against harvesting salmon in both State and Federal waters on the same calendar day.

As described in sections 2.5.6 and 4.7.2.2 of the Analysis, NMFS considered but chose not to require more costly onboard observers or electronic monitoring camera systems in this fishery. Therefore, VMS data and logbooks are necessary to ensure accuracy of reported fishing effort, catch accounting, and compliance with regulations. Critically, NMFS managers will depend on VMS to determine the effort and projected catch in order to inform management decisions. Furthermore, without VMS, NOAA Fisheries Office of Law Enforcement would have to rely exclusively on resource-intensive patrols by air and sea; methods that are not as consistent as VMS in verifying that no fishing is occurring in closed waters and confirming fleet-wide reported fishing effort information.

Vessel owners will be responsible for the cost of obtaining and operating a VMS. As discussed in section 4.7.2.2.7 of the Analysis, NMFS estimates the cost of purchasing a compliant VMS unit at 3,100 dollars. One-time installation and tax costs are estimated at 888 dollars. Annual service and maintenance is estimated at 206 dollars. NMFS acknowledges that these requirements place additional burden on fishermen. However, Federal funds may be available to qualified vessel owners or operators for complete reimbursement of the cost of purchasing type-approved VMS units, which could offset over 75 percent of the total purchase and installation cost for fishery participants.

To facilitate compliance with the VMS requirement, NMFS has provided information on obtaining VMS and opportunities for reimbursement within the small entity compliance guide published with this final rule. Beyond VMS, this final rule does not require other electronic monitoring for vessels commercially fishing for salmon in the Cook Inlet EEZ.

Comment 45: VMS devices impose a significant privacy cost, requiring vessel owners to transmit their exact location to NMFS every hour of every day, regardless of why they are using their vessel.

Response: NMFS disagrees. VMS use would be required when operating a vessel named, or required to be named, on an SFFP in the waters of Cook Inlet with drift gillnet gear on board, and only on days when the Cook Inlet EEZ Area is open to commercial salmon fishing. When a vessel is operated outside the waters of Cook Inlet, the Cook Inlet EEZ Area is closed, or no drift gillnet gear is onboard the vessel, the VMS unit would not be required to be activated and transmitting. VMS data are collected for many Federal fisheries. Section 402(a)(2) of the Magnuson-Stevens Act authorizes the collection of data necessary for the efficient management of fisheries but provides for restrictions on the release of that data beyond NMFS. VMS collects vessel location information in near real time that it uses to ensure efficient management and compliance with regulations. VMS data collected for law enforcement purposes is considered confidential under sections 311(b)(1)(a)(vi) and 402 of the Magnuson-Stevens Act. Federal regulations at § 679.28(f)(3)(v) provide that vessel owners participating in a fishery that requires a VMS must make the VMS transmitter available to ''NMFS personnel, observers, or an authorized officer.'' Federal regulations at § 600.1509(b) limit the circumstances under which personally identifying information, including business identifiable information, can be disclosed beyond authorized entities, such as NMFS. NMFS does not release confidential data to the public unless directed by a court order. If NMFS uses VMS data in publications, it is aggregated to prevent release of confidential information.

Comment 46: Will the drift gillnet fishery participants be required to maintain a digital logbook?

Response: This final rule does not require a digital logbook. Under regulations at § 679.115, this action requires vessel operators to complete and submit logbooks in paper or electronic format. NMFS will make logbook sheets available to participants at no cost.

Comment 47: The proposed rule appears to allow new participants into the commercial fishery by requiring only a Federal fisheries permit and provides no explanation or justification for doing so. Commercial fishing for salmon in Federal and State waters in Cook Inlet has been restricted to State CFEC limited entry permit holders since 1974. If the permitting requirements under this action allow new participants by no longer requiring a CFEC permit, that will significantly devalue the CFEC permits held by existing participants. If NMFS is not opening the fishery up to new participants, it must clarify the ambiguity in the proposed rule in response to this comment.

Response: This action does not modify the State requirements related to CFEC permits. As described in section 2.5.6 of the Analysis, NMFS issues Federal permits authorizing participation in Federal fisheries and allowing for implementation of Federal monitoring, recordkeeping, and reporting requirements in order to manage fisheries. This final rule at § 679.114(b)(1) requires vessel owners or operators to obtain a SFFP to commercially fish for salmon in the Cook Inlet EEZ. NMFS will issue SFFPs free of charge. A SFFP is not a Federal limited entry permit. As described in section 2.5.15 of the Analysis, a Federal limited entry program was considered but not selected.

Although the SFFP is not a limited entry permit, vessels that land salmon from the Cook Inlet EEZ in Alaska must also comply with all applicable State requirements, which include the requirement to have the appropriate State CFEC permit, which is a limited entry permit. Because landing or transferring fish in the EEZ is prohibited, and there are significant logistical constraints to landing salmon outside of Alaska, NMFS anticipates that all participating vessels will land

their fish within the State of Alaska where they would be required to have State CFEC S03H limited entry permits. This will help ensure that historical participants in the fishery are not displaced or disrupted by new entrants and avoid negative impacts to CFEC permit values.

As described in section 2.5.15 of the Analysis, in the future the Council may consider whether it is necessary to recommend an FMP amendment to limit entry in the Cook Inlet EEZ Area.

Comment 48: Can a vessel registered in a separate Alaska gillnet area (*e.g.,* a vessel fishing in Bristol Bay state waters) participate in the Federal Cook Inlet fishery?

Response: No, as explained in response to *Comment 47,* in order to use drift gillnet gear in the Cook Inlet EEZ Area, participants are required to have a SFFP. State CFEC permit requirements fall under the purview of the State and are not modified by this final rule. NMFS anticipates that a CFEC S03H permit for Cook Inlet drift gillnet would continue to be required to land fish caught using drift gillnet gear in the Cook Inlet EEZ Area in Alaska. Participants should consult the applicable State of Alaska regulations for a definitive answer regarding landing requirements.

Comment 49: The State supports maintaining the requirement for drift gillnet vessels in the EEZ to have the appropriate CFEC permit(s) to land salmon or other species caught in the EEZ within the State or enter State waters.

Response: NMFS acknowledges this comment. This final rule does not modify any State requirements for landing salmon or other species caught in the EEZ within the State or transiting through State waters with drift gillnet gear on board.

Other Commercial Salmon Fishing Management Measures and Prohibitions

Comment 50: The State supports the proposed legal gear definition for drift gillnet fishing of a net no longer than 200 fathoms (365.76 m) in length, 45 meshes deep, and maximum mesh size of no greater than 6 inches (15.24 cm). The proposed definition is consistent with State regulations and would help maintain consistency with recent fishery operations in terms of effort and selectivity and enable managers to estimate projected catches in the fishery more effectively.

Response: NMFS acknowledges this comment.

Comment 51: Are the net length requirements the same as State waters or can a single permit fish 200 fathoms (365.76 m) in Federal waters?

Response: This final rule at § 679.118(f)(1) limits the length of drift gillnet gear in the Cook Inlet EEZ Area to a maximum length of 200 fathoms (365.76 m) for all participants. Fishery participants should consult State of Alaska regulations when determining what amount of gear is allowable when transiting State waters and landing salmon in Alaska with the CFEC permit(s) they hold.

Comment 52: One commenter stated that no more than 150 fathoms (274.32 m) of gillnet gear per permit should be allowable. Another suggested that NMFS impose the same State of Alaska CFEC rules regarding permits (*i.e.,* allow 150 fathoms (274.32 m) for 1 CFEC permit, and 200 fathoms (365.76 m) for 2 CFEC permits).

Response: NMFS disagrees with these recommendations. As described in section 4.5.1.2.1 of the Analysis, up to 200 fathoms (365.76 m) of drift gillnet gear may be used by participants who are drift gillnet fishing in the Cook Inlet EEZ Area. NMFS does not anticipate this final rule will increase the allowable length of gear and result in increased harvests in the Cook Inlet EEZ Area, as State restrictions on the amount of gear a vessel can have on board will still apply when transiting through State waters following a fishing trip in the Cook Inlet EEZ Area.

Fishery participants should consult State of Alaska regulations to determine the amount of fishing gear they are allowed to have on board while transiting through State waters and landing salmon in Alaska.

Recreational Fishing

Comment 53: The State supports the proposed management measures for recreational anglers in the EEZ, including requirements for allowable gear, processing harvested salmon and reporting harvest. The proposed rule would establish bag and possession limits in Federal regulations consistent with current State regulations; however, we note that State regulations could change in the future and result in different regulations for anglers harvesting salmon in State waters and the EEZ.

Response: NMFS acknowledges this comment.

National Standard 2

Comment 54: NMFS failed to use the best scientific information, as required by National Standard 2. One example of this is the data used to calculate a potential TAC, as it is unknown what percent of fish have been harvested in the EEZ. ''Best guess'' data should not be used.

Similarly, NMFS relied on State catch records, but those may be skewed by 20 percent or more due to the history of overescapement and pulling the in-river fish counters prior to the end of the later runs. The one good historical reference is the Offshore Test Fishery, which should be used in the analysis and to set TACs. Previous years run data cannot be considered reliable because Cook Inlet has not been properly managed for many years which has resulted in overescapement and stock declines. Consider modifying the historical percent of drift gillnet harvests attributed to the Cook Inlet EEZ to 65 percent.

Response: NMFS disagrees that the management measures implemented by amendment 16 and this final rule rely on information that is inconsistent with National Standard 2. National Standard 2 provides that conservation and management measures shall be based upon the best scientific information available. NMFS considered and weighed all of the information available in making the decisions, including public testimony, to develop and approve amendment 16, respectively.

NMFS used the best scientific information to inform the Analysis, which includes comprehensive fish ticket data including locale codes. Previously, data regarding harvests, landings, and statistical areas in Upper Cook Inlet did not differentiate between State and Federal waters. Therefore, NMFS had to develop a methodology to estimate historic salmon harvest in the Cook Inlet EEZ. The methodology used to develop EEZ harvest estimates for the Cook Inlet EEZ Area is presented in section 4.5.1.2.3 of the Analysis, along with a description of the associated uncertainties. This method and the results were reviewed and approved by the SSC, which agreed that the Analysis and harvest specification process relies on the best scientific information available. NMFS received no comments providing additional data to estimate EEZ harvest and no suggested alternate methodologies and cannot arbitrarily increase the attribution of historical harvest to the EEZ in the absence of any supporting data. Therefore, NMFS determined that the estimates presented in the Analysis constitute the best scientific information available.

However, this action establishes a fishery management framework that is adaptive, and is expected to improve the scientific information available for management of Cook Inlet salmon stocks over time. Once amendment 16 is implemented, NMFS will collect the

landings information needed to directly and precisely determine EEZ harvests. NMFS will review the information available to manage Cook Inlet salmon stocks each year, including any data gaps and uncertainties. As actual data is collected on harvest in this new fishery, NMFS will include that information in the ongoing assessment of what constitutes best scientific information available at that time, reviewed by the SSC, to establish harvest specifications and manage the Cook Inlet EEZ Area.

NMFS agrees that the offshore test fishery may be a useful source of information for management of the Cook Inlet EEZ salmon fishery, but disagrees that it should have relied on it. The offshore test fishery provides standardized CPUE information. However, as described in the response to *Comment 29* and in section 2.4.4 of the Analysis, CPUE data could not provide sufficient information to evaluate salmon abundance and determine whether catches exceed a level that could cause overfishing.

National Standard 3

Comment 55: Defining fishing as limited to the Cook Inlet EEZ violates National Standard 3. NMFS's definition of the fishery fails to manage salmon stocks as a unit throughout their range. Splitting the fishery into a Federal and State fishery makes the Federal fishery subordinate to the State fishery because the State fishery will continue overescapement. If there are harvestable surpluses, waiting to find out via the State fishery will mean the EEZ fishery will be compromised by State management.

Response: As explained in greater detail in the proposed rule, NMFS has determined that amendment 16 is consistent with National Standard 3. As set forth under section 301 of the Magnuson Stevens Act, National Standard 3 provides that, to the extent practicable, an individual stock of fish shall be managed as a unit throughout its range, and interrelated stocks of fish shall be managed as a unit or in close coordination.

The key term here is ''practicable.'' It is not practicable for NMFS to manage salmon stocks into State waters where NMFS has no management jurisdiction, and, thus, NMFS has designed management measures that allow it to manage stocks of salmon as a unit throughout the portion of their range under NMFS's authority, grouping interrelated stocks of salmon together because vessels cannot target individual stocks in the EEZ. Amendment 16 will allow NMFS to manage to optimum levels of EEZ harvest while preventing overfishing, but NMFS cannot rely on National Standard 3 as a basis to assert management authority over State waters.

Furthermore, the National Standard 3 guidelines explain how to structure appropriate management units for stocks and stock complexes (§ 600.320). These guidelines state that the purpose of National Standard 3 is to induce a comprehensive approach to fishery management (§ 600.320(b)). The guidelines define management unit as a fishery or that portion of a fishery identified in an FMP as relevant to the FMP's management objectives and state that the choice of a management unit depends on the focus of the FMP's objectives and may be organized around biological, geographic, economic, technical, social, or ecological perspectives (§ 600.320(d)). As discussed above, in defining the fishery, NMFS primarily focused on co-occurring salmon stocks harvested within the Cook Inlet EEZ Area, as that geographic area defines the routine limits of NMFS's management jurisdiction.

There are unique technical, ecological, and economic features of salmon fishing in the Cook Inlet EEZ Area that further support limiting the management unit to the Cook Inlet EEZ. As described in the preamble to the proposed rule, drift gillnet gear captures all salmon in an area, and an entangled salmon cannot be released without an extremely high mortality rate. Further, in EEZ waters, salmon stocks are highly mixed, and catch in the EEZ includes both the Kenai and Kasilof stocks of sockeye salmon that are currently highly abundant, as well as much less abundant Northern District salmon stocks. In contrast, in nearshore waters, individual salmon stocks can be targeted by fishing adjacent to the river a specific salmon stock is returning to. This is not possible in EEZ waters. In other words, the EEZ is ecologically unique compared to near-shore waters due to the highly mixed stock nature of the fishery, with varying abundances and compositions of the stocks caught. The stocks that are mixed in the EEZ may be more discretely targeted in State waters management districts. Therefore, salmon fishery management in the EEZ requires an approach that ensures the stocks of lowest abundance are not overharvested before they reach their natal streams. The Cook Inlet EEZ Area is also economically unique because the drift gillnet fleet has exclusive use of the area for commercial salmon fishing. Within State waters, there are multiple commercial and non-commercial fishery sectors operating to selectively target specific individual stocks to the extent practicable, with management measures in place to limit catch and mortality on stocks at risk of overfishing.

Federal management of the Cook Inlet EEZ Area under amendment 16 achieves National Standard 3 objectives through coordination with the State to the extent practicable before, during, and after each fishing season, as described in the harvest specifications and annual processes section of this preamble. This includes reviewing the available scientific information for management of Cook Inlet salmon stocks held by the State, as well as other sources, and estimating what harvests are expected in State waters to inform harvest limits for the Cook Inlet EEZ Area that are designed to prevent overfishing on all Cook Inlet salmon stocks. NMFS and the Council will evaluate both where harvest of salmon stocks may be constrained by the presence of stocks of low abundance and where there may be opportunities to harvest additional salmon that would not otherwise be utilized. NMFS will provide data on early EEZ catches to the State to inform run strength forecasts for management of all other upper Cook Inlet salmon fisheries.

National Standard 4

Comment 56: This action discriminates against Cook Inlet commercial fishers. Amendment 16 violates National Standard 4 as it does not allocate fishing privileges in a way that is fair and equitable. It places a TAC on one group of harvesters (the drift gillnet fleet) in one area (the EEZ), without a similar requirement on any other group. This can severely affect the economic viability of the drift gillnet fleet if the TAC is set incorrectly, and the drift gillnet fleet is precluded from harvesting the excess salmon. In addition, requiring a VMS system to commercial fish in Federal waters is not equitable as there is no similar requirement for the recreational fishery sector, or any VMS requirement for vessels fishing salmon in the East Area.

Response: NMFS disagrees that amendment 16 is inconsistent with National Standard 4, or that it allocates harvest in a manner that is not fair and equitable to the drift gillnet fleet. As set forth under section 301 of the Magnuson Stevens Act, National Standard 4 provides that conservation and management measures shall not discriminate between residents of different states. This final rule does not in any way discriminate between residents of different states. National Standard 4 further provides that, if it becomes necessary to allocate or assign

fishing privileges among various United States fishermen, such allocation shall be (1) fair and equitable to all such fishermen; (2) reasonably calculated to promote conservation; and (3) carried out in such manner that no particular individual, corporation, or other entity acquires an excessive share of such privilege.

To start, this action allocates all commercial fishing privileges in the Cook Inlet EEZ to the drift gillnet fleet—NMFS cannot conclude that an allocation made to a single sector is not fair and equitable for that sector. No other commercial sector is subject to a TAC because no other commercial sector is permitted to fish in the EEZ at all. The drift gillnet fleet has historically harvested over 99.99 percent of the salmon caught in the Cook Inlet EEZ. The recreational fishery sector in the Cook Inlet EEZ harvests the remaining amount, an estimated average of 66 fish per year. This action is expected to maintain the harvest range of both sectors in the EEZ and does not allocate any harvest away from the drift gillnet fleet.

Although allocations must be fair and equitable and reasonably calculated to promote conservation, not all management measures required by the Magnuson-Stevens Act are subject to the same analysis. Neither the use of TACs to manage fishery effort nor the requirement to install VMS are allocations. The Magnuson-Stevens Act requires ACLs for fisheries managed under the Magnuson-Stevens Act, and TACs are how NMFS implements ACLs. And because fishing will take place adjacent to multiple closed areas, VMS is needed to enforce and monitor time and area closures. But even if NMFS were required to show that TACs or VMS requirements were fair and equitable to the drift gillnet fleet when compared to regulations that apply to the only other authorized sector in the EEZ, the recreational sector, it easily meets that burden here. Because the recreational sector catches under 100 fish per year in the EEZ and because recreational anglers are prohibited from possessing or landing the bag limit for both State and Federal waters on the same day—and thus there is no way that sector could increase its harvest opportunities compared to the status quo—neither a TAC nor VMS is needed to control recreational harvest or enforce rules for recreational fishermen.

The rationale for requiring VMS for commercial salmon fishing vessels in the Cook Inlet EEZ Area but not the East Area is described in the response to *Comment 44.*

If harvests by the recreational fishery sector increase, then NMFS may implement monitoring, recordkeeping, or reporting measures. For the time being, on-the-water and dockside enforcement of the recreational fishery sector is sufficient because the same bag limits apply across State and Federal waters for a single calendar day.

The allocation decisions referenced in National Standard 4 do not apply to decisions made by other management authorities that govern fishing outside of the Cook Inlet EEZ.

Comment 57: The proposed TAC does not address priority use for Federal Subsistence.

Response: Although it is unclear from the comment what the commenter means by ''Federal Subsistence,'' NMFS acknowledges that, in Alaska, subsistence taking of fish and wildlife is regulated by Federal law under Title VIII of the Alaska National Interests Land Conservation Act (ANILCA), which accords a priority for taking of fish and wildlife for subsistence uses over recreational/sport and commercial users on Federal public lands in Alaska (16 U.S.C. 3102, 3114). However, here NMFS is managing the Cook Inlet EEZ Area (*i.e.,* Federal marine waters) pursuant to the Magnuson-Stevens Act, and therefore Title VIII of ANILCA does not apply to this action regulating Federal marine waters in the Cook Inlet EEZ. The Magnuson-Stevens Act does not have a subsistence priority for fisheries in the EEZ.

Comment 58: Multiple commenters, including municipalities, trade associations, and fishing guides located in the Matanuska-Susitna Valley indicated that stable and predictable salmon fishing opportunities for all commercial and non-commercial users have both provided food security and an economic base for the region (communities of Palmer, Wasilla, Knik, Houston, Willow, Skwentna, Talkeetna, and Trapper Creek). These commenters cited several economic studies, which concluded that a broad base of fishing activities and fishing activities with conservative regulations, limits, and harvest opportunities (*e.g.,* recreational and subsistence) generate considerable economic benefit for each fish harvested.

Response: NMFS acknowledges the importance of salmon to fishermen and communities in Northern Cook Inlet, and when there are declines in salmon abundance, it results in adverse economic impacts. For discussion of the potential economic impacts on communities from this action, see sections 4.7.1.3 to 4.7.1.4 of the Analysis.

Comment 59: Several commenters felt this action would increase Cook Inlet EEZ Area salmon harvests, which would require the State to implement more restrictive fishery management measures for the Northern District commercial and non-commercial fisheries and may cause overfishing of weak stocks, such as the Susitna sockeye stock and the coho stock. By increasing commercial harvest, this action will exacerbate the inequity between the drift gillnet fleet and Northern Cook Inlet fishing groups. Drift gillnet permit holders have historically been the only commercial fishermen allowed to harvest salmon in Federal waters and also have better harvest opportunities in State waters.

Response: As described in section 4.7.1.3 of the Analysis, this action is not expected to increase salmon harvests in the Cook Inlet EEZ. Therefore, historical harvests by all fishery sectors in both State and EEZ waters should be maintained. As described in the response to *Comment 25,* this action will account for weak stocks and uncertainty when setting TACs for the Cook Inlet EEZ. NMFS acknowledges that harvest in the Cook Inlet EEZ Area occurs before all other salmon users in upper Cook Inlet and before there is robust information on realized inseason salmon abundance, both generally and for specific stocks. The uncertainty associated with this and risks of reducing or eliminating the harvestable surplus for other salmon users will be accounted for in both the harvest specification process and inseason management decisions. NMFS also acknowledges that the drift gillnet fleet is one of the largest salmon harvesters in Cook Inlet and has fishing opportunities in both State and Federal waters.

Comment 60: The Magnuson-Stevens Act emphasizes fairness in allocation and the production of food. To that end, the drift gillnet fleet should have not only meaningful harvest opportunities for sockeye but also a fair chance to bring northbound coho to market.

Response: As described in section 4.5.1.2.2 of the Analysis, the drift gillnet fleet is generally the largest or second largest harvester of coho salmon in Cook Inlet. On average, they harvest over 30 percent of the coho salmon in Cook Inlet, with an increasing harvest trend from 1999 to 2021. This results in an approximately even split between the drift gillnet fleet, the commercial set gillnet sector, and all non-commercial fishery sectors (recreational, personal use, and subsistence). This action is not expected to significantly reduce drift gillnet harvests of coho salmon. NMFS

determined that this action balances food production and recreational opportunities across all users in Cook Inlet while also protecting salmon stocks and the marine ecosystem. If there are increased harvests by the drift gillnet fleet, it is expected that the harvest of other users would necessarily be reduced, which NMFS concludes would reduce the fairness of salmon resource allocations in Cook Inlet by preempting or even eliminating harvest opportunities for other users, many of which can only operate in State waters.

Comment 61: Where in amendment 16 are the management plans the State will follow? For example, amendment 16 does not address closures of the East Side set net fishery and the implications for Federal management. The East Side set net fishery is the second largest fishery in Cook Inlet but has been ignored. The failure to include the entire fishery has decimated the East Side set net fishery, which has been restricted and closed based on illegal and unscientific objectives.

Response: NMFS does not include management measures in this action for salmon fishing in State waters. The East Side set net fishery sector and other salmon fishery sectors operating in State waters are described in section 4.6 of the Analysis. The East Side set net fishery sector occurs entirely within State waters. NMFS has no jurisdiction to implement management measures within State waters in Cook Inlet. NMFS will consider the harvests of other fisheries, including the East Side set net fishery sector, in making management decisions for the Cook Inlet EEZ Area. Comments on State management of the East Side set net fishery are outside of the scope of this action.

National Standard 5 and 7

Comment 62: The restriction on fishing in State and Federal waters on the same calendar day violates National Standard 5 because it is impossible to fish near the boundary line between State and Federal waters, given large Cook Inlet tides and current speeds in excess of 7 knots (12.96 kph) and the difficulty of staying within the irregularly-shaped Federal boundary line. Drift gillnetters lack the technology to determine where the boundary line is located while fishing.

Response: NMFS disagrees that the prohibition on fishing in both State and Federal waters in a single calendar day is not practicable and disagrees that the prohibition violates National Standard 5, which provides that conservation and management measures shall consider efficiency in the utilization of fishery resources where practicable. Under State management, participants have successfully remained within the boundaries open to drift gillnet fishing within either State or EEZ waters. This action does not modify legal fishing gear or other operational elements in a way that is expected to increase the difficulty of staying within an open area. Nothing in this rule prohibits participants who are concerned about their ability to remain within Federal waters during certain fishing conditions from setting and retrieving their gear farther away from the State/EEZ boundary. Vessels participating in the Cook Inlet EEZ Area drift gillnet fishery are expected to be aware of their fishing location and fish only in locations and at times open to that fishery. In other Federal fisheries off Alaska and elsewhere, federally permitted vessels fishing in EEZ waters are commonly prohibited from fishing in State waters and are able to successfully remain with the Federal waters open to fishing immediately adjacent to the EEZ boundary. Examples include the Pacific cod fisheries in the Kodiak, Chignik, and South Alaska Peninsula areas, and the Aleutian Islands and Dutch Harbor subdistricts of the Bering Sea-Aleutian Islands Area.

As for the availability of suitable technology to verify vessel locations, NMFS has provided charts depicting the boundary and will provide electronic charts compatible with smartphone applications and commonly used commercial navigation products available at the NMFS Alaska Region website at *https://www.fisheries.noaa.gov/region/alaska*. More information is provided in the small entity compliance guide published with this action.

Comment 63: Amendment 16 does not adequately consider or promote efficiency in the utilization of fishery resources, and it fails to minimize costs and avoid unnecessary duplication to the extent practicable in violation of National Standards 5 and 7.

NMFS's analysis notes that amendment 16 will increase direct costs and burdens to drift gillnet vessels harvesting salmon in the Cook Inlet EEZ Area due to requirements including obtaining a SFFP, installing and operating a VMS, and maintaining a Federal logbook. NMFS also chose to open fishing in the EEZ on the same days and at the same times that the State fishery is open and to prohibit participants from fishing in State and Federal waters during the same trip. This limitation makes no sense, is extremely inefficient, is impracticable for participants, and appears punitive.

Response: NMFS disagrees that any of the above-described requirements are punitive, impractical, or inconsistent with either National Standard 5 or 7. As set forth under section 301 of the Magnuson Stevens Act, National Standard 5 provides that conservation and management measures shall, where practicable, consider efficiency in the utilization of fishery resources, except that no such measure shall have economic allocation as its sole purpose. National Standard 7 provides that conservation and management measures shall, where practicable, minimize costs and avoid unnecessary duplication.

This action considers efficiency in the utilization of fishery resources and minimizes costs and avoids unnecessary duplication to the extent practicable. NMFS recognizes that a system in which a single authority manages both State and Federal waters could allow for a more efficient means of conducting the catch accounting necessary to avoid overfishing. This is not possible here. Because the State did not accept delegated management authority nor would it commit to providing the information required for management within the needed timeframe, NMFS must establish Federal monitoring, recordkeeping, and reporting requirements to supply this essential information to Federal fishery managers, consistent with the mandates of the Magnuson-Stevens Act. As discussed in the response to *Comment 31,* to account for fish caught solely in the Federal EEZ, it is necessary for NMFS to prohibit fishing in State and Federal waters on the same trip. As such, this requirement is consistent with National Standard 7.

As described thoroughly in the response to *Comment 44* and in section 4.7.2.2 of the Analysis, NMFS identified the minimum level of information required to effectively manage and enforce salmon fishing in the Cook Inlet EEZ Area. NMFS considered the additional costs and burden of these measures, including the costs of VMS equipment, on participants. NMFS managers will depend on VMS to determine the effort and projected catch in order to inform management decisions. Furthermore, without VMS, NOAA Fisheries Office of Law Enforcement would have to rely exclusively on resource-intensive patrols by air and sea; methods that are not as consistent as VMS in verifying that no fishing is occurring in closed waters and confirming fleet-wide reported fishing effort information. NMFS considered but did not choose to require management measures that would provide additional information

but impose disproportionate costs to participants such as fishery observers and electronic monitoring camera systems. Federal funds may be available to qualified vessel owners or operators for complete reimbursement of the cost of purchasing type-approved VMS units, which could offset over 75 percent of the total purchase and installation cost for fishery participants.

Logbooks are similarly necessary to ensure accuracy of reported fishing effort, catch accounting, and compliance with regulations. Logbook sheets will be available for participants to obtain from NOAA's website, free of charge.

National Standard 8

Comment 64: Amendment 16 violates National Standard 8 because it fails to take into account the importance of fishery resources to the Cook Inlet fishing communities and does not utilize economic and social data to provide for the sustained participation of such communities and to minimize adverse economic impacts on such communities.

Response: NMFS disagrees that amendment 16 violates National Standard 8. As set forth under section 301 of the Magnuson Stevens Act, National Standard 8 provides that conservation and management measures shall, consistent with the conservation requirements of the Act (including the prevention of overfishing and rebuilding of overfished stocks), take into account the importance of fishery resources to fishing communities by utilizing economic and social data (based on the best scientific information available), in order to (1) provide for the sustained participation of such communities, and (2) to the extent practicable, minimize adverse economic impacts on such communities.

Section 4 of the Analysis extensively documents the importance of salmon to Cook Inlet fishing communities throughout the Cook Inlet region as well as communities in Washington and Oregon. Many of these communities are jointly dependent on commercial salmon fishing (both drift gillnet and set gillnet), as well as non-commercial salmon fishing (recreational participants and guides, subsistence, ceremonial, and educational fishery sectors). NMFS carefully considered the costs and benefits of each management measure. As described in the Analysis and the preamble to the proposed rule, NMFS selected measures that balance the burden on participants with providing the information that is essential for NMFS to manage salmon fishing in the Cook Inlet EEZ Area. Further, NMFS expects that participants drift gillnet fishing in the Cook Inlet EEZ Area will be able to maintain their existing range of harvests and may be able to increase harvests if conservation conditions allow for it. Overall, because harvest levels of all sectors are expected to remain more or less consistent with status quo conditions, no long term community level impacts are expected. And because this rule is expected to maintain more or less status quo fishing opportunities for all users in Cook Inlet—with some possibility of additional days for the drift gillnet fleet—it appropriately provides for the sustained participation of fishing communities throughout Cook Inlet, including communities with residents that participate in State water fisheries. Many public commenters from Northern Cook Inlet expressed concern with any management plan that would increase EEZ harvests and thereby decrease salmon returns to the Northern Cook Inlet, causing adverse economic impacts on those communities. Instead, NMFS selected a management strategy that will preserve the complicated balance among various groups throughout Cook Inlet that has provided for the sustained participation of all Cook Inlet fishing communities for decades.

National Standard 10

Comment 65: There is no meaningful discussion of National Standard 10 Safety for this action. In the recent 10 year period, many vessels have been lost or damaged during periods of bad weather. Amendment 16 needs to address what happens and how the fishery will still achieve OY when these regular bad weather events occur.

Response: NMFS disagrees; the impacts of amendment 16 on the safety of human life at sea are discussed in sections 4.5.1.7 and 4.7.4 of the Analysis and NMFS finds this rule in consistent with National Standard 10. National Standard 10 provides that conservation and management measures shall, to the extent practicable, promote the safety of human life at sea. Overall impacts to public health and safety from this action are not expected to be significant. The VMS requirement provides a valuable tool for search and rescue efforts to locate a vessel in distress by regularly providing position information. This action also closes fishing in the Cook Inlet EEZ Area prior to the advent of deteriorating late summer and fall weather conditions. NMFS acknowledges that an inseason closure of the Cook Inlet EEZ under this action could result in vessel congestion in the fishing areas that remain open. In addition, closures of traditional, local fishing areas may induce vessel operators to take additional risks, such as fishing in weather and sea conditions that they would normally avoid, to remain economically viable. However, NMFS expects that the safety benefits resulting from VMS will more than offset any marginal, indirect adverse effects on safety that this action may have.

Economic Impacts

Comment 66: Multiple commenters cited studies and information highlighting the economic importance of salmon fisheries to participants and regional Alaskan communities. Several commenters support amendment 16 as a vehicle to conserve the salmon species on which these fisheries depend.

Response: NMFS acknowledges this comment. Economic information, community information, and an analysis of expected economic impacts are presented in section 4 of the Analysis.

Comment 67: Many commenters and their families are long-term Cook Inlet drift gillnet participants who feel State management has left drift gillnet fishery participants struggling, and worry this will continue under amendment 16. They allege this action does not correct the perceived errors in State management and will continue to reduce harvester and processor participation.

Response: NMFS acknowledges relatively low revenues to the Cook Inlet drift gillnet fleet and decreases in participation in recent years. Under this action, NMFS will be responsible for managing salmon fishing within the Cook Inlet EEZ Area. NMFS has no jurisdiction to modify salmon management within State waters.

As discussed in the response to *Comment 10,* NMFS recognizes that some of the management measures necessary to meet Federal managements in the EEZ will require additional costs and time commitments from participants. As described in the Final Regulatory Flexibility Analysis in the Classifications section of this preamble, NMFS designed the management measures related to collection of information for management purposes to minimize the financial impact on participants to the extent practicable. NMFS selected these measures after evaluating a range of options for information collection, as described in sections 2.5.6 and 4.7.2.2 of the Analysis. More information is provided in the response to comments related to Monitoring, Recordkeeping, and Reporting Requirements.

Because EEZ fishing opportunity is expected to be similar to the status quo under this action, salmon harvests in

the Cook Inlet EEZ Area and other areas of Cook Inlet are expected to remain at or near existing levels. As described in section 4.7.1.3, temporary shutdown or permanent closing of some processing businesses would only be expected to occur if there were substantial decreases in production. This is not expected to occur because harvest levels are expected to remain near existing levels. However, in the event NMFS closed the EEZ under this action, that likely means fishery conditions would also be expected to result in EEZ closure or severe restrictions under status quo management by the State. The most likely reason for closure is the low abundance of stocks that pass through the EEZ as they move into the Northern District of Cook Inlet. Thus, as compared to the status quo, no substantial reductions in EEZ harvest are anticipated when considered in the context of run strength in a given fishing season.

NMFS disagrees that State management has arbitrarily left the drift gillnet fleet struggling. The low abundance of specific salmon stocks in Cook Inlet has been challenging to all salmon fishery sectors in Cook Inlet. The State has taken necessary management action to protect these weak stocks, which has reduced harvest for all users. As described in section 4.5.1.2.2 of the Analysis, despite these conservation challenges, the drift gillnet fleet has, on average, harvested an increasing percentage of the available harvestable surplus for all salmon species over this same time period (1999–2021).

Further, the Analysis includes an examination of the social and economic impacts of the alternatives. Section 3 of the Analysis evaluates the impact of the proposed action on salmon stocks and other parts of the environment while section 4.7 of the Analysis discusses the impact on fishing communities in comparison to the status quo. Based on the Analysis, NMFS concluded that this final rule will not have a significant impact on the human environment.

Comment 68: A commenter stated support for NMFS's proposed action to manage the Cook Inlet EEZ because the local economy on the Kenai Peninsula is fragile, with people affected by economic disasters such as fishing closures and fires and faced with few employment opportunities.

Response: NMFS acknowledges this comment.

Comment 69: Several local government representatives and bodies requested that NMFS implement management for the Cook Inlet EEZ Area that provides for a healthy commercial fishing industry including processors and support services, considers all user groups, and considers the impact that management of the Cook Inlet EEZ can have on all Alaska communities that rely on sportfishing for economic development and subsistence use of salmon.

Response: NMFS acknowledges this comment. One of NMFS's primary concerns in developing amendment 16 is ensuring that all Cook Inlet salmon users, processors, and fishing communities retain access to and benefits from Cook Inlet salmon resources.

Comment 70: NMFS has not adequately addressed the economic impacts on fishermen and communities where the harvest is landed, including consideration of landing taxes, employment on the vessels, and in the processing plants.

Response: NMFS disagrees. The economic impacts of salmon fishing under the alternatives in Cook Inlet were comprehensively described and analyzed throughout section 4 of the Analysis. This included consideration of revenues, taxes, employment, and dependency. As summarized in section 4.10 of the Analysis, this action is expected to maintain harvest levels and opportunities commensurate with status quo conditions to the extent possible while accounting for uncertainty and the expectation that Federal management should improve over time as management expertise is developed. In fact, as noted above, this action allows for the possibility of slight increases in fishing days and harvest for the drift gillnet fleet when possible without impacting stocks of lower abundance. Thus, because this action is expected to maintain status quo harvest opportunities or even increase harvest opportunities for participants willing to comply with regulations in Federal waters, the best scientific information available supports NMFS's conclusion that minimal adverse economic impacts are anticipated from this action. Landings, landings taxes, employment, and processing are not expected to be significantly affected by this final rule compared to status quo conditions.

Comment 71: Market conditions arising from competition with farm-raised salmon account for a large part of the economic losses in salmon fisheries around Alaska. Permitting increased harvest of salmon in the Cook Inlet EEZ is unlikely to correct this problem but will likely adversely affect other Upper Cook Inlet salmon users.

Response: NMFS acknowledges that market conditions can have significant impacts on fishery values and that fisheries management decisions made in other jurisdictions do affect market conditions. Sections 4.5.1 and 4.7.1.3 of the Analysis describe market conditions. In the near-term, this action is not expected to result in the harvesting of significantly more or less salmon in the Cook Inlet EEZ. Therefore, it should not directly affect the market conditions for commercially harvested salmon.

NMFS also acknowledges that management of the Cook Inlet EEZ Area may impact the harvestable surplus available to all other salmon users in Upper Cook Inlet. Again, because NMFS does not anticipate a significant change in harvest in the Cook Inlet EEZ as a result of this action, NMFS disagrees that this action will adversely affect the fishing opportunity, and associated economic value, for other users in the Upper Cook Inlet area.

As described in sections 4.5.1.3.4.2 and 4.6 of the Analysis, commercial catches and fishery values in nearly all Cook Inlet salmon fishery sectors were above the long-term average from 2010 to 2014. The ability to realize high fishery values are dependent on the number and value of harvested species. Drift gillnet fishery catches during recent years have been constrained by mixed stock management considerations, including constraining fishing time and area in order to avoid overharvesting less abundant salmon stocks.

Section 4.6 of the Analysis included an examination of the potentially affected fisheries, including personal use, set net, freshwater, subsistence, and educational fisheries and determined that harvests near status quo levels are likely to be maintained by this action.

General Support

Comment 72: I support Federal management of fisheries in Alaska.

Response: NMFS acknowledges this comment.

Comment 73: Federal management will ensure optimum yield and sustainable fish populations.

Response: NMFS acknowledges this comment.

Comment 74: I support this action. Federally regulating fishing for all salmon in the Cook Inlet EEZ will help save the resources so that salmon fishing by all users can continue. However, I want more input from Alaskans.

Response: NMFS acknowledges this comment. The public had multiple opportunities to provide input, including at AP, SSC, and Council meetings in 2022 and 2023; during a public hearing hosted online by NMFS

on Mary 18, 2023; and during the public comment period on the proposed rule and notice of availability for Amendment 16. Public input on this action from all members of the public was considered and is summarized and responded to in this final rule.

General Opposition

Comment 75: NMFS does not need to recreate the wheel to create this FMP. It should adopt the FMP management plan put forward by Cook Inlet Fisherman's Fund, which is based on historic regulations and would manage the Cook Inlet fishery to comply with the court orders, Magnuson-Stevens Act, and other applicable laws.

The commenter's proposed FMP amendment can be viewed at *https://www.regulations.gov/comment/NOAA-NMFS-2023-0065-0071*.

The commenter's FMP includes the following primary provisions:

- Escapement based management.
- Management measures for all commercial salmon fishery sectors in both State and Federal waters.
- Management of Chinook stocks throughout upper Cook Inlet with the commercial fishery allowed whatever harvest necessary to achieve the MSY/OY objectives for sockeye, coho, pink, and chum stocks.
- Prioritize restrictions on non-resident sport fishing over resident sport-fishing when restrictions are needed to achieve OY.
- A commercial fishing season from May through December, with two or three 12 hour regular commercial fishing periods per week. The State or NMFS would retain authority to adjust this fishing schedule to manage for MSY escapement goals or exploitation rates as required.

Response: NMFS disagrees that this commenter's proposed FMP amendment should be adopted. As explained in the responses to *Comments 3* and *4*, NMFS cannot adopt Federal management measures that apply to the State waters of Cook Inlet. As explained in the response to *Comment 23,* NMFS cannot implement escapement based management through amendment 16. NMFS disagrees that commercial salmon fishing should be exempt from management restrictions required to conserve Chinook salmon or other salmon stocks. Even with severe restrictions to both recreational and commercial salmon fishing, Chinook salmon stocks in Cook Inlet are not meeting escapement goals under the status quo. Forgoing any restrictions on commercial fishing to harvest all available yield of sockeye, coho, pink, and chum salmon stocks would result in overfishing, which is inconsistent with NMFS's National Standard 1 mandate. NMFS disagrees that achieving MSY, particularly for a single fishery sector, constitutes achieving OY or maximizing net benefits to the nation. As explained in the response to *Comment 39,* a dramatic increase the fishing season duration and number of commercial fishing periods in the Cook Inlet EEZ Area would result in overfishing and reduce or eliminate the harvestable surplus for other salmon users in Cook Inlet. And NMFS may not discriminate between residents of different states when adopting Federal management measures. Section 2.7 of the Analysis generally explains why other provisions in stakeholder-submitted FMP amendments are inconsistent with the Magnuson-Stevens Act.

Amendment 16 complies with the Ninth Circuit ruling by amending the Salmon FMP to include the Cook Inlet EEZ Area. It complies with the District Court's order by implementing a federally-managed fishery in the EEZ that includes all Magnuson-Stevens Act requirements—including ACLs—and does not rely on the State to achieve any of the FMP's management objectives. The Analysis provides a comprehensive description of the purpose and need for this action, the management alternatives considered, and an analysis of their respective impacts.

Comment 76: Despite having the flexibility and resources to do an excellent job, NMFS is making amendment 16 unnecessarily complicated and difficult.

Response: NMFS developed amendment 16, the proposed rule, and this final rule in compliance with the Magnuson-Stevens Act and all other applicable Federal law. Management of Cook Inlet salmon fisheries is complex and challenging. The fishery includes multiple stocks of varying abundance, no stocks can be targeted in isolation in EEZ waters, and Cook Inlet includes many stakeholders beyond the drift gillnet fleet with competing demands. There is no simple solution to fisheries management in the Cook Inlet EEZ Area if NMFS is to consider the perspectives of all stakeholders and tribes, as it must. The Analysis identifies the strengths and weaknesses of each management alternative under consideration, including procedural constraints and currently available expertise.

NMFS intends to do an effective job managing the Cook Inlet EEZ Area salmon fishery, and expertise in this new Federal fishery will increase over time.

Comment 77: This unprecedented action should not be implemented. It will disrupt management of Cook Inlet waters and lead to further lawsuits. While not everyone will be happy with any rule, the action's legality and the resources are most important.

Response: NMFS acknowledges that this action implements a separate Federal salmon fishery management regime within Cook Inlet for the Cook Inlet EEZ Area and that salmon users have diverse preferences for management measures. As described in the response to *Comment 9,* NMFS must implement Federal management of the Cook Inlet EEZ to comply with applicable court orders, the Magnuson-Stevens Act, and all other applicable Federal law.

Tribal Comments

Comment 78: Regional tribes were not adequately consulted in the development of amendment 16, which may have adverse impacts to salmon stocks that tribes have traditionally depended on since time immemorial. Three federally recognized regional tribal groups requested government-to-government tribal consultation.

Response: NMFS acknowledges the importance of salmon to many tribal entities located throughout Cook Inlet and adjacent lands. NMFS's efforts to engage and consult with tribes on this action are described in detail in the Tribal Summary Impact Statement of this rule. In brief, NMFS participated in three tribal engagement meetings on this action before the Council failed to take action and NMFS began developing a Secretarial FMP amendment. NMFS offered to consult with tribes after the Council failed to take action, and NMFS subsequently held consultations with two tribes in May and June, 2023. NMFS held a public hearing on the action in May 2023, to which it invited all impacted tribes. After publishing the proposed rule in October 2023, NMFS directly solicited comments on the proposed rule from impacted tribes in the fall of 2023. In December 2023, NMFS held an engagement meeting with the tribal fishing group, and in January 2024, NMFS held two informational meetings with tribal entities throughout the Southcentral Alaska region.

Many of the tribes NMFS engaged with requested an indigenous subsistence fishery set-aside to be incorporated into amendment 16 and this final rule. However, given the impending court deadline of May 1, 2024 for publication of this action, there was not sufficient opportunity to work with interested tribes on developing a proposal that could be analyzed and incorporated into amendment 16 while

remaining on schedule to comply with the court order. NMFS received additional tribal consultation requests related to the possibility of an indigenous subsistence fishery in the Cook Inlet EEZ and will honor them.

Comment 79: Multiple tribes in the region noted that this action impacts sovereign federally recognized Tribes and their citizens and ask that NMFS, as part of its Federal trust responsibilities to tribes, co-develop with Alaska Native tribes a tribal subsistence fishery or set-aside (tribal fishery) and include it as part of this action. Many reasons were provided in support, including that Alaska Natives have used Cook Inlet salmon since ancestral times; they have stewarded salmon for thousands of years; tribal inherent fishing rights have long been ignored; a lack of equitable tribal representation in Federal fisheries management; obligations under international law, Executive orders, and ANILCA; and that a new subsistence set-aside fishery in the EEZ would be highly beneficial for tribal members unable to sufficiently meet their needs with other harvest opportunities. It was suggested that a tribal fishery be modeled after the subsistence halibut fishery.

Response: NMFS recognizes that Alaska tribes are seeking more equitable fisheries management and increased involvement in Federal fisheries management processes. Furthermore, NMFS acknowledges the long-standing and ancestral use of salmon fishery resources by Alaskan tribes.

NMFS evaluated the impacts of this action on tribes in the Analysis and the tribal impact summary statement. NMFS recognizes that salmon fishing in the Cook Inlet EEZ Area occurs before all other fishing in Cook Inlet and impacts the harvestable surplus available to all others who rely on the salmon resources in Cook Inlet, including tribal and subsistence users. As described in section 4.7.1.3 of the Analysis, because this action is expected to maintain salmon harvests near status quo levels, NMFS does not expect that amendment 16 will decrease the harvestable surplus for ongoing tribal and subsistence fisheries in Cook Inlet.

To create a new tribal fishery within the Cook Inlet EEZ would require an FMP amendment, including further analysis and consideration by NMFS and the Council. NMFS has committed to honor requests for tribal consultation regarding the potential establishment of a tribal fishery in the Cook Inlet EEZ. FMPs are adaptive and the Council may recommend and NMFS may amend the FMP in the future to incorporate feedback from tribes received in upcoming consultations.

Comment 80: The proposed action and subsequent management directly impacts the sovereign federally recognized tribes of the Cook Inlet and their citizens, which directly ties to their vital cultural way of life that has sustained their people for millennia. NMFS must partner with the Cook Inlet Tribes, thereby fulfilling their Federal trust responsibilities and guaranteeing the utilization and sustainability of traditional resources. The requirement to engage directly, government-to-government, is found in international law, treaties, declarations, Presidential Executive Orders (E.O.), and Secretarial Orders (See U.S. Department of the Interior's Secretary Order No. 3335 affirming the Federal trust responsibility of the United States to Indian Tribes and their citizens). Furthermore, the White House signed E.O. 14096 on Environmental Justice in April 2023. The E.O. directly cites tribal sovereignty and self-governance, recognizing the requirement for tribal consultation and enhanced collaboration with tribes on Federal policies, stating, in part, that we must recognize, honor, and respect the different cultural practices—including subsistence practices, ways of living, Indigenous Knowledge, and traditions—in communities across America.

Response: As described in response to *Comment 78* and in the Tribal Summary Impact Statement section of this final rule, NMFS provided multiple informational meetings to tribes and conducted tribal consultations. Impacts to tribes, their members and all other salmon users in Cook Inlet will continue to be considered in management of the Cook Inlet EEZ Area. NMFS will continue to consult and work with interested tribes to develop potential future management actions for the Cook Inlet EEZ Area that may provide subsistence or tribal fishing opportunities.

Marine Mammals

Comment 81: I support including the Cook Inlet EEZ in the Salmon FMP. Consider the importance of available salmon to the Cook Inlet beluga whales, which are endangered under the ESA. Cook Inlet beluga whales rely on salmon as prey. Failure to protect against overfishing or otherwise could amount to an illegal ''taking'' under the ESA. Harassing or harming the beluga whale is another reason the Salmon FMP must include the Cook Inlet EEZ.

Response: NMFS acknowledges that salmon are important prey to Cook Inlet beluga whales and that the availability of salmon prey for Cook Inlet beluga whales is a factor identified in the recovery plan. NMFS Sustainable Fisheries Division consulted with NMFS Protected Resources Division under ESA section 7 to evaluate the potential impacts of these management measures to all ESA-listed species, including Cook Inlet beluga whales, that may be affected by this action. As described in section 3.3.1 of the Analysis, the best scientific information available at this time suggests that status quo salmon prey availability is adequate for belugas. This final rule is not expected to appreciably alter salmon availability to belugas compared to the status quo. NMFS will continue to review and consider any new information on the importance and availability of salmon prey to Cook Inlet beluga whales.

Comment 82: Drift gillnet gear can be destructive and its continued use in Cook Inlet may have adverse impacts to endangered beluga whales.

Response: As described in section 3.3.1 of the Analysis, NMFS has no information indicating that the drift gillnet gear used in the Cook Inlet EEZ Area has resulted in entanglements of Cook Inlet beluga whales or habitat degradation. This action does not modify drift gillnet fishing in Cook Inlet in any way that is expected to increase the entanglement risk for Cook Inlet beluga whales.

Process Concerns

Comment 83: One commenter stated that the EEZ line being used was ruled illegal in *U.S.* v. *Alaska* in 1975. This commenter alleges NMFS continues to use an illegal EEZ boundary. If NMFS were to use a proper boundary line (50 to 60 miles (80.47 to 96.56 km) north), the majority of the fishery would occur in State waters, undermining its argument that it cannot regulate State waters under section 306(b) of the Magnuson-Stevens Act.

Another commenter suggested that the EEZ boundary was incorrect for fisheries jurisdiction and should only be used for oil and gas leasing purposes. Federal waters for fishing have not been designated and need to be decided by the Boundary Commission as in Southeast Alaska.

Response: NMFS disagrees that it is using an incorrect EEZ boundary. NMFS also disagrees that Federal waters boundaries for the purpose of fisheries jurisdiction have not been defined in Cook Inlet. Under the Magnuson-Stevens Act, the EEZ is defined as the zone established by Proclamation Numbered 5030, dated March 10, 1983. For purposes of applying this Act, the inner boundary of that zone is a line

coterminous with the seaward boundary of each of the coastal States. The baselines used to determine the EEZ boundary are reviewed and approved by an interagency committee called the U.S. Baseline Committee, which is chaired by the Department of State. In 2006, a new method was used to calculate the baseline and NOAA navigation charts published in 2006 depict changes in the 3 nmi (5.56 km) boundary in parts of Alaska. In 2011, the U.S. Baseline Committee reviewed some of the changes to the baseline in Cook Inlet based on feedback from the State and updated their recommendations. However, not all areas where the baseline changes occurred have been reviewed by the Baseline Committee. For this reason, NMFS manages and enforces Federal fisheries according to the decisions of the U.S. Baseline Committee for the areas they reviewed and approved after considering input from the State since 2006. NMFS recognizes the historical (pre-2006) t3-nmi (5.56 km) state-waters boundary line for all other areas. This information is documented in a letter from NMFS to Alaska Department of Fish and Game that is posted on NMFS Alaska Region website.

To the extent this comment is alleging the U.S. Baseline Committee erred in approving this EEZ boundary, the decisions of the Baseline Committee are outside the scope of this action. For NMFS's response to the contention that it has authority to regulate state waters under section 306(b) of the Magnuson-Stevens Act, see the response to *Comment 4.*

Comment 84: NMFS has repeatedly disregarded instruction from courts, and a special master should be appointed to oversee development of Federal management of Cook Inlet.

Response: NMFS disagrees that it disregarded instruction from any court. NMFS has worked to ensure that Federal management of salmon fishing in the Cook Inlet EEZ will be in place by May 1, 2024, consistent with the Ninth Circuit and District Court orders.

Comment 85: One commenter felt that NMFS has been disingenuous, duplicitous, insulting to stakeholders, and deliberately obstructive throughout this process and produced poor work product that suggests it does not understand the fishery. It was also suggested that this action fails to reflect consideration or incorporation of input that the stakeholders from the drift gillnet fleet have provided on multiple occasions over several years, including the Council's stakeholder committee, resulting in an unworkable product.

Response: NMFS disagrees. The proposed rule and Analysis prepared for this action contains all relevant information about salmon fisheries in Cook Inlet and perspectives provided by stakeholders during the development of this action. Amendment 16 and this final rule implement Federal management in the Cook Inlet EEZ Area in accordance with the Magnuson-Stevens Act and as appropriate in recognition of the multiple users of salmon throughout Cook Inlet.

Throughout the development of this action, some stakeholders advocated for many provisions to increase harvests by the drift gillnet fleet that NMFS is not implementing for reasons discussed in a number of responses to comments. This input, as well as recommendations from the stakeholder committee, is also summarized in section 2.7 of the Analysis, which provides a comprehensive discussion of why certain recommendations were not incorporated into the management alternatives under consideration. Many of the drift gillnet fleets requests can be distilled to two basic premises, neither of which are consistent with the Magnuson-Stevens Act: (1) NMFS must apply Federal management to both State and Federal waters in Cook Inlet; and (2) NMFS must manage to fully harvest MSY for Kenai and Kasilof sockeye salmon, as well as all other salmon stocks and prevent overescapement. As described in the response to *Comment 4,* NMFS does not have jurisdiction to assert management authority over the State waters of Cook Inlet. As explained throughout the Analysis, the preamble to the proposed rule, and in responses to comments in this final rule, fully harvesting the entire harvestable surplus for Kenai and Kasilof sockeye would require an amount of fishery effort in the EEZ that would result in overfishing of other salmon stocks and could completely eliminate fishery opportunities and access to fishery resources for other users in Cook Inlet. To achieve OY and ensure that the fishery results in the greatest net benefits to the Nation, NMFS cannot prioritize access for one user group over access for all others. And in mixed stock fisheries, harvest is always constrained by the stocks of lowest abundance, as the Magnuson-Stevens Act requires that fishery management measures prevent overfishing.

NMFS's decision not to implement specific measures advocated for by one group of fishery stakeholders—and which other stakeholders and tribes oppose as likely to decrease their access to salmon and the State opposes based on conservation concerns—does not mean NMFS is being disingenuous, duplicitous, insulting, or deliberately obstructive.

Comment 86: Most Council members could see their special interests (trawlers) affected by further scrutiny over salmon management. These conflicts are the reason that the Magnuson-Stevens Act requires science to drive management. These conflicts and the lack of accountability are why councils nationwide should be appointed by the president and be held responsible for their decisions.

Alaska has a majority of seats on the Council, including the commissioner of ADF&G, and the Council will mostly rule in favor of the State's parochial interests. This prioritizes protecting State interests and revenues.

Response: Amendment 16 is a Secretarial FMP amendment developed by NMFS and was not recommended by the Council. When this action was previously under Council consideration, none of the Council members had financial interests that would have required recusal from voting had the Council decided to recommend action. Regardless, the statutorily prescribed system for appointing Council members is outside the scope of this action.

Comment 87: ADF&G has a financial conflict of interest in managing South Central Alaska Salmon stocks. They are funded, in part, by sport fishing licenses and associated Federal matched funds. Therefore, they have a financial incentive to favor the recreational and personal use fisheries.

Response: The State of Alaska's allocation decisions among various sectors within State waters are outside of the scope of this action. In the Cook Inlet EEZ, nearly all catch is by the commercial drift gillnet fleet. There is no Federal personal use fishery, and the recreational sector catches less than 70 fish per year on average in the Cook Inlet EEZ.

Comment 88: Multiple commenters suggested that ADF&G had prioritized political considerations, or specific user groups, over sustainability and has not managed salmon and other species properly, which has resulted in the declines of Chinook and sockeye fisheries in Cook Inlet and unnecessary litigation. One commenter felt that amendment 16 results in more political management.

Response: NMFS disagrees that amendment 16 is political management. As described throughout the preamble to the proposed rule, NMFS worked to balance competing interests and demands of the National Standards in the policy decisions inherent to this fishery management action. NMFS will

manage salmon fishing in the Cook Inlet EEZ Area using best available science to achieve OY and prevent overfishing on all Cook Inlet salmon stocks. The State will continue to manage salmon fishing within State waters.

NMFS found the State has prioritized protecting stocks with the lowest abundance in regulating salmon fishing in Cook Inlet. As described in sections 3.1, 4.5, and 4.6 of the Analysis, salmon abundance is cyclical, and the harvests of different user groups have both increased and decreased at different times. To the extent the comment is criticizing allocation decisions made by the BOF (*i.e.,* which user group(s) are allowed to harvest the available excess yield of salmon), that is outside the scope of this action.

Comment 89: Our fisheries statewide are in peril because of multi-jurisdictional authority and allocations to specific user groups based on political agendas. Trawling back and forth across the mouth to Cook Inlet occurred only weeks prior to our State-regulated 2023 commercial salmon season being shut down due to a prediction of a shortage of what turned out to be less than 1,500 Chinook salmon. This was under both jurisdictions. So who should manage the anadromous fishery? The owner of the resource.

Response: NMFS, with guidance from the Council, has jurisdiction over salmon fishing in the Cook Inlet EEZ Area. This action addresses directed fishing for salmon in the Cook Inlet EEZ Area. Comments regarding salmon bycatch in trawl fisheries are outside of the scope of this action.

Comment 90: The State should no longer manage the fishery as they have failed to do so in a way that supports Alaskan interests. Furthermore, there is no longer a fishery to manage in the EEZ, as the president has taken away the ability of Alaskans to utilize Alaska's natural resources, such as oil and gas.

Response: Under this rule, NMFS, not the State of Alaska, will manage all salmon fishing (commercial and recreational) in the Cook Inlet EEZ. Comments regarding executive actions that affect other natural resources in Alaska are outside the scope of this action.

Comment 91: Alaskans who are licensed business owners and fishing in the EEZ should be managing their resources. People in Washington DC or Washington State are the reason many of our wild resources are being depleted; they should not have a say in managing Alaska fisheries.

Response: The Magnuson-Stevens Act governs the management of the fisheries in the EEZ. Section 2 of the Magnuson-Stevens Act provides that the purpose of the Act is to exercise sovereign rights for the purpose of exploring, exploiting, conserving, and managing all fish within the exclusive economic zone. It further provides that, with respect to management within the EEZ adjacent to Alaska waters, the Council is responsible for developing and recommending fishery management plans and regulations that implement those plans for management. Comments from all stakeholders and members of the public were considered in the development of amendment 16 and will be considered every year in the annual management processes for establishing salmon harvest specifications for the Cook Inlet EEZ Area.

Comment 92: Alaska's permanent fund dividend is declining and is being used to build commercial vessel docks. This litigation, which favors one fishing group over others, is costing millions of dollars. Commercial fishing is not hurting anyone. Protecting recreational fishing is not needed.

Response: Comments on the Alaska permanent fund, State government revenues, and dock construction are outside of the scope of this action. Comments about the cost of litigation are outside the scope of this action. This action will implement conservation and management measures for commercial drift gillnet and recreational fishing solely within the Cook Inlet EEZ Area.

Other

Comment 93: The proposed rule is incomplete without a complete overview of how offshore wind turbines, which are responsible for the increase in deaths of whales, dolphins, and other cetaceans off the East Coast, will be handled off Alaska.

Response: This action does not include elements related to offshore wind energy. Therefore, this comment is outside of the scope of this action.

Comment 94: Protect the hooligan (eulachon); that fishery needs review.

Response: This comment is outside the scope of this action.

Comment 95: In the Cook Inlet area, salmon spawning and rearing occurs on Federal lands and waters under the Department of the Interior. The Department of the Interior should be consulted and included in the development of this action.

Response: The United States Fish and Wildlife Service (USFWS), an agency within the Department of the Interior, has a representative on the Council and is aware of the issue. The USFWS did not provide comments to NMFS during the comment period on amendment 16 or the proposed rule. In this action, NMFS implements federal management over commercial and recreational fishing in the Cook Inlet EEZ Area consistent with NMFS's authorities under the Magnuson-Stevens Act. The authorities of other agencies, including the Department of the Interior and USFWS, over lands and waters outside of the EEZ are outside the scope of this action.

Classification

The NMFS Assistant Administrator (AA) has determined that this action is consistent with the Salmon FMP, the National Standards, other provisions of the Magnuson-Stevens Act, and other applicable law.

NMFS prepared an environmental assessment (EA) for amendment 16 and the AA concluded that there will be no significant impact on the human environment as a result of this rule. This action is expected to maintain Cook Inlet EEZ salmon harvests at or near existing levels. The same or similar vessels will continue to use the same or similar fishing gear. As a result, no significant environmental impacts are anticipated. Copies of the EA and Finding of No Significant Impact are available from the NMFS (see **ADDRESSES**).

This final rule has been determined to be not significant for the purposes of Executive Order 12866.

A Regulatory Impact Review was prepared to assess costs and benefits of available regulatory alternatives. A copy of this analysis is available from NMFS (see **ADDRESSES**). NMFS approved amendment 16 and these regulations based on those measures that maximize net benefits to the Nation when considering the viable management alternatives. Specific aspects of the economic analysis are discussed below in the Final Regulatory Flexibility Analysis (FRFA) section.

Small Entity Compliance Guide

Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 states that, for each rule or group of related rules for which an agency is required to prepare a FRFA, the agency shall publish one or more guides to assist small entities in complying with the rule, and shall designate such publications as ''small entity compliance guides.'' Copies of the proposed rule, this final rule, and the small entity compliance guide are available on the Alaska Region's website at: *https://www.fisheries.noaa.gov/region/alaska.*

Final Regulatory Flexibility Analysis

NMFS prepared a FRFA that incorporates the Initial Regulatory Flexibility Analysis (IRFA) and a summary of the analyses completed to support this final rule.

Section 604 of the Regulatory Flexibility Act (RFA) requires that, when an agency promulgates a final rule under section 553 of title 5 of the U.S. Code (5 U.S.C. 553), after being required by that section or any other law to publish a general notice of final rulemaking, the agency shall prepare a FRFA (5 U.S.C. 604). Section 604 describes the required contents of a FRFA: (1) A statement of the need for and objectives of the rule; (2) a statement of the significant issues raised by the public comments in response to the IRFA, a statement of the assessment of the agency of such issues, and a statement of any changes made to the proposed rule as a result of such comments; (3) the response of the agency to any comments filed by the Chief Counsel for Advocacy of the Small Business Administration (SBA) in response to the proposed rule, and a detailed statement of any change made to the proposed rule in the final rule as a result of the comments; (4) a description of and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available; (5) a description of the projected reporting, recordkeeping, and other compliance requirements of the rule, including an estimate of the classes of small entities that will be subject to the requirement and the type of professional skills necessary for preparation of the report or record; and (6) a description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes including a statement of the factual, policy, and legal reasons for selecting the alternative adopted and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected.

A description of this final rule and the need for and objectives of this rule are contained in the preamble to the proposed rule and final rule and are not repeated here.

Public and Chief Counsel for Advocacy Comments on the IRFA

An IRFA was prepared in the Classification section of the preamble to the proposed rule. The Chief Counsel for Advocacy of the SBA did not file any comments on the proposed rule. NMFS received no comments specifically on the IRFA. No comments provided information that refuted the conclusions presented in the IRFA.

Number and Description of Small Entities Regulated by This Final Action

This final rule will directly regulate commercial salmon fishing vessels that operate in the Cook Inlet EEZ Area, charter guides and charter businesses fishing for salmon in the Cook Inlet EEZ Area, and entities receiving deliveries of salmon harvested in the Cook Inlet EEZ Area.

For RFA purposes only, NMFS has established small business size standards for businesses, including their affiliates, whose primary industries are commercial fishing, charter fishing, seafood processing, and seafood buying (see 50 CFR 200.2). A business primarily engaged in commercial fishing (NAICS code 11411) is classified as a small business if it is independently owned and operated, is not dominant in its field of operation (including its affiliates), and has combined annual receipts not in excess of $11 million for all its affiliated operations worldwide. For charter fishing vessels (NAICS code 713990), this threshold is combined annual receipts not in excess of $9 million. For shoreside processors (NAICS code 311710), the small business size is defined in terms of number of employees, with the threshold set at not greater than 750 employees. For entities that purchase seafood but do not process it (NAICS code 424460), the small business threshold is not greater than 100 employees.

From 2019 to 2021, there was an average of 567 S03H permits in circulation, with an average of 361 active permit holders, all of which are considered small entities based on the 11 million dollar threshold. Because NMFS expects the State to maintain current requirements for a commercial salmon fishing vessels landing any salmon in upper Cook Inlet to hold a CFEC S03H permit, NMFS does not expect participation from non-S03H permit holders in the federally managed salmon fishery in the Cook Inlet EEZ Area. Therefore, the number of S03H permit holders represents the maximum number of directly regulated entities for the commercial salmon fishery in the Cook Inlet EEZ Area. From 2019 to 2021, there was an average of 11 shoreside processors and 6 direct marketers, all of which are considered small entities based on the 750 employee threshold. From 2019 to 2021, there was an average of 4 catcher-sellers, all of which are considered small entities based on the 100 employee threshold. From 2019 to 2021, there was an average of 58 charter guides that fished for salmon at least once in the Cook Inlet EEZ Area, all of which are considered small entities based on the 9 million dollar threshold. Additional detail is included in sections 4.5 and 4.9 in the Analysis prepared for this action (see **ADDRESSES**).

Description of Significant Alternatives That Minimize Adverse Impacts on Small Entities

NMFS considered, but did not select three other alternatives. The alternatives, and their impacts to small entities, are described below.

Alternative 1 would take no action and would maintain existing management measures and conditions in the fishery within recently observed ranges, resulting in no change to impacts on small entities. This is not a viable alternative because it would be inconsistent with the Ninth Circuit's ruling that the Cook Inlet EEZ must be included within the Salmon FMP and managed according to the Magnuson-Stevens Act.

Alternative 2 would delegate management to the State. If fully implemented, Alternative 2 would maintain many existing conditions within the fishery. Fishery participants would have the added burdens of obtaining a SFFP, maintaining a Federal fishing logbook, and monitoring their fishing position with respect to EEZ and State waters as described in sections 2.4.8 and 4.7.2.2 of the Analysis. However, section 306(a)(3)(B) of the Magnuson-Stevens Act provides that NMFS cannot delegate management to the State without a three-quarter majority vote by the Council, which did not occur. Therefore, Alternative 2 cannot be implemented and is not a viable alternative.

Alternative 4 would close the Cook Inlet EEZ but not impose any additional direct regulatory costs on participants and would allow directly regulated entities to possibly recoup lost EEZ harvest inside State waters. However, the District Court ruled that Alternative 4 was contrary to law. Therefore, Alternative 4 is not a viable alternative.

This action (Alternative 3) will result in a Cook Inlet EEZ salmon fishery managed directly by NMFS and the Council. Within Alternative 3, there were numerous sub-options for management measures. As described below, NMFS worked to select specific management measures that minimized cost and burden on participants to the extent practicable. This action will increase direct costs and burdens to

commercial salmon fishing vessels that operate in the Cook Inlet EEZ Area by requiring an SFFP, associated requirements to install and operate a VMS, and maintaining a Federal logbook as described in sections 2.5.6 and 4.7.2.2 of the Analysis. This action also requires that TACs be set before each fishing season. The TAC will be set to account for management uncertainty and reduce the risk of overfishing without the benefit of inseason harvest data, but overall catch in the EEZ is likely to remain near existing levels with a possibility for slight increases from the status quo (particularly as Federal managers collect data specific to the EEZ and develop expertise managing the fishery). As is possible under the status quo, salmon harvest in the EEZ could be reduced or prohibited in years when salmon returns are not predicted to result in a harvestable surplus, with an appropriate buffer to account for scientific and management uncertainty.

Processors receiving deliveries of salmon commercially harvested in the Cook Inlet EEZ Area are required to obtain an SFPP. Entities receiving deliveries of salmon commercially harvested in the Cook Inlet EEZ but not processing the fish are required to obtain an RSRP. All of these permits are available at no cost from NMFS. However, entities with these permits are required to use eLandings and report landings with all associated information by noon of the day following the completion of each delivery, which increases direct costs and burden.

While these measures do increase costs to commercial fishery sector participants, all of these elements are necessary to manage the fishery and prevent overfishing. Specific consideration was given in their development to minimize the burden on participants to the extent practicable while also providing required information to Federal fishery managers in a timely manner. More costly means of monitoring catch—including observers and electronic monitoring—were considered but rejected by NMFS. All entities that may be directly regulated by this action could also choose to continue participating in only the State waters fisheries to avoid being subject to these Federal requirements.

Charter fishing vessels do not have any additional Federal recordkeeping, reporting, or monitoring requirements but are subject to Federal bag, possession, and gear regulations. These measures are the same as existing State requirements and do not add additional burden.

Based upon the best scientific information available, there are no significant alternatives to the action that have the potential to comply with applicable court rulings, accomplish the stated objectives of the Magnuson-Stevens Act and any other statutes, and minimize any significant adverse economic impact of the action on small entities while preventing overfishing. After a public process, NMFS concluded that of the viable management options, Alternative 3, amendment 16 and this final rule, best accomplish the stated objectives articulated in the preamble for this action and in applicable statutes, and minimizes, to the extent practicable, adverse economic impacts on directly regulated small entities.

Recordkeeping, Reporting, and Other Compliance Requirements

This action implements new recordkeeping, reporting, and compliance requirements. These requirements are necessary for the management and monitoring of the Cook Inlet EEZ Area salmon fishery.

All Cook Inlet EEZ Area salmon fishery participants using drift gillnet gear are required to provide additional information to NMFS for management purposes. As in other North Pacific fisheries, processors provide catch recording data to managers to monitor harvest. Processors are required to record deliveries and processing activities to aid in fishery administration.

To participate in the fishery, persons are required to complete application forms, reporting requirements, and monitoring requirements. These requirements impose costs on small entities in gathering the required information and completing the information collections.

NMFS has estimated the costs of complying with the requirements based on information such as the burden hours per response, number of responses per year, and wage rate estimates from industry or the Bureau of Labor Statistics. Persons are required to complete many of the requirements prior to fishing, such as obtaining permits. Persons are required to complete some requirements every year, such as the SFPP and RSRP applications. Other requirements are more periodic, such as the SFFP application, which must be submitted every 3 years. The impacts of these changes are described in more detail in sections 2.5.6 and 4.7.2 of the Analysis prepared for this action (see **ADDRESSES**).

Vessels commercially fishing for salmon in the Cook Inlet EEZ Area are required to obtain an SFFP, complete a Federal fishing logbook, and install and maintain an operational VMS. NMFS issues SFFPs at no cost. Although VMS costs may be significant for some participants, there may be funds available from NMFS for reimbursement of the purchase costs. Information on the VMS reimbursement program is contained in the small entity compliance guide published with this Final Rule. The vessel will also be required to mark buoys at each end of their drift gillnet with their SFFP number. While commercially fishing for salmon in the Cook Inlet EEZ Area, participants must remain within Federal waters and cannot also fish in State waters on the same calendar day or conduct any other types of fishing while in Federal waters.

Processors and other entities receiving landings of commercially caught Cook Inlet salmon from the Cook Inlet EEZ Area are required to obtain an SFPP or an RSRP, and report landings through eLandings by noon of the day following completion of the delivery. NMFS issues SFPPs and RSRPs at no cost.

For recreational salmon fishing, no additional Federal recordkeeping and reporting requirements are established. The State's existing recordkeeping and reporting requirements are expected to provide the information needed to manage recreational fishing in the Cook Inlet EEZ Area and satisfy Magnuson-Stevens Act requirements given the small scale and very limited harvest by the recreational sector. Information collected by the State includes creel sampling, the ADF&G's Statewide Harvest Survey, harvest records for annual limits, and the Saltwater Guide Logbooks.

Paperwork Reduction Act

This final rule contains collection-of-information requirements subject to review and approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act (PRA). This final rule adds a new collection of information for the Cook Inlet EEZ salmon fishery under new OMB control number 0648–0818 and revises and extends for 3 years existing collection-of-information requirements for OMB Control Number 0648–0445 (NMFS Alaska Region VMS Program). The public reporting burden estimates provided below for these collections of information include the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

OMB Control Number 0648–0818

A new collection of information is created for reporting, recordkeeping, and monitoring requirements implemented by this action that are necessary to federally manage the Cook Inlet EEZ Area salmon fishery. This new collection contains the applications and processes used by harvesters, processors, and other entities receiving deliveries of Cook Inlet EEZ Area salmon to apply for and manage their permits; provide catch, landings, and processing data; and mark drift gillnet buoys. The data are used to ensure that the fishery participants adhere to harvesting, processing, and other requirements for the Cook Inlet EEZ Area salmon fishery.

The public reporting burden per individual response is estimated to average 15 minutes for the SFFP application, 25 minutes for the SFPP application, 20 minutes for the RSRP application, 15 minutes to register for eLandings, 10 minutes for landing reports, 15 minutes for the daily fishing logbook, and 30 minutes to mark drift gillnet buoys.

OMB Control Number 0648–0445

NMFS proposes to revise and extend by 3 years the existing requirements for OMB Control Number 0648–0445. This collection contains the VMS requirements for the federally managed groundfish and crab fisheries off Alaska. This collection is revised because this action requires vessels commercially fishing for salmon in the Cook Inlet EEZ Area to install and maintain an operational VMS. The public reporting burden per individual response is estimated to average 6 hours for installation of a VMS unit, 4 hours for VMS maintenance, and 2 hours for VMS failure troubleshooting. VMS transmissions are not assigned a reporting burden because the transmissions are automatic.

Public Comments

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. Written comments and recommendations for these information collections should be submitted on the following website: *https://www.reginfo.gov/public/do/PRAMain.* Find the particular information collection by using the search function and entering either the title of the collection or the OMB Control Number.

Notwithstanding any other provisions of the law, no person is required to respond 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.

Tribal Summary Impact Statement

NMFS's responsibility to engage in tribal consultations on Federal policies with tribal implications is outlined in Executive Order (E.O.) 13175, Consultation and Coordination with Indian Tribal Governments (November 6, 2000), the Executive Memorandum (April 29, 1994), the American Indian and Alaska Native Policy of the U.S. Department of Commerce (March 30, 1995), the Department of Commerce Tribal Consultation and Coordination Policy (78 FR 33331, June 4, 2013), Presidential Memorandum (Tribal Consultation and Strengthening Nation-to-Nation Relationships) (86 FR 7491, January 29, 2021), and the updated NOAA Policy on Government-to-Government Consultations with Federally Recognized Indian Tribes and Alaska Native Corporations (July 27, 2023). Congress required federal agencies to consult with Alaska Native corporations on the same basis as federally recognized Indian tribes under E.O. 13175 (Pub. L. 108–199, 118 Stat. 452, as amended by Pub. L. 108–447, 118 Stat. 3267). NOAA interprets the term ''Alaska Native corporations'' in this requirement to mean ''Native corporation[s]'' as that term is defined under the Alaska Native Claims Settlement Act (ANCSA) of 1971 (43 U.S.C. 1602).

Section 5(b)(2)(B) of E.O. 13175 requires a ''Tribal Summary Impact Statement'' for any regulation that has tribal implications, imposes substantial direct compliance costs on Native Tribal governments, and is not required by statute. Although not required by section 5(b)(2)(B) of E.O. 13175, the following is a tribal summary impact statement for this final rule that is consistent with E.O. 13175 and summarizes and responds to issues raised during all tribal consultations on Amendment 16 and the proposed rule.

Under E.O. 13175 and agency policies, NMFS notified all potentially impacted federally recognized Tribal governments in Alaska and Alaska Native Corporations and provided the opportunity to comment and respond to the agency's invitation for tribal consultation on the action.

A Description of the Extent of NMFS's Prior Consultation With Tribal Officials

On February 17, 2023, NMFS emailed tribal consultation invitation letters to Alaska Native Tribes, Alaska Native Corporations, and Alaska Native Organizations (''Alaska Native representatives''). The letter notified Alaska Native representatives that the management of salmon fisheries in the Federal (EEZ) marine waters of upper Cook Inlet would be presented to the Council for review, with an invitation to participate in the process and contribute to fishery decisions at the April 2023 meeting. NMFS invited Alaska Native representatives to consult with and provide comments to the agency directly via meeting or by telephone.

NMFS received one response from the Chickaloon Village Traditional Council (CVTC) to consult on management of salmon fisheries in the Federal (EEZ) waters of Cook Inlet. The purpose was to complete consultation between CVTC and NMFS Alaska Region per the agency's government-to-government relationship regarding the management of salmon fisheries in the EEZ waters of Cook Inlet before scheduled final action at the April 2023 Council meeting to hear and better understand the CVTC's perspectives regarding tribal impacts. NMFS also shared information about the action and its potential implementation and answered questions during the consultation.

NMFS was invited by Alaska Native representatives to speak on this action at the Tikahtnu Forum Meeting on February 24, 2023, the Kenaitze/Salamatof Hunting Fishing and Gathering Commission Meeting on March 7, 2023, and the Cook Inlet Fishers Group on March 30, 2023, to listen to tribal perspectives, provide information and answer questions on the action.

On April 21, 2023, NMFS sent an announcement to Alaska Native representatives stating the agency was under a court order to implement an amendment to the Salmon FMP by May 1, 2024 to federally manage the salmon fisheries that occur in the Cook Inlet EEZ, consistent with Magnuson-Stevens Act requirements. NMFS provided a second invitation for tribal consultation and engagement opportunities on this issue. Two Alaska Native tribes responded to the invitation to consult on amendment 16. NMFS held tribal consultation on this action with the Salamatof Tribe on May 22, 2023, and with the Chickaloon Native Village (CNV) on June 20, 2023. NMFS shared information regarding Federal salmon management during the meeting but

primarily wanted to hear and better understand the Salamatof Tribe's and CNV's perspectives regarding tribal impacts. Also, on June 22, 2023, NMFS received a letter from the Ninilchik Traditional Council (NTC). NTC thanked NMFS for the invitation to consult and for engaging with tribes on the action but declined NMFS's invitation to consult based on lack of agency engagement in the past, lack of adequate time, and because of NTC's concern that the action did not incorporate tribal input in studies and impact statements related to traditional ecological knowledge.

On April 26, 2023, NMFS notified Alaska Native representatives that NMFS would hold a public hearing to receive input on an amendment to the Salmon FMP to establish Federal management for salmon fishing in the Federal waters of upper Cook Inlet. Alaska Native representatives were given another opportunity to provide verbal comments at the public hearing on May 18, 2023 or written comments by May 25, 2023 during the public comment process.

On October 18, 2023, NMFS solicited public comment—including comments from Alaska Native representatives—on the proposed rule that would implement Federal management of commercial and recreational salmon fishing in the Cook Inlet EEZ (88 FR 72314, October 19, 2023). NMFS invited comment from Alaska Native representatives on the action through December 18, 2023. Additionally, on October 20, 2023, NMFS provided a response letter to the NTC thanking them for their concerns and encouraging the NTC to reconsider engagement with NMFS on this action.

On November 16, 2023, NMFS received a response from the Cook Inlet Fishers Group asking for tribal engagement. On December 5, 2023, NMFS met with tribal representatives from the Cook Inlet Tribal Fishers Group, which included the Knik Tribal Council, CVTC, and NTC. The purpose of this meeting was to engage with interested Cook Inlet Tribes regarding Federal management of salmon fisheries in the Cook Inlet EEZ. NMFS shared information about the action and its potential implementation during the meeting but primarily wanted to hear and better understand the Cook Inlet Tribes' perspectives regarding tribal impacts. At the close of the meeting, participants agreed that a follow up tribal engagement meeting on this action would be pertinent in January 2024.

At the close of the amendment 16 public comment period on December 18, 2023, NMFS received written comments from NTC, Salamatof Tribe, CVTC, and Kenaitze Tribe. The Salamatof Tribe requested separate government-to-government engagement while the remaining Cook Inlet tribes requested joint government-to-government consultation. On January 8, 2024, NMFS met with the Salamatof Tribe to share a status update on amendment 16 as well as hear and better understand their perspectives on the need for an indigenous subsistence fishery set-aside. On January 9, 2024, NMFS met with 11 Alaska Native representatives, including the NVC, CVTC, Seldovia Village Tribe, NTC, Knik Tribe, Native Village of Eklutna, Kenaitze Tribe, Chugach Regional Resource Commission, Ninilchik Native Association, Tyonek Native Corporation, and the Salamatof Tribe. NMFS listened to tribal concerns and perspectives regarding the new idea for an indigenous subsistence fishery set-aside and provided a status update on the amendment 16 process.

After the close of the amendment 16 public comment period, NMFS also received three written tribal comments from the Chugach Regional Resource Commission representing the Nanwalek Indian Reorganization Act Council and Port Graham Village Council, Tyonek Conservation District, and Native Village of Eklutna. The Chugach Regional Resource Commission requested tribal consultation with Nanwalek IRA Council and Port Graham Village Council. The Tyonek Conservation District expressed significant interest in participating in natural resource management decisions that could affect Cook Inlet. The Native Village of Eklutna requested to further develop traditional stewardship, through a degree of co-management with NMFS and the U.S. Fish and Wildlife Service (USFWS), of culturally important trust salmon stocks returning to traditional areas.

Many tribal members requested an indigenous subsistence fishery set-aside to be incorporated into amendment 16 and this final rule. Such a modification could not have been made to amendment 16 without publishing a new proposed rule, which was not possible given the impending court deadline for implementation of a final rule. Creating an indigenous subsistence fishery set-aside within the Cook Inlet EEZ would require further analysis and consideration by NMFS and the Council that are outside of the original scope and purpose of this action. As noted in response the *Comment 79,* FMPs are adaptive and the Council may recommend amending the Salmon FMP in the future to incorporate feedback from tribes in upcoming consultations that NMFS has committed to honoring.

A Summary of the Nature of Tribal Concerns

Comments from Alaska Native representatives received prior to the close of the public comment period are summarized in the Comments and Responses section of this final rule. NMFS also received three written comments from Alaska Native representatives after the public comment period closed. Tribal comments received after the public comment period are included in the summary below.

Cook Inlet tribes expressed a significant interest in collaborating with NMFS on this action. The primary question received from Alaska Native representatives during tribal outreach and engagement on amendment 16 was how this action would impact tribal subsistence fishing. Based on the above tribal engagements, consultations, and public comments, the nature of tribal concerns fell into four main categories: (1) impacts to traditional lands/Federal trust responsibility; (2) indigenous subsistence fishery set-aside; (3) salmon status/fishery management; and (4) fish & habitat enhancement. The nature of tribal concerns are summarized for each of these categories below.

Impacts To Traditional Lands/Federal Trust Responsibility

All Cook Inlet tribes expressed that this action would affect their traditional ancestral territories, customary areas of use, and vital way of life and would impact environmental and cultural resources that are imperative to the health, safety, and welfare of tribal citizens. Cook Inlet tribes stated that NMFS must partner with them to fulfill the Federal trust responsibility and international obligations for tribal rights and food security, including access to traditional resources such as salmon. Cook Inlet tribes stated that Federal, territorial, and State regulations have dramatically reduced the fishing opportunities for Alaska Native tribal citizens while globally significant markets have been developed to sell Alaskan fish, which have eroded indigenous rights and have had a huge impact on Alaska Native peoples.

Indigenous Subsistence Fishery Set-Aside

Cook Inlet tribes expressed concerns that less weight was given to tribal comments relative to the commercial fishing industry and that they do not have a voice in the government process. Cook Inlet tribes asked NMFS to be

mindful of this power imbalance and that the action impacts tribal rights. Personal use, educational fishery permits, and a few (select) subsistence permits are how tribal citizens currently harvest fish in Cook Inlet. Cook Inlet tribes believe that Federal management of salmon in the Cook Inlet EEZ provides a long overdue opportunity for an indigenous subsistence fishery (*e.g.,* tribal fishery set-aside) in the Cook Inlet EEZ, ahead of commercial and recreational needs, and would like to work with NMFS to develop an indigenous set-aside for salmon harvest that has priority over other uses.

Salmon Status/Fishery Management

One Cook Inlet tribe felt overescapement was unsustainable for the available habitat. Another tribe had significant concerns about the EEZ fishing and wanted to maintain the conservation corridor in Cook Inlet. Other tribes highlighted that there are numerous and increasing threats to Cook Inlet salmon populations that decrease salmon runs originating from Cook Inlet. Several Cook Inlet tribes support Federal management of salmon in the Cook Inlet EEZ. Tribes generally emphasized that NMFS must do more to achieve a precautionary fishery management approach based on threats to Cook Inlet salmon populations. Tribes also stated that by merely focusing on the commercial and recreational fishing that was the subject of the District Court's 2022 order, NMFS ignores subsistence needs, which are also included in the Magnuson-Stevens Act. With subsistence use representing only one tenth of one percent of Cook Inlet harvest, Cook Inlet tribes stated a subsistence fishery would not threaten commercial or recreational fisheries, have a very small effect on the salmon populations, and have a notably beneficial impact on tribal cultural perpetuation, citizen health, and wellbeing. Cook Inlet tribes requested that Federal fishery management be precautionary with TACs based on timely in-season escapements and not historical harvest averages and pre-season forecasts. Tribal recommendations included funding better escapement data collection and genetic analysis of EEZ-harvested salmon, development of a salmon database with in-season genetic data, development of test fisheries, a fishery period from July 16 to August 15, allowing only one 12-hour fishing period per week, and maintaining the current drift gillnet length of 150 fathoms (274.32 m). Lastly, tribes recommend creating a tribal fishing opportunity modeled after the Alaska Subsistence Halibut Program and providing proxy fishing opportunities developed collectively with Tribal governments to ensure tribal elders and other tribal citizens who are physically unable to harvest fish in the Cook Inlet EEZ can access salmon.

Fish & Habitat Enhancement

All Cook Inlet tribes that commented want to work towards increasing salmon runs and have been taking actions (*e.g.,* fish and habitat enhancement) over the past 50 years to address Alaska Native community concerns by reducing invasive species; replacing fish passage barriers in their district; restoring over 45 miles (72.42 km) of upstream salmon habitat; leading regional efforts for the prevention, early detection, and treatment of aquatic invasive plants; collecting baseline stream data; and surveying streams for inclusion in the State of Alaska Anadromous Waters Catalog for protection. Cook Inlet tribes have also performed research to advise habitat assessments and salmon restoration planning.

In summary, tribal concerns were focused on providing relief to Alaska Native salmon fishing families and communities as well as continued communication in the NMFS tribal engagement and consultation process as it relates to fishery resource access that sustains the tribal way of life. Detailed meeting summaries of the tribal concerns listed above are available on the NMFS Alaska Region website (see **ADDRESSES**).

NMFS's Position Supporting the Need To Issue the Regulation

This final rule is needed to implement Federal fisheries management of the Cook Inlet EEZ. NMFS's position is stated in the preamble to the proposed rule and this final rule, and in the comments and responses section.

Statement of the Extent to Which the Concerns of Tribal Officials Have Been Met

From the perspective of a number of Cook Inlet tribes, the primary concern was over how this fishery would impact Alaska Native subsistence fishing and, secondly, if the action would include a tribal subsistence set-aside. The Analysis prepared for this action provides information on the current subsistence fisheries in Cook Inlet and indicates that there has not been a subsistence fishery in the EEZ during the time period for which NMFS has data, though tribes have stated that they did historically fish in EEZ waters. Throughout litigation and for much of the development of amendment 16, a tribal subsistence fishery did not come up as a management proposal. This final rule, developed in response to court decisions on a strict timeline, therefore authorizes only commercial drift gillnet and recreational fishing in the EEZ. To address tribal concerns that amendment 16 did not include an indigenous subsistence set-aside, NMFS has committed to honoring the Cook Inlet tribal consultation requests received in 2024 and welcomes further engagement and discussion.

NMFS and the Council have made significant efforts in conducting direct outreach and engagement, and for NMFS in conducting tribal consultations, with Alaska Native representatives, which include Alaska Native tribes, Alaska Native corporations, and Native organizations and communities over the last few years. NMFS made significant efforts to involve Alaska Native representatives in the development of this action. In conjunction with Council outreach, NMFS provided information to Alaska Native representatives that were interested in engaging at each step in the process and consulted with interested Alaska Native representatives, as described above.

NMFS considered all input from these consultations and engagements, consistent with E.O. 13175 and the agency's tribal consultation obligations before reaching a final decision on this action. In addition, NMFS committed to honoring the Cook Inlet tribal consultation and information requests to discuss the possibility of a tribal subsistence fishery in the Cook Inlet EEZ.

NMFS acknowledges the long-standing challenges that Alaska Native representatives have had communicating with the agency and appreciates the tribes' commitment to communicating needed improvements to the consultation process. NMFS has taken several actions over the last year, including building staff capacity and hosting listening sessions, and intends to continue to improve tribal consultation.

List of Subjects

15 CFR Part 902

Reporting and recordkeeping requirements.

50 CFR Part 600

Administrative practice and procedure, Confidential business information, Fish, Fisheries, Fishing, Fishing vessels, Foreign relations, Intergovernmental relations, Penalties,

Reporting and recordkeeping requirements, Statistics.

50 CFR Part 679

Alaska, Fisheries, Reporting and recordkeeping requirements.

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 amends 15 CFR part 902 and 50 CFR parts 600 and 679 as follows:

TITLE 15—COMMERCE AND FOREIGN TRADE

PART 902—NOAA INFORMATION COLLECTION REQUIREMENTS UNDER THE PAPERWORK REDUCTION ACT: OMB COLLECTION NUMBERS

■ 1. The authority citation for 15 CFR part 902 continues to read as follows:

Authority: 44 U.S.C. 3501 *et seq.*

■ 2. Amend § 902.1, in the table in paragraph (b), by adding in numerical order entries for ''679.114'', ''679.115'', ''679.117(b)(1)(xiv)'', and ''679.118(f)(2)'' to read as follows:

§ 902.1 OMB control numbers assigned pursuant to the Paperwork Reduction Act.

* * * * *

(b) * * *

CFR part or section where the information collection requirement is located	Current OMB control No. (all numbers begin with 0648–)
* * * * *	
50 CFR	.....
* * * * *	
679.114	–0818
679.115	–0818
679.117(b)(1)(xiv)	–0445
679.118(f)(2)	–0818

CFR part or section where the information collection requirement is located	Current OMB control No. (all numbers begin with 0648–)
* * * * *	

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TITLE 50—WILDLIFE AND FISHERIES

PART 600—MAGNUSON-STEVENS ACT PROVISIONS

■ 3. The authority citation for part 600 continues to read as follows:

Authority: 5 U.S.C. 561 and 16 U.S.C. 1801 *et seq.*

■ 4. Amend § 600.725, in the table in paragraph (v), under the heading ''VII. North Pacific Fishery Management Council'' by revising entry ''8'' to read as follows:

§ 600.725 General prohibitions.

* * * * *

(v) * * *

Fishery	Authorized gear types
* * * * * * *	
VII. North Pacific Fishery Management Council	
* * * * * * *	
8. Alaska Salmon Fishery (FMP):	
A. East Area	A. Hook and line.
B. Cook Inlet EEZ Area	B. Drift gillnet, handline, rod and reel, hook and line.
* * * * * * *	

* * * * *

PART 679—FISHERIES OF THE EXCLUSIVE ECONOMIC ZONE OFF ALASKA

■ 5. The authority citation for part 679 continues to read as follows:

Authority: 16 U.S.C. 773 *et seq.,* 1801 *et seq.,* 3631 *et seq.;* Pub. L. 108–447; Pub. L. 111–281.

■ 6. Amend § 679.1 by revising paragraph (i)(1) to read as follows:

§ 679.1 Purpose and scope.

* * * * *

(i) * * *

(1) Regulations in this part govern commercial fishing for salmon by fishing vessels of the United States in the West Area and commercial and recreational fishing for salmon in the Cook Inlet EEZ Area of the Salmon Management Area.

* * * * *

■ 7. Amend § 679.2 by:

■ a. Adding, in alphabetical order, the definition for ''Daily bag limit'';

■ b. Revising the definition of ''Federally permitted vessel,''

■ c. Adding paragraph (7) to the definition of ''Fishing trip'';

■ d. Adding, in alphabetical order, the definitions for ''Possession limit'' and ''Registered Salmon Receiver'';

■ e. Revising the definition of ''Salmon Management Area''; and

■ f. Adding, in alphabetical order, the definitions for ''Salmon shoreside processor'' and ''Waters of Cook Inlet.''

The additions and revision read as follows:

§ 679.2 Definitions.

* * * * *

Daily bag limit means the maximum number of salmon a person may retain in any calendar day from recreational fishing in the Cook Inlet EEZ Area.

* * * * *

Federally permitted vessel means a vessel that is named on a Federal fisheries permit issued pursuant to § 679.4(b), a Salmon Federal Fisheries Permit issued pursuant to § 679.114(b), or a Federal crab vessel permit issued pursuant to § 680.4(k) of this chapter. Federally permitted vessels must conform to regulatory requirements for purposes of fishing restrictions in habitat conservation areas, habitat conservation zones, habitat protection areas, and the Modified Gear Trawl Zone; for purposes of anchoring prohibitions in habitat protection areas; for purposes of requirements for the BS and GOA nonpelagic trawl fishery pursuant to §§ 679.7(b)(9) and (c)(5), and 679.24(f); and for purposes of VMS requirements.

* * * * *

Fishing trip means:

* * * * *

(7) For purposes of subpart J of this part, the period beginning when a vessel

operator commences commercial fishing for any salmon species in the Cook Inlet EEZ Area and ending when the vessel operator offloads or transfers any unprocessed salmon species from that vessel.

* * * * *

Possession limit means the maximum number of unprocessed salmon a person may possess from recreational fishing in the Cook Inlet EEZ Area.

* * * * *

Registered Salmon Receiver means a person holding a Registered Salmon Receiver Permit issued by NMFS.

* * * * *

Salmon Management Area means those waters of the EEZ off Alaska (see figures 22 and 23 to part 679) under the authority of the Salmon FMP. The Salmon Management Area is divided into three areas: the East Area, the West Area, and the Cook Inlet EEZ Area:

(1) *The East Area* means the area of the EEZ in the Gulf of Alaska east of the longitude of Cape Suckling (143°53.6′ W).

(2) *The West Area* means the area of the EEZ off Alaska in the Bering Sea, Chukchi Sea, Beaufort Sea, and the Gulf of Alaska west of the longitude of Cape Suckling (143°53.6′ W), but excludes the Cook Inlet EEZ Area, Prince William Sound Area, and the Alaska Peninsula Area. The Prince William Sound Area and the Alaska Peninsula Area are shown in figure 23 to this part and described as:

(i) The Prince William Sound Area means the EEZ shoreward of a line that starts at 60°16.8′ N and 146°15.24′ W and extends southeast to 59°42.66′ N and 144°36.20′ W and a line that starts at 59°43.28′ N and 144°31.50′ W and extends northeast to 59°56.4′ N and 143°53.6′ W.

(ii) The Alaska Peninsula Area means the EEZ shoreward of a line at 54°22.5′ N from 164°27.1′ W to 163°1.2′ W and a line at 162°24.05′ W from 54°30.1′ N to 54°27.75′ N.

(3) *The Cook Inlet EEZ Area,* shown in figure 22 to this part, means the EEZ of Cook Inlet north of a line at 59°46.15′ N.

* * * * *

Salmon shoreside processor means any person or vessel that receives, purchases, or arranges to purchase, and processes unprocessed salmon harvested in the Cook Inlet EEZ Area, except a Registered Salmon Receiver.

* * * * *

Waters of Cook Inlet means, for the purposes of §§ 679.28(f)(6)(x) and 679.117(b)(1)(xiv), all Federal waters and Alaska State waters north of a line from Cape Douglas (58°51.10′ N) to Point Adam (59°15.27′ N).

* * * * *

■ 8. Amend § 679.3 by revising paragraph (f) to read as follows:

§ 679.3 Relation to other laws.

* * * * *

(f) *Domestic fishing for salmon.* Management of the salmon commercial troll fishery and recreational fishery in the East Area of the Salmon Management Area, defined at § 679.2, is delegated to the State of Alaska. Regulations governing the commercial drift gillnet salmon fishery and recreational salmon fishery in the Cook Inlet EEZ Area, defined at § 679.2, are set forth in subpart J of this part.

* * * * *

§ 679.7 [Amended]

■ 9. Amend § 679.7 by removing and reserving paragraph (h).

■ 10. Amend § 679.25 by:

■ a. Revising paragraph (a)(1) introductory text;

■ b. Adding paragraphs (a)(1)(vi) and (a)(2)(vi) through (viii); and

■ c. Revising paragraphs (b) introductory text and (b)(3) and (8).

The revisions and additions read as follows:

§ 679.25 Inseason adjustments.

(a) * * *

(1) *Types of adjustments.* Inseason adjustments for directed fishing for groundfish, fishing for IFQ or CDQ halibut, or fishing for Cook Inlet EEZ Area salmon issued by NMFS under this section include:

* * * * *

(vi) Adjustment of TAC for any salmon species or stock and closure or opening of a season in all or part of the Cook Inlet EEZ Area.

(2) * * *

(vi) Any inseason adjustment taken under paragraph (a)(1)(vi) of this section must be based on a determination that such adjustments are necessary to prevent:

(A) Overfishing of any species or stock of fish or shellfish;

(B) Harvest of a TAC for any salmon species or stock that, on the basis of the best available scientific information, is found by NMFS to be incorrectly specified; or

(C) Underharvest of a TAC for any salmon species or stock when catch information indicates that the TAC has not been reached, and there is not a conservation or management concern for any species or stock that would also be harvested with additional fishing effort.

(vii) The selection of the appropriate inseason management adjustments under paragraphs (a)(1)(vi) of this section must be from the following authorized management measures and must be based on a determination by the Regional Administrator that the management adjustment selected is the least restrictive necessary to achieve the purpose of the adjustment:

(A) Closure of a management area or portion thereof, or gear type, or season to all salmon fishing; or

(B) Reopening of a management area or season to achieve the TAC for any of the salmon species or stock without exceeding the TAC of any other salmon species or stock.

(viii) The adjustment of a TAC for any salmon species or stock under paragraph (a)(1)(vi) of this section must be based upon a determination by the Regional Administrator that the adjustment is based upon the best scientific information available concerning the biological stock status of the species or stock in question and that the currently specified TAC is incorrect. Any adjustment to a TAC must be reasonably related to the change in biological stock status.

(b) *Data.* Information relevant to one or more of the following factors may be considered in making the determinations required under paragraphs (a)(2)(i), (ii), (vi) and (vii) of this section:

* * * * *

(3) Relative distribution and abundance of stocks of groundfish species, salmon species or stocks, and prohibited species within all or part of a statistical area;

* * * * *

(8) Any other factor relevant to the conservation and management of groundfish species, salmon species or stocks, or any incidentally caught species that are designated as prohibited species or for which a PSC limit has been specified.

* * * * *

■ 11. Amend § 679.28 by adding paragraph (f)(6)(x) to read as follows:

§ 679.28 Equipment and operational requirements

* * * * *

(f) * * *

(6) * * *

(x) You operate a vessel named, or required to be named, on an SFFP issued under § 679.114 in the waters of Cook Inlet during a calendar day when directed fishing for salmon using drift gillnet gear is open in the Cook Inlet

EEZ Area and have drift gillnet gear on board or deployed.

* * * * *

■ 12. Add subpart J, consisting of §§ 679.110 through 679.119, to read as follows:

Subpart J—Salmon Fishery Management

Sec.
679.110 Applicability.
679.111 through 679.113 [Reserved]
679.114 Permits.
679.115 Recordkeeping and reporting.
679.116 [Reserved]
679.117 Salmon fisheries prohibitions.
679.118 Management measures.
679.119 Recreational salmon fisheries.

Subpart J—Salmon Fishery Management

§ 679.110 Applicability.

This subpart contains regulations governing the commercial and recreational harvest of salmon in the Salmon Management Area (See § 679.2).

§ 679.111 through 679.113 [Reserved]

§ 679.114 Permits.

(a) *Requirements*—(1) *What permits are available?* The following table describes the permits available under this subpart that authorize the retention, processing, and receipt of salmon in the Cook Inlet EEZ Area, respectively, along with date of effectiveness for each permit and reference paragraphs for further information:

If permit type is:	Permit is in effect from issue date through the end of:	For more information, see . . .
(i) *Salmon Federal Fisheries Permit* (SFFP)	3 years or until expiration date shown on permit.	Paragraph (b) of this section.
(ii) *Salmon Federal Processor Permit* (SFPP) ...	Until expiration date shown on permit	Paragraph (c) of this section.
(iii) *Registered Salmon Receiver Permit* (RSRP)	1 year	Paragraph (d) of this section.

(2) *Permit and logbook required by participant and fishery.* For the various types of permits issued pursuant to this subpart, refer to § 679.115 for recordkeeping and reporting requirements.

(3) *Permit application.* (i) A person may obtain an application for a new permit, or for renewal or revision of an existing permit, from NMFS for any of the permits under this section and must submit forms to NMFS as instructed in application instructions. All permit applications may be completed online and printed from the NMFS Alaska Region website (See § 679.2);

(ii) Upon receipt of an incomplete or improperly completed permit application, NMFS will notify the applicant of the deficiency in the permit application. If the applicant fails to correct the deficiency, the permit will not be issued. NMFS will not approve a permit application that is untimely or incomplete;

(iii) The owner or authorized representative of a vessel, owner or authorized representative of a processor, and Registered Salmon Receiver must obtain a separate permit for each vessel, entity, operation, or facility, as appropriate to each Federal permit in this section;

(iv) All permits are issued free of charge;

(v) NMFS will consider objective written evidence in determining whether an application is timely. The responsibility remains with the sender to provide objective written evidence of when an application to obtain, amend, or to surrender a permit was received by NMFS (*e.g.,* certified mail or other method that provides written evidence that NMFS Alaska Region received it); and

(vi) For applications delivered by hand delivery or carrier, the date the application was received by NMFS is the date NMFS staff signs for it upon receipt. If the application is submitted by fax or mail, the receiving date of the application is the date stamped received by NMFS.

(4) *Disclosure.* NMFS will maintain a list of permit holders that may be disclosed for public inspection.

(5) *Sanctions and denials.* Procedures governing permit sanctions and permit denials for enforcement purposes are found at subpart D of 15 CFR part 904. Such procedures are not required for any other purposes under this part.

(6) *Harvesting privilege.* Permits issued pursuant to this subpart are neither a right to the resource nor any interest that is subject to the ''Takings Clause'' provision of the Fifth Amendment to the U.S. Constitution. Rather, such permits represent only a harvesting privilege that may be revoked or amended subject to the requirements of the Magnuson-Stevens Act and other applicable law.

(7) *Permit surrender.* (i) NMFS will recognize the voluntary surrender of a permit issued under this subpart, if a permit is authorized to be surrendered and if an application is submitted by the permit holder or authorized representative and approved by NMFS; and

(ii) For surrender of an SFFP and SFPP, refer to paragraphs (b)(3)(ii) and (c)(3)(ii) of this section, respectively.

(b) *Salmon Federal Fisheries Permit (SFFP)*—(1) *Requirements.* (i) No vessel of the United States may be used to commercially fish for salmon in the Cook Inlet EEZ Area unless the owner or authorized representative first obtains an SFFP for the vessel issued under this part. Only persons who are U.S. citizens are authorized to obtain an SFFP; and

(ii) Each vessel used to commercially fish for salmon within the Cook Inlet EEZ Area must have a legible copy of a valid SFFP on board at all times. The vessel operator must present the valid SFFP for inspection upon the request of any authorized officer.

(2) *Vessel operation.* An SFFP authorizes a vessel to conduct operations in the Cook Inlet EEZ Area.

(3) *Duration*—(i) *Length of permit effectiveness.* NMFS issues SFFPs on a 3-year cycle, and an SFFP is in effect from the effective date through the expiration date, as indicated on the SFFP, unless the SFFP is revoked, suspended, or modified under § 600.735 or § 600.740 of this chapter, or surrendered in accordance with paragraph (a)(7) of this section.

(ii) *Surrendered permit.* (A) An SFFP may be voluntarily surrendered in accordance with paragraph (a)(7) of this section. NMFS will not reissue a surrendered SFFP to the owner or authorized representative of a vessel named on an SFFP until after the expiration date of the surrendered SFFP as initially issued.

(B) An owner or authorized representative who applied for and received an SFFP must notify NMFS of the intention to surrender the SFFP by submitting an SFFP application found at the NMFS Alaska Region website and indicating on the application that surrender of the SFFP is requested. Upon receipt and approval of an SFFP surrender application, NMFS will withdraw the SFFP from active status.

(4) *Amended permit.* An owner or authorized representative who applied for and received an SFFP must notify NMFS of any change in the permit

information by submitting an SFFP application found at the NMFS Alaska Region website. The owner or authorized representative must submit the application form as instructed on the form. Except as provided under paragraph (b)(3)(ii)(B) of this section, upon receipt and approval of an application form for permit amendment, NMFS will issue an amended SFFP.

(5) *SFFP application.* To obtain, amend, renew, or surrender an SFFP, the vessel owner or authorized representative must complete an SFFP application form per the instructions from the NMFS Alaska Region website. The owner or authorized representative of the vessel must sign and date the application form, certifying that all information is true, correct, and complete to the best of their knowledge and belief. If the application form is completed by an authorized representative, proof of authorization must accompany the application form.

(6) *Issuance.* (i) Except as provided in subpart D of 15 CFR part 904, upon receipt and approval of a properly completed permit application, NMFS will issue an SFFP required by paragraph (b) of this section.

(ii) NMFS will send an SFFP with the appropriate logbooks to the owner or authorized representative, as provided under § 679.115.

(7) *Transfer.* An SFFP issued under paragraph (b) of this section is not transferable or assignable and is valid only for the vessel for which it is issued.

(c) *Salmon Federal Processor Permit (SFPP)*—(1) *Requirements.* No salmon shoreside processor, as defined at § 679.2, may process salmon harvested in the Cook Inlet EEZ Area, unless the owner or authorized representative first obtains an SFPP issued under this subpart. A salmon shoreside processor may not be operated in a category other than as specified on the SFPP. A legible copy of a valid SFPP must be on site at the salmon shoreside processor at all times and must be presented for inspection upon the request of any authorized officer.

(2) *SFPP application.* To obtain, amend, renew, or surrender an SFPP, the owner or authorized representative of the salmon shoreside processor must complete an SFPP application form per the instructions from the NMFS Alaska Region website. The owner or authorized representative of the salmon shoreside processor must sign and date the application form, certifying that all information is true, correct, and complete to the best of their knowledge and belief. If the application form is completed by an authorized representative, proof of authorization must accompany the application form.

(3) *Issuance.* Except as provided in subpart D of 15 CFR part 904, upon receipt and approval of a properly completed permit application, NMFS will issue an SFPP required by paragraph (c) of this section.

(4) *Duration*—(i) *Length of effectiveness.* An SFPP is in effect from the effective date through the date of permit expiration, unless it is revoked, suspended, or modified under § 600.735 or § 600.740 of this chapter, or surrendered in accordance with paragraph (a)(7) of this section.

(ii) *Surrendered permit.* (A) An SFPP may be voluntarily surrendered in accordance with paragraph (a)(7) of this section. NMFS may reissue an SFPP to the person to whom the SFPP was initially issued in the same fishing year in which it was surrendered.

(B) An owner or authorized representative who applied for and received an SFPP must notify NMFS of the intention to surrender the SFPP by submitting an SFPP application found at the NMFS Alaska Region website and indicating on the application form that surrender of the SFPP is requested. Upon receipt and approval of an SFPP surrender application, NMFS will withdraw the SFPP from active status.

(5) *Amended permit.* An owner or authorized representative who applied for and received an SFPP must notify NMFS of any change in the permit information by submitting an SFPP application found at the NMFS Alaska Region website. The owner or authorized representative must submit the application form as instructed on the form. Upon receipt and approval of an SFPP amendment application, NMFS will issue an amended SFPP.

(6) *Transfer.* An SFPP issued under this paragraph (c) is not transferable or assignable and is valid only for the salmon shoreside processor for which it is issued.

(d) *Registered Salmon Receiver Permit (RSRP)*—(1) *Requirements.* An RSRP authorizes the person identified on the permit to receive a landing of salmon from an SFFP holder at any time during the fishing year for which it is issued until the RSRP expires, as indicated on the RSRP, or is revoked, suspended, or modified under § 600.735 or § 600.740 of this chapter, or surrendered in accordance with paragraph (a)(7) of this section. An RSRP is required for any person, other than an SFPP holder, to receive salmon commercially harvested in the Cook Inlet EEZ Area from the person(s) who harvested the fish. A legible copy of the RSRP must be present at the time and location of a landing. The RSRP holder or their authorized representative must make the RSRP available for inspection upon the request of any authorized officer.

(2) *Application.* To obtain, amend, renew, or surrender an RSRP, the owner or authorized representative must complete an RSRP application form per the instructions from the NMFS Alaska Region website. The owner or authorized representative of a Registered Salmon Receiver must sign and date the application form, certifying that all information is true, correct, and complete to the best of their knowledge and belief. If the application form is completed by an authorized representative, proof of authorization must accompany the application form.

(3) *Issuance.* Except as provided in subpart D of 15 CFR part 904, upon receipt and approval of a properly completed permit application, NMFS will issue an RSRP required by paragraph (d) of this section.

(4) *Duration.* An RSRP is issued on an annual cycle defined as May through the end of April of the next calendar year, to persons who submit a Registered Salmon Receiver Permit application that NMFS approves.

(i) An RSRP is in effect from the first day of May in the year for which it is issued or from the date of issuance, whichever is later, through the end of the current annual cycle, unless it is revoked, suspended, or modified under § 600.735 or § 600.740 of this chapter, or surrendered in accordance with paragraph (a)(7) of this section.

(ii) An RSRP may be voluntarily surrendered in accordance with paragraph (a)(7) of this section. An RSRP may be reissued to the permit holder of record in the same fishing year in which it was surrendered.

(5) *Amended permit.* An owner or authorized representative who applied for and received an RSRP must notify NMFS of any change in the permit information by submitting an RSRP application found at the NMFS Alaska Region website. The owner or authorized representative must submit the application form as instructed on the form. Upon receipt and approval of an RSRP amendment application, NMFS will issue an amended RSRP.

§ 679.115 Recordkeeping and reporting.

(a) *General recordkeeping and reporting (R&R) requirement.* R&R requirements include, but are not limited to, paper and electronic documentation, logbooks, forms, reports, and receipts.

(1) *Salmon logbooks and forms.* (i) The Regional Administrator will prescribe and provide logbooks required

under this section. All forms required under this section are available from the NMFS Alaska Region website or may be requested by calling the Sustainable Fisheries Division at 907–586–7228. These forms may be completed online, or submitted according to the instructions shown on the form.

(ii) The operator must use the current edition of the logbooks and current format of the forms, unless they obtain prior written approval from NMFS to use logbooks from the previous year. Upon approval from NMFS, electronic versions of the forms may be used.

(iii) Commercial salmon harvest that occurred in the Cook Inlet EEZ Area must be recorded in eLandings by an SFPP or RSRP holder. See paragraph (b) of this section for more information.

(2) *Responsibility.* (i) The operator of a vessel, the manager of a salmon shoreside processor (hereafter referred to as the manager), and a Registered Salmon Receiver are responsible for complying with applicable R&R requirements in this section.

(ii) The owner of a vessel, the owner of a salmon shoreside processor, and the owner of a Registered Salmon Receiver are responsible for ensuring their employees and agents comply with applicable R&R requirements in this section.

(3) *Fish to be recorded and reported.* The operator of a vessel or manager must record and report the following information (see paragraphs (a)(3)(i) through (iv) of this section) for all salmon, groundfish (see table 2a to this part), halibut and crab, forage fish (see table 2c to this part), and sculpins (see table 2c to this part). The operator of a vessel or manager may record and report the following information (see paragraphs (a)(3)(i) through (iv) of this section) for other species (see table 2d to this part):

(i) Harvest information from vessels;

(ii) Receipt information from vessels, buying stations, and tender vessels, including fish received from vessels not required to have an SFFP or FFP, and fish received under contract for handling or processing for another processor;

(iii) Discard or disposition information, including fish reported but not delivered to the operator or manager (*e.g.,* fish used on board a vessel, retained for personal use, discarded at sea), when receiving catch from a vessel, buying station, or tender vessel; and

(iv) Transfer information, including fish transferred off the vessel or out of the facility.

(4) *Inspection and retention of records*—(i) *Inspection of records.* The operator of a vessel, a manager, and a Registered Salmon Receiver must make available for inspection R&R documentation they are required to retain under this section upon the request of an authorized officer; and

(ii) *Retention of records.* The operator of a vessel, a manager, and a Registered Salmon Receiver must retain the R&R documentation they are required to make under this section as follows:

(A) Retain these records on board a vessel, on site at the salmon shoreside processor or stationary floating processor (see § 679.2), or at the Registered Salmon Receiver's place of business, as applicable, until the end of the fishing year during which the records were made and for as long thereafter as fish or fish products recorded in the R&R documentation are retained on site.

(B) Retain these records for 3 years after the end of the fishing year during which the records were made.

(5) *Maintenance of records.* The operator of a vessel, a manager, and a Registered Salmon Receiver must maintain all records described in this section in English and in a legible, timely, and accurate manner, based on Alaska local time (A.l.t.); if handwritten, in indelible ink; if computer-generated, as a readable file or a legible printed paper copy.

(6) *Custom processing.* The manager or Registered Salmon Receiver must record products that result from custom processing for another person in eLandings consistently throughout a fishing year using one of the following two methods:

(i) For combined records, record landings, discards or dispositions, and products of custom-processed salmon routinely in eLandings using processor name, any applicable RSRP number or SFPP number, and ADF&G processor code; or

(ii) For separate records, record landings, discards or dispositions, and products of custom-processed salmon in eLandings identified by the name, SFPP number or RSRP number, and ADF&G processor code of the associated business entity.

(7) *Representative.* The operator of a vessel, manager, and RSRP holder may identify one contact person to complete the logbook and forms and to respond to inquiries from NMFS.

(b) *Interagency Electronic Reporting System (IERS) and eLandings*—(1) *Responsibility.* (i) An eLandings User must obtain at his or her own expense hardware, software, and internet connectivity to support internet submissions of commercial fishery landings for which participants report to NMFS: landing data, production data, and discard or disposition data. The User must enter this information via the internet by logging on to the eLandings system at *https://elandings.alaska.gov* or other NMFS-approved software or by using the desktop client software.

(ii) If the User is unable to submit commercial fishery landings of Cook Inlet EEZ salmon due to hardware, software, or internet failure for a period longer than the required reporting time, the User must contact NMFS Sustainable Fisheries Division at 907–586–7228 for instructions. When the hardware, software, or internet is restored, the User must enter this same information into eLandings or other NMFS-approved software.

(2) *eLandings processor registration.* (i) Before a User can use the eLandings system to report landings, production, discard, or disposition data, he or she must request authorization to use the system, reserve a unique UserID, and obtain a password by using the internet to complete the eLandings processor registration at *https://elandings.alaska.gov/elandings/Register;*

(ii) Upon registration acceptance, the User must print, sign, and mail or fax the User Agreement Form to NMFS at the address or fax number shown on the form. Confirmation is emailed to indicate that the User is registered, authorized to use eLandings, and that the UserID and User's account are enabled; and

(iii) The User's signature on the registration form means that the User agrees to the following terms:

(A) To use eLandings access privileges only for submitting legitimate fishery landing reports;

(B) To safeguard the UserID and password to prevent their use by unauthorized persons; and

(C) To ensure that the User is authorized to submit landing reports for the processor permit number(s) listed.

(3) *Information required for eLandings processor registration form.* The User must enter the following information (see paragraphs (b)(3)(i) through (ix) of this section) to obtain operation registration and UserID registration:

(i) Select the operation type from the dropdown list;

(ii) Enter a name that will refer to the specific operation. For example, if the plant is in Kodiak and the company is East Pacific Seafoods, the operation name might read ''East Pacific Seafoods-Kodiak;''

(iii) Enter ADF&G processor code;

(iv) Enter all the Federal permits associated with the operation;

(A) If a processor for Cook Inlet EEZ salmon, enter the SFPP number; and

(B) If a Registered Salmon Receiver, enter the RSRP number;

(v) Enter the home port code (see tables 14a, 14b, and 14c to this part) for the operation;

(vi) If a tender operation, the operator must enter the ADF&G vessel identification number of the vessel;

(vii) If a buying station or Registered Salmon Receiver operation is a vehicle, enter vehicle license number and the state of license issuance;

(viii) If a buying station, tender vessel, or custom processor, enter the following information to identify the associated processor where the processing will take place: operation type, ADF&G processor code, and applicable SFPP number, and RSRP number; and

(ix) Each operation requires a primary User. Enter the following information for the primary User for the new operation: create and enter a UserID, initial password, company name, User name (name of the person who will use the UserID), city and state where the operation is located, business telephone number, business fax number, business email address, security question, and security answer.

(4) *Information entered automatically for eLandings landing report.* eLandings autofills the following fields from processor registration records (see paragraph (b)(2) of this section): UserID, processor company name, business telephone number, email address, port of landing, operation type (for catcher/processors, motherships, or stationary floating processors), ADF&G processor code, and Federal permit number. The User must review the autofilled cells to ensure that they are accurate for the landing that is taking place. eLandings assigns a unique landing report number and an ADF&G electronic fish ticket number upon completion of data entry.

(5) *Registered Salmon Receiver landing report.* The manager and a Registered Salmon Receiver that receives salmon from a vessel issued an SFFP under § 679.114 and that is required to have an SFPP or RSRP under § 679.114(c) or (d) must use eLandings or other NMFS-approved software to submit a daily landing report during the fishing year to report processor identification information and the following information under paragraphs (b)(5)(i)(A) through (C) of this section:

(i) Information entered for each salmon delivery to a salmon shoreside processor or Registered Salmon Receiver. The User for a shoreside processor, stationary floating processor, or Registered Salmon Receiver must enter the information specified at (b)(5)(i)(A) through (C) of this section for each salmon delivery provided by the operator of a vessel, the operator or manager of an associated buying station or tender vessel, and from processors for reprocessing or rehandling product into eLandings or other NMFS-approved software:

(A) *Delivery information.* The User must:

(*1*) For crew size, enter the number of licensed crew aboard the vessel, including the operator;

(*2*) Enter the management program name in which harvest occurred (see paragraph (a)(1)(iii) of this section);

(*3*) Enter the ADF&G salmon statistical area of harvest;

(*4*) For date of landing, enter date (mm/dd/yyyy) that the delivery was completed;

(*5*) Indicate (YES or NO) whether delivery is from a buying station or tender vessel;

(*6*) If the delivery is received from a buying station, indicate the name of the buying station;

(*7*) If the delivery is received from a tender vessel, enter the ADF&G vessel registration number;

(*8*) If delivery is received from a vessel, indicate the ADF&G vessel registration number of the vessel; and

(*9*) Mark whether the vessel logsheet has been received.

(B) *Catch information.* The User must record the number and landed scale weight in pounds of salmon, including any applicable weight modifier such as delivery condition code, and disposition code of fish by species.

(C) *Discard or disposition information.* (*1*) The User must record discard or disposition of fish: that occurred on and was reported by a vessel; that occurred on and was reported by a salmon shoreside processor or Registered Salmon Receiver; and that occurred prior to, during, and/or after production at the salmon shoreside processor.

(*2*) The User for a salmon shoreside processor or Registered Salmon Receiver must submit a landing report containing the information described in paragraph (b)(5)(i) of this section for each salmon delivery from a specific vessel by 1200 hours, A.l.t., of the day following completion of the delivery. If the landed scale weight required in paragraph (b)(5)(i)(B) of this section is not available by this deadline, the User must transmit an estimated weight and count for each species by 1200 hours, A.l.t., of the day following completion of the delivery, and must submit a revised landing report with the landed scale weight for each species by 1200 hours, A.l.t., of the third day following completion of the delivery.

(*3*) By using eLandings, the User for a salmon shoreside processor or a Registered Salmon Receiver and the operator of the vessel providing information to the User for the salmon shoreside processor or Registered Salmon Receiver accept the responsibility of and acknowledge compliance with § 679.117(b)(5).

(ii) [Reserved]

(c) *Logbooks*—(1) *Requirements.* (i) All Cook Inlet EEZ Area logbook pages must be sequentially numbered.

(ii) Except as described in paragraph (c)(1)(iii) or (iv) of this section, no person may alter or change any entry or record in a logbook;

(iii) An inaccurate or incorrect entry or record in printed data must be corrected by lining out the original and inserting the correction, provided that the original entry or record remains legible. All corrections must be made in ink; and

(iv) If after an electronic logsheet is signed, an error is found in the data, the operator must make any necessary changes to the data, sign the new logsheet, and export the revised file to NMFS. The operator must retain both the original and revised logsheet reports.

(2) *Logsheet distribution and submittal.* The operator of a vessel must distribute and submit accurate copies of logsheets to the salmon shoreside processor or Registered Salmon Receiver and to NOAA Fisheries Office of Law Enforcement Alaska Region according to the logsheet instructions.

(3) *Salmon drift gillnet vessel daily fishing log.* The operator of a vessel that is required to have an SFFP under § 679.114(b), and that is using drift gillnet gear to harvest salmon in the Cook Inlet EEZ Area, must maintain a salmon drift gillnet vessel daily fishing log.

(4) *Reporting time limits.* The operator of a vessel using drift gillnet gear must record in the daily fishing log the information from the following table for each set within the specified time limit:

REPORTING TIME LIMITS, CATCHER VESSEL DRIFT GILLNET GEAR

Required information	Time limit for recording
(i) SFFP number, set number, date and time gear set, date and time gear hauled, beginning and end positions of set, length of net deployed, total number of salmon, and estimated hail weight of groundfish for each set.	Within 2 hours after completion of gear retrieval.
(ii) Discard and disposition information	Prior to landing.
(iii) Submit an accurate copy of the groundfish discards reported on the daily fishing log to shoreside processor or Registered Salmon Receiver receiving catch.	At the time of catch delivery.
(iv) All other required information	At the time of catch delivery.
(v) Operator sign the completed logsheets	At the time of catch delivery.

§ 679.116 [Reserved]

§ 679.117 Salmon fisheries prohibitions.

In addition to the general prohibitions specified in § 600.725 of this chapter and § 679.7, it is unlawful for any person to do any of the following:

(a) *The East Area and the West Area*—(1) *East Area.* Engage in commercial fishing for salmon using any gear except troll gear, defined at § 679.2, in the East Area of the Salmon Management Area, defined at § 679.2 and figure 23 to this part.

(2) *West Area.* Engage in commercial fishing for salmon in the West Area of the Salmon Management Area, defined at § 679.2 and figure 23 to this part.

(b) *Cook Inlet EEZ Area*—(1) *Commercial fishery participants.* (i) Engage in commercial fishing for salmon in the Cook Inlet EEZ Area of the Salmon Management Area, defined at § 679.2 and figure 22 to this part, with a vessel of the United States that does not have on board a legible copy of a valid SFFP issued to the vessel under § 679.114;

(ii) Engage in commercial fishing for salmon using any gear except drift gillnet gear, described at § 679.118, in the Cook Inlet EEZ Area;

(iii) Have on board, retrieve, or deploy any gear, except a drift gillnet legally configured for the Cook Inlet EEZ Area commercial salmon fishery while commercial fishing for salmon in the Cook Inlet EEZ Area;

(iv) Deploy more than one drift gillnet while commercial fishing for salmon in the Cook Inlet EEZ Area;

(v) Deploy drift gillnet gear within, or allow any portion of drift gillnet gear to enter, Alaska State waters on the same calendar day that drift gillnet gear is also deployed in the Cook Inlet EEZ Area while commercial fishing for salmon in the Cook Inlet EEZ Area;

(vi) Deploy drift gillnet gear in excess of the allowable configuration for total length and mesh size specified at § 679.118(f) while commercial fishing for salmon in the Cook Inlet EEZ Area;

(vii) Use a vessel named, or required to be named, on an SFFP to fish for salmon in the Cook Inlet EEZ Area if that vessel fishes for salmon in Alaska State waters on the same calendar day;

(viii) Possess salmon, harvested in Alaska State waters, on board a vessel commercial fishing for salmon in the Cook Inlet EEZ Area;

(ix) Have salmon on board a vessel at the time a fishing trip commences in the Cook Inlet EEZ Area;

(x) Conduct recreational fishing for salmon, or have recreational or subsistence salmon on board, while commercial fishing for salmon in the Cook Inlet EEZ Area;

(xi) Use or employ aircraft (manned or unmanned) to locate salmon or to direct commercial fishing while commercial fishing for salmon in the Cook Inlet EEZ Area 1 hour before, during, and 1 hour after a commercial salmon fishing period;

(xii) Land salmon harvested in Alaska State waters concurrently with salmon harvested commercially in the Cook Inlet EEZ Area;

(xiii) Land or transfer salmon harvested while commercial fishing for salmon in the Cook Inlet EEZ Area, within the EEZ off Alaska;

(xiv) Operate a vessel named, or required to be named, on an SFFP in the waters of Cook Inlet without an operable VMS as required in § 679.28(f).

(xv) Discard any salmon harvested while commercial fishing for salmon in the Cook Inlet EEZ Area.

(xvi) Engage in commercial fishing for salmon in the Cook Inlet EEZ Area contrary to notification of inseason action, closure, or adjustment issued under §§ 679.25 and 679.118.

(2) *Recreational fishery participants.* (i) Engage in recreational fishing for salmon using any gear except for handline, rod and reel, or hook and line gear, defined at § 600.10, in the Cook Inlet EEZ Area of the Salmon Management Area, defined at § 679.2 and figure 22 to this part;

(ii) Use more than a single line, with more than two hooks attached, per angler in the Cook Inlet EEZ Area;

(iii) No person shall possess on board a vessel, including charter vessels and pleasure craft used for fishing, salmon retained in the Cook Inlet EEZ Area that have been filleted, mutilated, or otherwise disfigured in any manner, except that each salmon may be cut into no more than two pieces with a patch of skin on each piece, naturally attached. One piece from one salmon on board may be consumed.

(iv) Exceed the daily bag limits and possession limits established under § 679.119.

(v) Engage in recreational fishing for salmon in the Cook Inlet EEZ Area contrary to notification of inseason action, closure, or adjustment issued under § 679.118.

(3) *Processors and Registered Salmon Receivers.* (i) Receive, purchase or arrange for purchase, discard, or process salmon harvested in the Cook Inlet EEZ Area without having on site a legible copy of a valid SFPP or valid RSRP issued under § 679.114;

(ii) Process or receive salmon harvested in the Cook Inlet EEZ Area without submitting a timely and complete landing report as required under § 679.115;

(iii) Process salmon harvested in the Cook Inlet EEZ Area in the EEZ off Alaska; and

(iv) Receive or transport salmon caught in the Cook Inlet EEZ Area without an SFPP or RSRP issued under § 679.114.

(4) *Recordkeeping and reporting.* (i) Fail to comply with or fail to ensure compliance with requirements in § 679.114 or § 679.115.

(ii) Alter or forge any permit or document issued under § 679.114 or § 679.115;

(iii) Fail to submit or submit inaccurate information on any report, application, or statement required under this part; and

(iv) Intentionally submit false information on any report, application, or statement required under this part.

(5) *General.* Fail to comply with any other requirement or restriction specified in this part or violate any provision under this part.

§ 679.118 Management measures.

This section applies to vessels engaged in commercial fishing and recreational fishing for salmon in the Cook Inlet EEZ Area.

(a) *Harvest limits*—(1) *TAC.* NMFS, after consultation with the Council, will specify the annual TAC amounts for commercial fishing for each salmon stock or species after accounting for projected recreational fishing removals.

(2) *Annual TAC determination.* The annual determinations of TAC for each salmon species or stock may be based on a review of the following:

(i) Resource assessment documents prepared regularly for the Council that provide information on historical catch trends; updated estimates of the MSY of the salmon stocks or stock complexes; assessments of the stock condition of each salmon stock or stock complex; SSC recommendations on reference points established for salmon stocks; management uncertainty; assessments of the multispecies and ecosystem impacts of harvesting the salmon stocks at current levels, given the assessed condition of stocks, including consideration of rebuilding depressed stocks; and alternative harvesting strategies and related effects on the salmon species;

(ii) Social and economic considerations that are consistent with Salmon FMP goals for the Cook Inlet EEZ Area, including the need to promote efficiency in the utilization of fishery resources, including minimizing costs; the desire to conserve, protect, and rebuild depleted salmon stocks; the importance of a salmon fishery to harvesters, processors, local communities, and other salmon users in Cook Inlet; and the need to promote utilization of certain species.

(b) *Annual specifications*—(1) *Proposed specifications.* (i) As soon as practicable after consultation with the Council, NMFS will publish proposed specifications for the salmon fishery in the Cook Inlet EEZ Area; and

(ii) NMFS will accept public comment on the proposed specifications established by this section for a period specified in the notice of proposed specifications published in the **Federal Register**.

(2) *Final specifications.* NMFS will consider comments received on the proposed specifications and will publish a notice of final specifications in the **Federal Register** unless NMFS determines that the final specifications would not be a logical outgrowth of the notice of proposed specifications. If the final specifications would not be a logical outgrowth of the notice of proposed specifications, NMFS will either:

(i) Publish a revised notice of proposed specifications in the **Federal Register** for public comment, and after considering comments received on the revised proposed specifications, publish a notice of final specifications in the **Federal Register**; or

(ii) Publish a notice of final specifications in the **Federal Register** without an additional opportunity for public comment based on a finding that good cause pursuant to the Administrative Procedure Act justifies waiver of the requirement for a revised notice of proposed specifications and opportunity for public comment thereon.

(c) *Management authority*—(1) *Fishery closures.* (i) For commercial fishing, if NMFS determines that any salmon TAC for commercial fishing as specified under paragraph (b) of this section has been or may be reached for any salmon species or stock, NMFS will publish notification in the **Federal Register** prohibiting commercial fishing for salmon in the Cook Inlet EEZ Area.

(ii) For recreational fishing, if NMFS determines that any salmon ABC as specified under paragraph (b) of this section has been or may be reached, NMFS will publish notification in the **Federal Register** prohibiting retention of that salmon species when recreational fishing in the Cook Inlet EEZ Area and may also prohibit recreational fishing for one or more salmon species in the Cook Inlet EEZ Area. The Regional Administrator maintains the authority to open or close the Cook Inlet EEZ Area to recreational fishing for one or more salmon species if they deem it appropriate for conservation or other management purposes. Factors such as the ABC, anticipated harvest rates, expected mortality, and the number of participants will be considered in making any such determination.

(d) *Commercial Fishery maximum retainable amounts (MRA)*—(1) *Proportion of basis species.* The MRA of an incidental catch species is calculated as a proportion of the basis species retained on board the vessel using the retainable percentages in table 10 to this part for the GOA species categories.

(2) *Calculation.* (i) To calculate the MRA for a specific incidental catch species, an individual retainable amount must be calculated with respect to each basis species that is retained on board that vessel.

(ii) To obtain these individual retainable amounts, multiply the appropriate retainable percentage for the incidental catch species/basis species combination, set forth in table 10 to this part for the GOA species categories, by the amount of the relevant basis species on board, in round-weight equivalents.

(iii) The MRA for that specific incidental catch species is the sum of the individual retainable amounts for each basis species.

(e) *Seasons*—(1) *Fishing season.* Directed fishing for salmon using drift gillnet gear in the Cook Inlet EEZ Area may be conducted from 0700 hours, A.l.t., from the third Monday in June or June 19, whichever is later, through 1900 hours, A.l.t., August 15.

(2) *Fishing periods.* Notwithstanding other provisions of this part, fishing for salmon with drift gillnet gear in the Cook Inlet EEZ Area is authorized during the fishing season only from 0700 hours, A.l.t., until 1900 hours, A.l.t., Mondays and from 0700 hours, A.l.t., until 1900 hours, A.l.t., Thursdays from the third Monday in June or June 19, whichever is later, until July 15, and from August 1 until August 15. From July 16 until July 31, fishing for salmon with drift gillnet gear in the Cook Inlet EEZ Area is authorized during the fishing season only from 0700 hours, A.l.t., until 1900 hours, A.l.t., Thursdays. Fishing for salmon using drift gillnet gear at times other than during the specified fishing periods is not authorized.

(f) *Legal gear*—(1) *Size.* Drift gillnet gear must be no longer than 200 fathoms (1.1 kilometer) in length, 45 meshes deep, and have a mesh size of no greater than 6 inches (15.24 cm).

(2) *Marking.* Drift gillnet gear must be marked at both ends with buoys that legibly display the vessel's SFFP number.

(3) *Floating.* The float line and floats of gillnets must be floating on the surface of the water while the net is fishing, unless natural conditions cause the net to temporarily sink. Staking or otherwise fixing a drift gillnet to the seafloor is not authorized.

(4) *Measurement.* For purposes of paragraph (f)(1) of this section, nets must be measured, either wet or dry, by determining the maximum or minimum distance between the first and last hanging of the net when the net is fully extended with traction applied at one end only.

§ 679.119 Recreational salmon fisheries.

(a) *Daily bag limits and possession limits.* For each person recreational fishing for salmon in the Cook Inlet EEZ Area, the following daily bag and possession limits apply:

(1) *Chinook salmon.* From April 1 to August 31, the daily bag limit is one Chinook salmon of any size and the possession limit is one daily bag limit

(one Chinook salmon). From September 1 to March 31, the daily bag limit is two Chinook salmon of any size and the possession limit is one daily bag limit (two Chinook salmon).

(2) *Coho salmon, sockeye salmon, pink salmon, and chum salmon.* For coho salmon, sockeye salmon, pink salmon, and chum salmon, the daily bag limit is a total of six fish combined, of any size, of which a maximum of three may be coho salmon. The possession limit for coho salmon, sockeye salmon, pink salmon, and chum salmon is one daily bag limit (six fish total).

(3) *Combination of bag/possession limits.* A person who fishes for or possesses salmon in or from the Cook Inlet EEZ Area, specified in paragraph (a) of this section, may not combine such bag or possession limits with any bag or possession limit applicable to Alaska State waters.

(4) *Responsibility for bag/possession limits.* The operator of a vessel that fishes for or possesses salmon in or from the Cook Inlet EEZ Area is responsible for the cumulative bag or possession limit specified in paragraph (a) of this section that apply to that vessel, based on the number of persons aboard.

(5) *Transfer at sea.* A person who fishes for or possesses salmon in or from the Cook Inlet EEZ Area under a bag or possession limit specified in paragraph (a) of this section may not transfer a salmon at sea from a fishing vessel to any other vessel, and no person may receive at sea such salmon.

(b) *Careful release.* Any salmon brought aboard a vessel and not immediately returned to the sea with a minimum of injury will be included in the daily bag limit of the person catching the salmon.

■ 13. Add figure 22 to part 679 to read as follows:

Figure 22 to Part 679—Cook Inlet EEZ Area

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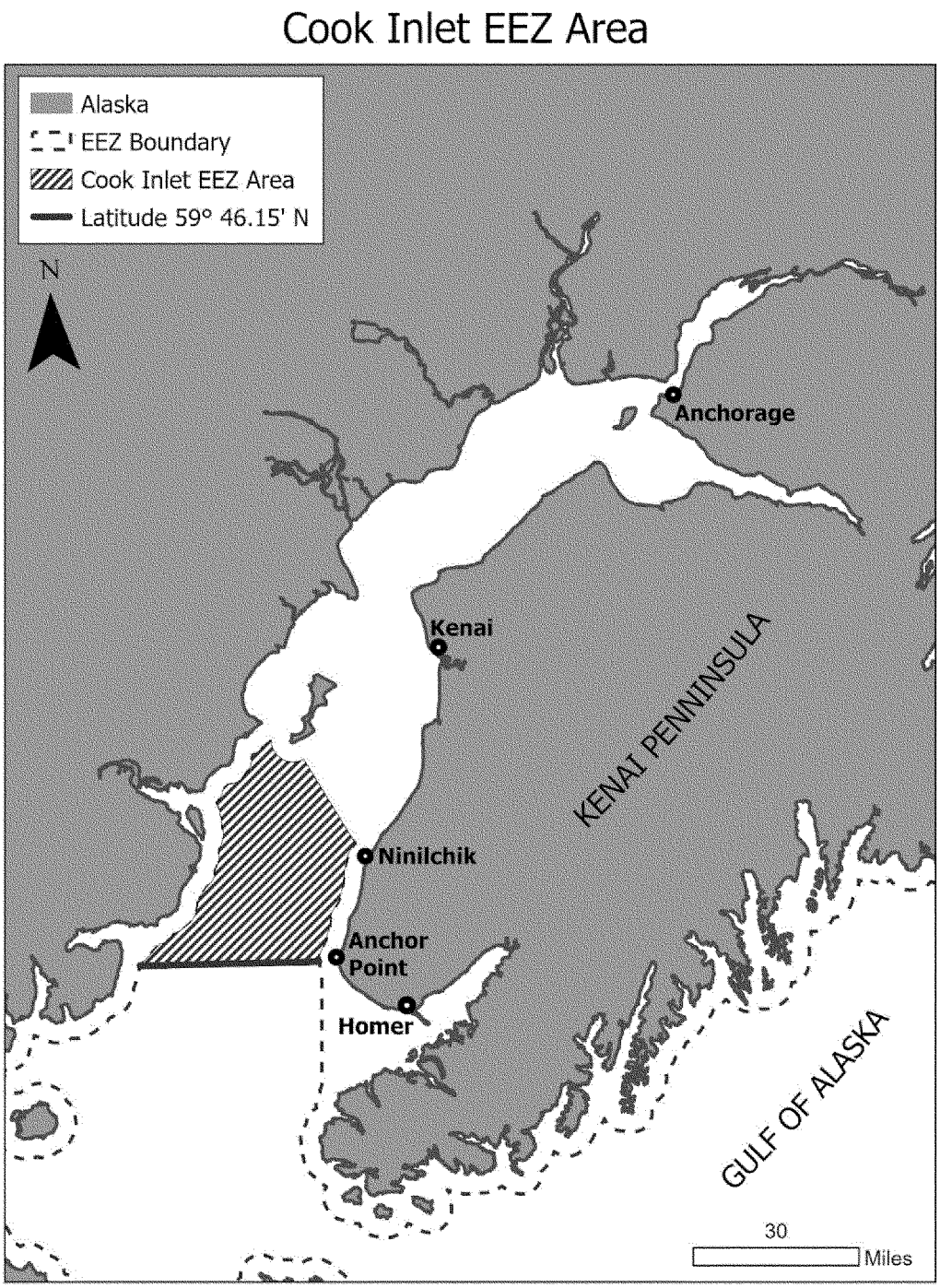

BILLING CODE 3510–22–C

■ 14. Amend table 15 to part 679 by:

■ a. Adding in alphabetical order the entry ''Gillnet, drift'' under the heading ''NMFS AND ADF&G GEAR CODES''; and

■ b. Removing the entry ''Gillnet, drift'' under the heading ''ADF&G GEAR CODES''.

The addition reads as follows:

* * * * *

TABLE 15 TO PART 679—GEAR CODES, DESCRIPTIONS, AND USE

Name of gear	Use alphabetic code to complete the following:			Use numeric code to complete the following:		
	Alpha gear code	NMFS logbooks	Electronic check-in/ check-out	Numeric gear code	IERS eLandings	ADF&G COAR
NMFS AND ADF&G GEAR CODES						
* *	*	*	*	*	*	
Gillnet, drift				03	X	X
* *	*	*	*	*	*	

[FR Doc. 2024–08664 Filed 4–29–24; 8:45 am]

BILLING CODE 3510–22–P

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Part VII

Department of the Treasury

Internal Revenue Service

26 CFR Part 1
Transfer of Certain Credits; Final Rule

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9993]

RIN 1545–BQ64

Transfer of Certain Credits

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final Regulations and removal of temporary regulations.

SUMMARY: This document contains final regulations concerning the election under the Inflation Reduction Act of 2022 to transfer certain tax credits. The regulations describe rules for the election to transfer eligible credits in a taxable year, including definitions and special rules applicable to partnerships and S corporations and regarding excessive credit transfer or recapture events. In addition, the regulations describe rules related to a required IRS pre-filing registration process. These regulations affect eligible taxpayers that elect to transfer eligible credits in a taxable year and the transferee taxpayers to which eligible credits are transferred.

DATES:

Effective Date: These regulations are effective on July 1, 2024.

Applicability Dates: For dates of applicability, *see* §§ 1.6418–1(r), 1.6418–2(g), 1.6418–3(f), 1.6418–4(d), and 1.6418–(5)(j).

FOR FURTHER INFORMATION CONTACT: Concerning the regulations, James Holmes at (202) 317–5114 and Jeremy Milton at (202) 317–5665 (not toll-free numbers).

SUPPLEMENTARY INFORMATION: This document contains final regulations that amend the Income Tax Regulations (26 CFR part 1) to implement the statutory provisions of section 6418 of the Internal Revenue Code (Code), as enacted by section 13801(b) of Public Law 117–169, 136 Stat. 1818, 2009 (August 16, 2022), commonly known as the Inflation Reduction Act of 2022 (IRA).

Background

I. Overview of Section 6418

Section 6418(a) provides that, in the case of an eligible taxpayer that elects to transfer to an unrelated transferee taxpayer all (or any portion specified in the election) of an eligible credit determined with respect to the eligible taxpayer for any taxable year, the transferee taxpayer specified in such election (and not the eligible taxpayer) is treated as the taxpayer for purposes of the Code with respect to such credit (or such portion thereof). Under section 6418(b), any amount of consideration paid by the transferee taxpayer to the eligible taxpayer for the transfer of such credit (or such portion thereof) is (1) required to be paid in cash, (2) not included in the eligible taxpayer's gross income, and (3) not allowed as a deduction to the transferee taxpayer under any provision of the Code.

Section 6418(f)(2) defines the term ''eligible taxpayer'' to mean any taxpayer that is not described in section 6417(d)(1)(A) of the Code (that is, any taxpayer that is not an ''applicable entity'' by reason of section 6417(d)(1)(A)).

Section 6418(f)(1)(A) defines the term ''eligible credit'' to mean each of the following 11 credits:

(1) So much of the credit for alternative fuel vehicle refueling property allowed under section 30C of the Code that, pursuant to section 30C(d)(1), is treated as a credit listed in section 38(b) of the Code (section 30C credit);

(2) The renewable electricity production credit determined under section 45(a) of the Code (section 45 credit);

(3) The credit for carbon oxide sequestration determined under section 45Q(a) of the Code (section 45Q credit);

(4) The zero-emission nuclear power production credit determined under section 45U(a) of the Code (section 45U credit);

(5) The clean hydrogen production credit determined under section 45V(a) of the Code (section 45V credit);

(6) The advanced manufacturing production credit determined under section 45X(a) of the Code (section 45X credit);

(7) The clean electricity production credit determined under section 45Y(a) of the Code (section 45Y credit);

(8) The clean fuel production credit determined under section 45Z(a) of the Code (section 45Z credit);

(9) The energy credit determined under section 48 of the Code (section 48 credit);

(10) The qualifying advanced energy project credit determined under section 48C of the Code (section 48C credit); and

(11) The clean electricity investment credit determined under section 48E of the Code (section 48E credit).

Under section 6418(f)(1)(B), an election to transfer a section 45 credit, section 45Q credit, section 45V credit, or section 45Y credit is made separately with respect to each facility and for each taxable year during the credit period of the respective credit. Pursuant to section 6418(f)(1)(C) an eligible credit does not include any business credit carryforward or business credit carryback. Section 6418(g)(4) provides that an eligible taxpayer may not make an election to transfer credits for progress expenditures.

Pursuant to section 6418(e)(1), an eligible taxpayer must make an election to transfer any portion of an eligible credit on its original tax return for the taxable year for which the credit is determined by the due date of such return (including extensions of time) but such an election cannot be made earlier than 180 days after the date of the enactment of section 6418 by section 13801(b) of the IRA (that is, in no event earlier than 180 days after August 16, 2022, which is February 13, 2023). An eligible taxpayer cannot revoke an election to transfer any portion of a credit. Pursuant to section 6418(d), a transferee taxpayer takes the transferred eligible credit into account in its first taxable year ending with, or after, the eligible taxpayer's taxable year with respect to which the transferred eligible credit was determined. Section 6418(e)(2) provides that a transferee taxpayer may not make any additional transfers of a transferred eligible credit under section 6418.

II. Section 6418 Rules for Partnerships and S Corporations

Pursuant to section 6418(c), in the case of a partnership or an S corporation (as defined in section 1361(a)) that directly holds a facility or property for which an eligible credit is determined: (1) the election to transfer an eligible credit is made at the entity level and no election by any partner or shareholder is allowed with respect to such facility or property; (2) any amount received as consideration for a transferred eligible credit is treated as tax exempt income for purposes of sections 705 and 1366 of the Code; and (3) a partner's distributive share of the tax exempt income is based on the partner's distributive share of the transferred eligible credit.

III. Special Rules

Section 6418(g) provides special rules regarding the elective transfer of certain credits. Section 6418(g)(1) provides that, as a condition of, and prior to, any transfer of any portion of an eligible credit pursuant to section 6418(a), the Secretary of the Treasury or her delegate (Secretary) may require such information (including, in such form or manner as is determined appropriate by the Secretary, such information returns) or registration as the Secretary deems necessary for purposes of preventing

duplication, fraud, improper payments, or excessive payments under section 6418.

Pursuant to section 6418(g)(2), if the Secretary determines that there is an excessive credit transfer to a transferee taxpayer, then the tax imposed on the transferee taxpayer by chapter 1 of the Code (chapter 1), regardless of whether such entity would otherwise be subject to tax under chapter 1, is increased in the year of such determination by the amount of the excessive credit transfer plus 20 percent of such excessive credit transfer. The additional amount of 20 percent of the excessive credit transfer does not apply if the transferee taxpayer demonstrates to the satisfaction of the Secretary that the excessive credit transfer resulted from reasonable cause.

An excessive credit transfer is defined in section 6418(g)(2)(C) as, with respect to a facility or property for which an election is made under section 6418(a) for any taxable year, an amount equal to the excess of (i) the amount of the eligible credit claimed by the transferee taxpayer with respect to such facility or property for such taxable year; over (ii) the amount of the eligible credit that, without application of section 6418, would be otherwise allowable under the Code with respect to such facility or property for such taxable year.

Pursuant to section 6418(g)(3), if a section 48 credit, section 48C credit, or section 48E credit is transferred, the basis reduction rules of section 50(c) of the Code apply to the applicable investment credit property as if the transferred eligible credit was allowed to the eligible taxpayer. Further, if applicable investment credit property is disposed of, or otherwise ceases to be investment credit property with respect to the eligible taxpayer, before the close of the recapture period as described in section 50(a)(1), then certain notification requirements apply. The eligible taxpayer must notify the transferee taxpayer of a recapture event in such form and manner as the Secretary may provide. In addition, the transferee taxpayer must notify the eligible taxpayer of the recapture amount, if any, in such form and manner as the Secretary may provide.

Section 6418(h) directs the Secretary to issue regulations or other guidance as may be necessary to carry out the purposes of section 6418, including guidance providing rules for determining a partner's distributive share of the tax exempt income described in section 6418(c)(1).

IV. Notice 2022–50

On October 24, 2022, the Department of the Treasury (Treasury Department) and the IRS published Notice 2022–50, 2022–43 I.R.B. 325, to, among other things, request feedback from the public on potential issues with respect to the transfer election provisions under section 6418 that may require guidance. Stakeholders submitted more than 200 letters in response to Notice 2022–50.

V. Proposed and Temporary Regulations

On June 21, 2023, informed by the stakeholder feedback received in response to Notice 2022–50, the Treasury Department and the IRS published proposed regulations under section 6418 (REG–101610–23) in the **Federal Register** (88 FR 40496) to provide guidance on transfer elections (proposed regulations). The proposed regulations included proposed § 1.6418–4, which contained proposed rules identical to the text of temporary regulations (TD 9975) at § 1.6418–4T. Those temporary regulations also were published on June 21, 2023, in the **Federal Register** (88 FR 40086) to provide guidance on the mandatory information and registration requirements for transfer elections. The preamble to the proposed regulations discusses stakeholder feedback received in response to Notice 2022–50 and explains in greater detail the provisions of the proposed regulations.

VI. 6417 Final Regulations

On March 11, 2024, the Treasury Department and the IRS published final regulations under section 6417 (TD 9988) in the **Federal Register** (89 FR 17546) to provide guidance on the section 6417 elective payment election (section 6417 final regulations). Among other things, the section 6417 final regulations provide guidance on the definition of applicable entity under section 6417(d)(1)(A).

Summary of Comments and Explanation of Revisions

This Summary of Comments and Explanation of Revisions summarizes comments submitted in response to the proposed regulations and the revisions to the proposed regulations reflected in these final regulations. The Treasury Department and the IRS received more than 80 written comments in response to the proposed regulations. The comments are available for public inspection at *https://www.regulations.gov* or upon request. A hearing was conducted in person and telephonically on August 23, 2023, during which 10 presenters provided testimony. After full consideration of the comments received and testimony provided, these final regulations adopt the proposed regulations with modifications in response to such comments and testimony as described in this Summary of Comments and Explanation of Revisions.

Comments merely summarizing or interpreting the proposed regulations, recommending statutory revisions to section 6418 or other statutes, or addressing issues that are outside the scope of this rulemaking, such as the calculation of eligible credits (including any bonus credit amounts) or recommended changes to IRS forms, are beyond the scope of these regulations and are generally not described in this preamble.

I. General Rule and Definitions

Proposed § 1.6418–1 would have described general rules related to the transfer of eligible credits. Proposed § 1.6418–1(a) would have provided an overview of a transfer of eligible credits, and paragraphs (b) through (q) would have provided definitions of terms under the section 6418 regulations. Commenters addressed certain aspects of the proposed definitions, as described in this part I. To the extent a definition in § 1.6418–1(b) through (q) is not addressed in this part I and no comment addressed it, such definition is adopted by this Treasury Decision as proposed.

A. Eligible Taxpayer

Section 6418(f)(2) defines the term ''eligible taxpayer'' to mean any taxpayer that is not described in section 6417(d)(1)(A). Proposed § 1.6418–1(b) would have clarified that the term ''eligible taxpayer'' means any taxpayer (as defined in section 7701(a)(14) of the Code), other than one described in section 6417(d)(1)(A) and § 1.6417–1(b). The intended cite in the proposed regulations was to § 1.6417–1(c), rather than § 1.6417–1(b). As the preamble to the proposed regulations noted, the term ''taxpayer'' in section 7701(a)(14) means ''any person subject to any internal revenue tax'' and generally includes entities that have a United States employment tax or excise tax obligation even if they do not have a United States income tax obligation.

A commenter recommended that an eligible taxpayer also include any person that does not have a United States internal revenue tax obligation, such as a taxpayer that is only subject to the taxes of a territory of the United States. Broadening the definition of eligible taxpayer in section 6418(f)(2) is beyond the definition of taxpayer in section 7701(a)(14) and is not supported by section 6418. Section 6418(f)(2) defines eligible taxpayer as ''any taxpayer'' not described in section 6417(d)(1)(A). Section 7701(a)(14)

provides the definition of taxpayer for purposes of the Code. Pursuant to section 7701(a), the definition under section 7701(a)(14) apples to all Code provisions unless a different definition is otherwise distinctly expressed or the definition in section 7701(a)(14) is manifestly incompatible with the intent of section 6418. Under section 6418, there is no distinct expression that the term ''taxpayer'' should include those not subject to any United States tax obligations, and there is no indication that the definition in section 7701(a)(14) is incompatible with the intent of section 6418. Thus, it is appropriate to use the definition of taxpayer in section 7701(a)(14) for purposes of defining eligible taxpayer for purposes of section 6418, and these regulations finalize the definition of eligible taxpayer as proposed.

A commenter requested a clarification that a partnership wholly or partially owned by applicable entities described in section 6417(d)(1)(A) qualifies as an eligible taxpayer under section 6418(f)(2). The Treasury Department and the IRS agree that if such a partnership has not elected to be treated as an applicable entity with respect to the section 45Q credit, section 45V credit, or section 45X credit, it can otherwise qualify as an eligible taxpayer. Section 6418(f)(2) defines eligible taxpayer as a taxpayer other than one described in section 6417(d)(1)(A). Under section 6417 and the section 6417 final regulations, a partnership (regardless of the tax status of its partners) can only be treated as an applicable entity with respect to the section 45Q credit, section 45V credit, or section 45X credit and only if the partnership makes an elective payment election. Further, section 7701(a)(14) defines the term ''taxpayer'' as any person subject to any internal revenue tax. The term ''person'' is defined in section 7701(a)(1) and includes a partnership. Consequently, if a partnership has not elected to be treated as an applicable entity with respect to the section 45Q credit, section 45V credit, or section 45X credit, it can qualify as an eligible taxpayer.

The same commenter also sought to clarify that a partnership that has one or more applicable entity partners described in section 6417(d)(1)(A) is entitled to transfer the entirety of the eligible credits determined with respect to a property or facility held directly by the partnership without a reduction of the eligible credits allocable to the applicable entity partners. The Treasury Department and the IRS agree that such a partnership is entitled to transfer the entirety of the eligible credits determined with respect to a property or facility held directly by the partnership; however, section 50(b)(3) and (4) may limit the amount of eligible investment tax credits (ITCs) determined with respect to any tax-exempt or government entity partner.

B. Eligible Credit Property

Section 6418(a) states that an eligible taxpayer can elect to transfer all (or any portion specified in the election) of an eligible credit determined with respect to such eligible taxpayer. Proposed § 1.6418–1(a) would have provided that an eligible taxpayer may make a transfer election to transfer any specified portion of an eligible credit determined with respect to any eligible credit property of the eligible taxpayer for any taxable year. Proposed § 1.6418–1(d) would have defined the term ''eligible credit property'' as the unit of property of an eligible taxpayer with respect to which the amount of an eligible credit is determined. Proposed § 1.6418–1(d)(1) through (11) would have described the unit of property that is considered an eligible credit property for each of the 11 eligible credits.

A commenter recommended that the final regulations use the same concept of a unit of property as is used for the various underlying eligible credit provisions (for example, energy property or energy project for purposes of section 48, and qualified facility for purposes of section 45). The proposed regulations referenced the statutory rules for each eligible credit to determine the appropriate unit of measurement for section 6418 registration and election and provided additional information relevant for each eligible credit. For example, proposed § 1.6418–1(d)(2) would have provided that, in the case of a section 45 credit, the relevant unit of property is a qualified facility described in section 45(d). Likewise, proposed § 1.6418–1(d)(9) would have provided that, in the case of a section 48 credit, the relevant unit of property is an energy property described in section 48, or, at the option of the taxpayer, an energy project described in section 48(a)(9)(A)(ii) and defined in guidance. The proposed regulations, without modification, are consistent with this comment. Thus, these final regulations, consistent with the proposed regulations, base the definition of an eligible credit property on the underlying Code provisions for the eligible credits and no further changes are necessary.

Another commenter asked for clarification that section 48 credits determined with respect to energy property qualifying as ''energy storage technology'' under section 48(c)(6)(A) would be eligible credits that could be transferred under section 6418. The preamble to the proposed regulations provided in part that energy property is comprised of all components of property necessary to generate electricity up to the point of transmission or distribution. The commenter raised that ''energy storage technology'' is specifically designated as ''energy property'' under section 48(a)(3)(A)(ix), but unlike other forms of ''energy property,'' it does not generate electricity. The Treasury Department and the IRS confirm that, to the extent a section 48 credit is determined with respect to energy property held by an eligible taxpayer, whether the credit is with respect to energy storage technology or other energy property, such credit is an eligible credit that can be transferred under section 6418 by the eligible taxpayer.

Other commenters recommended revising the definition of eligible credit property for purposes of section 45Q. Proposed § 1.6418–1(d)(3) would have provided that an eligible credit is determined, for purposes of section 45Q, based on a *single process train of carbon capture equipment* described in § 1.45Q–2(c)(3). Commenters recommended that, for the section 45Q credit, the definition of eligible credit property be a component of a single process train for the capture, disposal, utilization, or injection of qualified carbon oxide, rather than a single process train of carbon capture equipment described in § 1.45Q–2(c)(3). Other commenters urged that the final regulations reconcile the proposed rules with Rev. Rul. 2021–13, 2021–30 I.R.B. 152, under which a taxpayer need own only one component in a single process train to be the person to whom the section 45Q credit is attributable to (assuming the taxpayer also meets the requirements of section 45Q(a), as applicable). The Treasury Department and the IRS agree that guidance under section 45Q does not require a taxpayer to own every component of a single process train and have revised the language under § 1.6418–1(d)(3) (defining eligible credit property with respect to the section 45Q credit) to state ''[i]n the case of a section 45Q credit, a component of carbon capture equipment within a *single process train* described in § 1.45Q–2(c)(3).''

C. Paid in Cash

Section 6418(b)(1) requires that any amount paid by a transferee taxpayer to an eligible taxpayer as consideration for a transfer be paid in cash. Proposed § 1.6418–1(f) would have defined the

term ''paid in cash'' to mean a payment in United States dollars that (1) is made by cash, check, cashier's check, money order, wire transfer, automated clearing house (ACH) transfer, or other bank transfer of immediately available funds; (2) is made within the period beginning on the first day of the eligible taxpayer's taxable year during which a specified credit portion is determined and ending on the due date for completing a transfer election statement (as provided in proposed § 1.6418–2(b)(5)(iii)); and (3) may include a transferee taxpayer's contractual commitment to purchase eligible credits with United States dollars in advance of the date a specified credit portion is transferred to such transferee taxpayer if all payment of United States dollars are made in a manner described in proposed § 1.6418–1(f)(1) and during the time period in proposed § 1.6418–1(f)(2).

Several commenters recommended revising the proposed paid in cash rule so that advanced payments could be made for eligible credits that will be determined in later taxable years. For example, commenters specifically requested that the final regulations allow upfront payments for transfers of eligible credits that are production tax credits (PTCs) that are expected to be determined in a future taxable year. Commenters suggested that such a rule would more closely align the timing of payments for eligible credits that are PTCs with the timing of payments for eligible credits that are ITCs. Commenters raised that upfront payments for PTCs determined in future taxable years are standard in tax equity transactions and that allowing for upfront payments for future PTCs under section 6418 would more closely align transferability with traditional tax equity structures. Another commenter asked for clarification that the use of certain loan structures would not violate the paid in cash rule. Specifically, the commenter requested confirmation that loans, including security arrangements, made on arm's length terms by a transferee taxpayer or a third party to an eligible taxpayer would not be treated as an upfront payment under an eligible credit purchase and sale agreement or otherwise recharacterized.

Allowing advanced payments prior to the taxable year an eligible credit is determined may more closely align the section 6418 regulations with current tax equity transactions. However, proposed § 1.6418–1(f)(2) would have specifically provided a timing safe harbor that is intended to provide certainty as to the treatment of payments of United States dollars made during the prescribed time period. Allowing advanced payments would also raise several complex legal and administrative issues, such as whether an excessive credit transfer has occurred or if the eligible taxpayer has gross income if prepaid eligible credits were not transferred in a later tax year. No commenter addressed the administrative and legal challenges of allowing for advanced payments. Based on these reasons, the Treasury Department and the IRS have adopted the paid in cash definition of the proposed regulations without change.

Further, the Treasury Department and the IRS note that there is no prohibition on either a transferee taxpayer or another third-party loaning funds to an eligible taxpayer, including loans secured by an eligible credit purchase and sale agreement, provided such loans are at arm's length and treated as loans for Federal tax purposes. Whether such loans are treated as upfront payments for eligible credits or otherwise recharacterized is an analysis based on the facts and circumstances of the loan and is otherwise outside the scope of these final regulations.

D. Specified Credit Portion

Section 6418(a) provides that an eligible taxpayer can elect to transfer all (or any portion specified in the election) of an eligible credit determined with respect to such taxpayer. Proposed § 1.6418–1(h) would have defined the term ''specified credit portion'' to mean a proportionate share (including all) of an eligible credit determined with respect to a single eligible credit property of the eligible taxpayer that is specified in a transfer election. The proposed regulations further provided that a specified credit portion of an eligible credit reflects a proportionate share of each bonus credit amount that is taken into account in calculating the entire amount of eligible credit determined with respect to a single eligible credit property. Thus, under the proposed regulations, an eligible taxpayer would not be permitted to sever bonus credit amounts taken into account to determine an eligible credit from the base eligible credit determined with respect to the relevant eligible credit property and separately transfer any bonus credit amount or base eligible credit amount (horizontal credit transfer). Instead, an eligible taxpayer would be permitted to transfer the entire eligible credit (or portion of the entire eligible credit, which would include a proportionate amount of any component bonus credit amounts taken into account to determine the entire eligible credit) determined with respect to a single eligible credit property (vertical credit transfer).

Several commenters recommended that the final regulations allow for horizontal credit transfers and that the term ''portion'' in section 6418(a) should be broadly construed. As support, commenters contended that horizontal credit transfers would increase flexibility and marketability of eligible credits and allow eligible taxpayers to better allocate credit risk among various transferee taxpayers. Commenters also asserted that requiring vertical credit transfers favors large investors with sufficient resources for diligence, finance, and risk tolerance. One commenter stated that requiring vertical credit transfers will increase the burden of tax administration because auditing a transferee taxpayer's portion of a vertical credit transfer would require a larger audit team and auditors conversant with the rules applicable to the underlying eligible credits and the rules applicable to the bonus credit amounts. Another commenter suggested the final regulations allow for eligible taxpayers to elect either a vertical or a horizontal credit transfer for each specified credit portion.

Each eligible credit determined with respect to a single eligible credit property is a single eligible credit that cannot be separated into a base credit amount and bonus credit amounts for purposes of making transfer elections. The language in section 6418(a) that refers to a portion specified in the election is better understood to refer to a percentage of a single overall eligible credit amount, rather than to a particular ''layer'' of credit. Further, while commenters suggested allowing horizontal transfers of eligible credits, none of the commenters fully addressed the potential administrative issues with the approach. For example, allowing horizontal credit transfers would add another layer of compliance due to the need for taxpayers and the IRS to track all base and bonus credit amounts separately. Moreover, a bonus credit amount is not itself an eligible credit but only an amount taken into account to determine the single eligible credit with respect to an eligible credit property. In this regard, the pre-filing registration portal does not allow for registration numbers associated only with bonus credit amounts. Thus, these final regulations adopt the definition of specified credit portion in proposed § 1.6418–1(h) without change.

II. Rules for Making Transfer Elections

A. In General

Proposed § 1.6418–2 would have provided general rules for an eligible taxpayer to make a transfer election under section 6418 with respect to any eligible credit determined with respect to such taxpayer. Proposed § 1.6418–2(a)(1) would have provided that an eligible taxpayer can make an election as provided in proposed § 1.6418–2. Proposed § 1.6418–2(a)(2) through (4) would have provided rules regarding making multiple transfer elections, rules for determining the eligible taxpayer in certain ownership situations, and rules describing circumstances in which no transfer election is allowed. Commenters addressed aspects of these proposed rules, as discussed in this part II of the Summary of Comments and Explanation of Revisions. These final regulations generally adopt the rules as proposed, with the modifications described in this part II of the Summary of Comments and Explanation of Revisions.

Proposed § 1.6418–2(a)(2) would have provided that an eligible taxpayer may make multiple transfer elections to transfer one or more specified credit portion(s) to multiple transferee taxpayers, provided that the aggregate amount of specified credit portions transferred with respect to any single eligible credit property does not exceed the amount of the eligible credit determined with respect to the eligible credit property. A commenter asked for clarification of whether an eligible taxpayer may transfer all or a portion of an eligible credit to more than one taxpayer. The Treasury Department and IRS confirm that the proposed regulations, as drafted, would have allowed an eligible taxpayer to make multiple transfer elections of specified credit portions of an eligible credit determined with respect to an eligible credit property subject to the limitation that such portions, in the aggregate, cannot exceed the amount of the determined eligible credit. Because proposed § 1.6418–2(a)(2) would have already provided this result, a revision to the proposed rules is unnecessary, and these final regulations adopt the proposed rule without change.

Proposed § 1.6418–2(a)(3) would have provided rules for transfer elections in certain ownership situations, specifically with respect to ownership through a disregarded entity, as an undivided ownership interest, as a member of a consolidated group (as defined in § 1.1502–1), and for partnerships and S corporations. One commenter asked for clarity as to whether a grantor trust is treated as a disregarded entity in determining ownership of an eligible credit property, and, if a grantor trust directly holds an eligible credit property, which party registers the property and makes a transfer election. The Treasury Department and the IRS agree that these final regulations should provide rules for transfer elections if eligible property is held directly by a grantor trust. Accordingly, the final regulations add § 1.6418–2(a)(3)(v) to provide that if an eligible taxpayer is a grantor or any other person that is treated as the owner of any portion of a trust as described in section 671 of the Code, then the eligible taxpayer may make a transfer election in the manner provided in § 1.6418–2 for any eligible credits determined with respect to eligible credit property held directly by the portion of the trust that the eligible taxpayer is treated as owning under section 671.

Proposed § 1.6418–2(a)(4) would have described three circumstances in which no transfer election can be made. First, consistent with section 6418(g)(4), the proposed regulations would have precluded any election with respect to any amount of an eligible credit determined based on progress expenditures that is allowed pursuant to rules similar to the rules of section 46(c)(4) and (d) (as in effect on the day before the date of the enactment of the Revenue Reconciliation Act of 1990). Second, consistent with section 6418(b)(1), proposed § 1.6418–2(a)(4)(ii) would have precluded a transfer election if an eligible taxpayer receives any amount not paid in cash (as defined in proposed § 1.6418–1(f)) as consideration in connection with the transfer of a specified credit portion. Third, consistent with section 6418(a), proposed § 1.6418–2(a)(4)(iii) would have provided that no election is allowed if eligible credits are not determined with respect to an eligible taxpayer. As a result, proposed § 1.6418–2(a)(4)(iii) would have provided as an example that a section 45Q credit allowable to an eligible taxpayer because of an election under section 45Q(f)(3)(B), or a section 48 credit allowable to an eligible taxpayer because of an election made under section 50(d)(5) and § 1.48–4, although described in proposed § 1.6418–1(c)(2), is not an eligible credit that can be transferred because such credit is not determined with respect to the eligible taxpayer.

A commenter suggested that the final regulations allow transfers of section 48 ITCs before the taxable year in which the energy property is placed in service. While not explicitly referenced, the commenter appears to be requesting that progress expenditures (under section 48(b)) be permitted to be transferred under section 6418. Section 6418(g)(4) and proposed § 1.6418–2(a)(4)(i) both directly prohibit making a transfer election if an eligible credit is related to progress expenditures. Based on this, these final regulations adopt the rule in proposed § 1.6418–2(a)(4)(i) without change.

Multiple commenters advocated that the proposed regulations be modified to permit a taxpayer that is allowed a section 45Q credit due to an election under section 45Q(f)(3)(B) to make a transfer election with respect to the section 45Q credit. Commenters generally suggested that the proposed rule is incorrect because (1) ownership of the single process train is not necessary for credit determination, and (2) a taxpayer claiming the credit and making an election under section 45Q(f)(3)(B) does in fact determine the credit because of their activities. Commenters relied in part on the language in proposed § 1.6418–2(d)(1), which states that ''[f]or an eligible credit to be determined with respect to an eligible taxpayer, the eligible taxpayer must own the underlying eligible credit property or, *if ownership is not required, otherwise conduct the activities giving rise to the underlying eligible credit* [emphasis added].''

A taxpayer that is allowed a section 45Q credit as a result of an election under section 45Q(f)(3)(B) is not the taxpayer with respect to which the section 45Q credit is determined. Under section 45Q(f)(3)(A)(ii), a section 45Q credit is attributable to the person that owns the carbon capture equipment *and* physically or contractually ensures the capture and disposal, utilization, or use as a tertiary injectant of such qualified carbon oxide. Further, under § 1.45Q–1(h)(3), it is the taxpayer described in § 1.45Q–1(h)(1) to whom the section 45Q credit is attributable (electing taxpayer), that may elect to allow the person that enters into a contract with the electing taxpayer to dispose of the qualified carbon oxide (disposer), utilize the qualified carbon oxide (utilizer), or use the qualified carbon oxide as a tertiary injectant to claim the credit (section 45Q(f)(3)(B) election). Contrary to commenters' assertions, it is not sufficient for a party to only conduct carbon capture activities to be eligible for a section 45Q credit. Further, the ownership requirement in the section 45Q statute and regulations means the commenters' suggestions that the language in proposed § 1.6418–2(d)(1) allows a section 45Q credit to be

determined with respect to an eligible taxpayer if the party ''otherwise conducts the activities giving rise to the underlying applicable credit'' is misplaced. That language in proposed § 1.6418–2(d)(1) applies only in the case of an eligible credit for which ownership of property is not required, which is not the case with respect to a section 45Q credit. Thus, these final regulations clarify in § 1.6418–2(d)(1) that the only eligible credit for which ownership is not required is the section 45X credit. While the activities of a contractor may be necessary for a section 45Q credit to be determined, ultimately, the credit is attributable to and determined by the person that both owns the equipment and physically or contractually ensures the capture and disposal, injection, or utilization of such qualified carbon oxide. Thus, these final regulations adopt the proposed regulations without change on this issue.

A commenter asked that separate, unrelated taxpayers to which section 45Q credits and section 45Z credits are determined with respect to the same qualified facility each be permitted to make a separate transfer election with respect the section 45Q credits or section 45Z credits determined with respect to such taxpayer. Specifically, the commenter requested clarification as to who is an eligible taxpayer if more than one eligible credit (for example, a section 45Q credit and a section 45Z credit) is determined with respect to two unrelated, eligible taxpayers for units of property or a facility within the same general geographic location. The commenter stated that the qualified facility definition under section 45Z(d)(4) should not preclude an owner and producer taxpayer from making a transfer election, even if an unrelated taxpayer who is eligible for the section 45Q credit makes a transfer election in the same taxable year.

It is beyond the scope of these final regulations to address underlying requirements of eligible credits, such as the requirements of sections 45Q and 45Z, and who may be eligible for those credits. The Treasury Department and the IRS will consider this comment in connection with drafting additional guidance under sections 45Q and 45Z.

Several commenters recommended that the final regulations allow transfer elections following a lease passthrough election under the rules of section 50(d)(5), both generally and with specific additional rules (such as, revising § 1.48–4 to require a lessor to commit to not making an election to transfer under section 6418 and requiring the lessee to complete pre-filing registration). One commenter stated that the proposed regulations are inconsistent with existing tax law, suggesting that the original inclusion of the lease passthrough election obviated the need to engage in more complicated sale-leaseback transactions in order to calculate the credit based on fair market value of a property rather than on its cost. The commenter posited that the proposed regulations would upend that balance by putting sale-leaseback transactions on unequal footing with lease passthrough structures in the context of a contemplated transfer of eligible credits, which the commenter thought was precisely the outcome that Congress sought to avoid in 1962 at the time of the introduction of the ITC.

There is a distinction between sale-leaseback transactions under section 50(d)(4) and lease passthrough elections under former section 48(d) (pursuant to section 50(d)(5)). In the latter case, it is the owner or lessor that is the party with respect to which the credit is determined, and not the lessee that is allowed to claim the credit as a result of the election. Therefore, the lessee does not meet the requirement of section 6418(a), which requires the eligible credit to be determined with respect to the eligible taxpayer making the transfer election. For the reasons stated, these final regulations adopt the proposed rule without change.

B. Manner and Due Date of Making a Transfer Election

1. In General

Proposed § 1.6418–2(b)(1) would have provided that an eligible taxpayer must make a transfer election to transfer a specified credit portion on the basis of a single eligible credit property. As an example, the proposed regulations would have provided that an eligible taxpayer that determines eligible credits with respect to two eligible credit properties would need to make a separate transfer election with respect to any specified credit portion determined with respect to each eligible credit property. Because no comments were received on proposed § 1.6418–2(b)(1), these final regulations adopt this provision without change. Some commenters requested that grouping of eligible credit properties be permitted for purposes of registration and making a transfer election. These comments are discussed in part IV of this Summary of Comments and Explanation of Revisions.

2. Special Rules for Certain Eligible Credits

Section 6418(f)(1)(B) provides that, in the case of any eligible credit under sections 45, 45Q, 45V, or 45Y, an election is made (1) separately with respect to each facility for which a credit is determined, and (2) for each taxable year during the 10-year period beginning on the date such facility was originally placed in service (or, in the case of a section 45Q credit, for each taxable year during the 12-year period beginning on the date the single process train of carbon capture equipment was originally placed in service). Proposed § 1.6418–2(b)(2) would have provided rules consistent with section 6418(f)(1)(B). Because no comments were received on proposed § 1.6418–2(b)(2), these final regulations adopt this provision without change.

3. Manner of Making a Valid Transfer Election

Proposed § 1.6418–2(b)(3) would have provided rules for making a valid transfer election and included that a transfer election is made based on each specified credit portion with respect to a single eligible credit property. To make a valid transfer election, an eligible taxpayer as part of filing an annual tax return (or a return for a short year within the meaning of section 443 of the Code), must include the following: (1) a properly completed relevant source credit form for the eligible credit for the taxable year that the eligible credit was determined; (2) a properly completed Form 3800, General Business Credit (or its successor); (3) a schedule attached to the Form 3800 (or its successor) showing the amount of eligible credit transferred for each eligible credit property, except as otherwise provided in guidance; (4) a transfer election statement as described in proposed § 1.6418–2(b)(5); and (5) any other information related to the election specified in guidance. While comments were received on individual aspects of this proposed rule as described later in this Summary of Comments and Explanation of Revisions, there were no comments received on proposed § 1.6418–2(b)(3), and so these final regulations adopt the proposed rule without substantive change. However, the final regulations clarify that the registration number received during the required pre-filing registration (as described in proposed § 1.6418–4) related to an eligible credit property with respect to which a transferred eligible credit was determined must be included on a

properly completed relevant credit source form.

4. Due Date and Original Return Requirement of a Transfer Election

Section 6418(e)(1) states that an election under section 6418(a) to transfer any portion of an eligible credit must be made not later than the due date (including extensions of time) for the return of tax for the taxable year for which the credit is determined, but in no event earlier than 180 days after the date of the enactment of this section. Proposed § 1.6418–2(b)(4) would have provided that a transfer election must be made on an original return not later than the due date (including extensions) for the original return of the eligible taxpayer for the taxable year for which the eligible credit is determined. The proposed regulations stated that no transfer election could be made or revised on an amended return or by filing an administrative adjustment request under section 6227 of the Code (AAR). The preamble to the proposed regulations clarified that an original return includes a superseding return filed on or before the due date (including extensions). The proposed regulations also did not provide for relief under §§ 301.9100–1 through 301.9100–3 (9100 relief) for a late transfer election.

Some commenters asked that a transfer election be permitted on an amended return or AAR and/or that a taxpayer be permitted an extension of time under the 9100 relief procedures to make a late election. Commenters raised concerns that the amount of information required to obtain a registration number and file a transfer election is substantial, and that given there are bound to be omissions and misstatements, an eligible taxpayer should have the ability to cure errors or omissions on an amended return or pursuant to an AAR. Further, commenters urged that 9100 relief should be available in situations in which the parties acted in good faith with respect to a transfer election.

The section 6418 transfer election process is novel and eligible taxpayers may experience inadvertent errors or omissions. The statutory text of section 6418(e), however, provides that a transfer election must not be made ''later than the due date (including extensions of time) for the return of tax for the taxable year for which the credit is determined.'' The preamble to the proposed regulations provided that eligible taxpayers could make a transfer election on a superseding return up until the extended due date for the return.

Neither the Code nor regulations define a superseding return, but administrative IRS guidance provides that a superseding return is a return filed subsequent to the originally-filed return but before the due date for filing the return (including extensions). For example, if an eligible taxpayer subject to an automatic 6-month extension files an original return on the due date (excluding extensions) and then files a subsequent return within the automatic extension period, the subsequent return would generally be considered a superseding return. Unlike a superseding return, an amended return is a return filed after the taxpayer filed an original return and after the due date for filing the return (including extensions).

Accordingly, these final regulations modify proposed § 1.6418–2(b)(4) by clarifying that a transfer election filed by an electing taxpayer may be made or revised on a superseding return, but not on an amended return or AAR. These final regulations further clarify that a transfer election cannot be made for the first time on an amended return, withdrawn on an amended return, or made or withdrawn by filing an AAR, although a numerical error with respect to a properly claimed transfer election may be corrected on an amended return or by filing an AAR if necessary. This clarification is intended to address situations in which an eligible taxpayer intended to make a transfer election but made a reporting error with respect to an element of a valid election (for example, miscalculating the amount of the eligible credit on the original return or making a typographical error in the process of inputting a registration number), and to allow the eligible taxpayer to correct any errors that would result in a denial of the transfer election. The provision cannot be used to revoke a transfer election made on an original return or to make a transfer election for the first time on an amended return. In addition, the eligible taxpayer's original return (including a superseding return), which must be signed under penalties of perjury, must contain all of the information, including a registration number, required by these final regulations. In order to correct an error on an amended return or AAR, an eligible taxpayer must have made an error in the information included on the original return such that there is a substantive item to correct; a taxpayer cannot correct a blank item or an item that is described as being ''available upon request.''

The Treasury Department and the IRS note that the rules described in this part II.B.4 of the Summary of Comments and Explanation of Revisions, regarding the original return requirement, apply to transfer elections made on an originally filed return of the eligible taxpayer. A transferee taxpayer, however, may take a transferred specified credit portion into account on a properly filed amended return or AAR, or correct the amount of the transferred specified credit portion on a properly filed amended return or AAR to, for example, avoid a determination by the IRS that the transferee taxpayer is subject to an excessive credit transfer under § 1.6418–5(a). Excessive credit transfers are discussed in more detail in part V.A of this Summary of Comments and Explanation of Revisions.

An eligible taxpayer may file an amended return or an AAR to adjust the amount of the eligible credit following a timely and properly filed transfer election. Such an adjustment may affect the information that was reported on the transfer election statement under § 1.6418–2(b)(5)(ii), for example, the total amount of the credit determined with respect to the eligible credit property and any corresponding specified credit portion being transferred. Some commenters suggested that the final regulations provide clarity for a taxpayer that may need to correct the amount of an eligible credit reported on its tax return. The final regulations modify proposed § 1.6418–2(b)(4) to provide that an eligible taxpayer may, after making a timely and complete transfer election, file an amended return or AAR, if applicable, to adjust the amount of the eligible credit reported on the eligible taxpayer's original return if the amount of the eligible credit was incorrectly reported on the original return. Under § 1.6418–2(b)(4)(ii)(B), to the extent the eligible taxpayer's correction of an eligible credit results in an increase in the amount of the eligible credit reported, such amount must be reflected on the credit source forms with the eligible taxpayer's amended return or AAR, if applicable. However, such increase cannot be reflected by either the eligible taxpayer or the transferee taxpayer as a transferred specified credit portion on the transfer election statement, in accordance with the rules set forth in § 1.6418–2(b)(4)(i). Those rules, regarding the due date and original return requirement of a transfer election, are described in greater detail in part II.B.3 and 4 of the Summary of Comments and Explanation of Revisions.

Under § 1.6418–2(b)(4)(ii)(C), to the extent the eligible taxpayer's correction of an eligible credit results in a decrease in the amount of the eligible credit

reported, such amount must be reflected on the credit source forms with the eligible taxpayer's amended return or AAR, if applicable, and the transfer election statement reducing the amount of the credit reported. The amount of the decrease first reduces the amount of the eligible credit that is retained, if any (and thus not transferred) by the eligible taxpayer. Any portion of such decrease that remains after reducing the eligible credit retained by the eligible taxpayer then reduces the amount reported by the transferee taxpayer. If the eligible credit was transferred to more than one transferee taxpayer, the reduction to each transferee taxpayer's specified credit portion is on a pro rata basis. The amount of any cash consideration retained by the eligible taxpayer after accounting for any reduction in the amount of the eligible credit transferred to the transferee taxpayer(s) cannot be excluded from gross income. These rules are further described in § 1.6418–2(e)(2). The final regulations provide examples illustrating these rules.

If an eligible taxpayer has made an adjustment such that the specified credit portion is reduced, depending on the facts and circumstances, a transferee taxpayer may be at risk for an excessive credit transfer, should the IRS make such a determination prior to the transferee taxpayer making its own adjustment to correct the specified credit portion through a qualified amended return under § 1.6664–2(c)(3). The eligible taxpayer itself may have income to include to the extent it received a payment that directly relates to the excessive credit transfer.

These final regulations do not mandate a reporting or notification requirement on the eligible taxpayer or the transferee taxpayer in the event of an adjustment that occurs after a timely and properly filed transfer election. The eligible taxpayer and the transferee taxpayer may freely contract for such a requirement. Nevertheless, this part II.B.4 of the Summary of Comments and Explanation of Revisions acknowledges that an adjustment to the eligible credit determined by an eligible taxpayer may impact the tax liability of a transferee taxpayer.

Additionally, these final regulations modify the proposed regulations to permit an extension of time under § 301.9100–2(b) to allow for an automatic six-month extension of time from the due date of the return (excluding extensions) to make the election prescribed in section 6418(e)(1). A transfer election is a statutory election because its due date is prescribed by statute. As such, the section 9100 relief procedures only apply insofar as the late election is being filed pursuant to § 301.9100–2(b), which requires that the taxpayer timely filed its return for the year the election should have been made. Relief under this provision will only apply to taxpayers that have not received an extension of time to file a return after the original due date (excluding extensions). Taxpayers eligible for this relief must take corrective action under § 301.9100–2(c) and follow the procedural requirements of § 301.9100–2(d).

5. Transfer Election Statement

Proposed § 1.6418–2(b)(5)(i) generally would have defined a transfer election statement as a written document that describes the transfer of a specified credit portion between an eligible taxpayer and transferee taxpayer and would have provided rules for both an eligible taxpayer and transferee taxpayer to attach a transfer election statement to their respective return. The proposed regulations would have provided that any document can be used that meets the requirements of proposed § 1.6418–2(b)(5)(ii), with the document labeled as a ''Transfer Election Statement'' that is attached to a return. The information required in proposed § 1.6418–2(b)(5)(ii) would not otherwise have limited any other information that the eligible taxpayer and transferee taxpayer may agree to provide in connection with the transfer of any specified credit portion. The proposed regulations would have provided that the statement must be signed under penalties of perjury by an individual with authority to legally bind the eligible taxpayer and must also include the written consent of an individual with authority to legally bind the transferee taxpayer.

Proposed § 1.6418–2(b)(5)(ii) described the information required in a transfer election statement, which generally would have included: (1) information related to the transferee taxpayer and the eligible taxpayer; (2) a statement that provides the necessary information and amounts to allow the transferee taxpayer to take into account the specified credit portion with respect to the eligible credit property; (3) an attestation that the parties are not related (within the meaning of section 267(b) or 707(b)(1)); (4) a statement or representation from the eligible taxpayer that it has or will comply with all relevant requirements to make a transfer election; (5) a statement or representation from the eligible taxpayer and the transferee taxpayer acknowledging the notification of recapture requirements under section 6418(g)(3) and the section 6418 regulations (if applicable); and (6) a statement or representation from the eligible taxpayer that it has provided the required minimum documentation to the transferee taxpayer.

A commenter requested clarification on whether a transfer election statement can be a partnership agreement. Unless otherwise provided in guidance, any document, including a written partnership agreement, can serve as a transfer election statement if the document otherwise meets the requirements of proposed § 1.6418–2(b)(5)(i) and includes the information outlined in proposed § 1.6418–2(b)(5)(ii). The Treasury Department and the IRS did not include a specific rule in these final regulations allowing for a partnership agreement to be treated as a transfer election statement because the language in proposed § 1.6418–2(b)(5) was already broad enough to allow for such an agreement to qualify.

Another commenter recommended that an eligible taxpayer be required, in a form accompanying its annual tax return, to list all tax credits it generated in the year by credit type, the total amount of those tax credits it sold, a schedule of projects to which the sold credits relate, the parties to whom it sold, and the remaining credits it retained. The Treasury Department and the IRS note that the registration and transfer election process will require an eligible taxpayer to list all eligible credits it determined and transferred during a taxable year. Additionally, an eligible taxpayer will be required to file the relevant credit source forms and the Form 3800, which will include the type of credits the eligible taxpayer determined and if it claimed any credits against its tax liability. At this time, the Treasury Department and the IRS do not think it is necessary for tax administration purposes for an eligible taxpayer to report the parties to whom it transferred eligible credits as part of the registration process. This is because the IRS matches the registration numbers obtained by an eligible taxpayer in the registration process with the transferee taxpayers that claim transferred specified credit portions against their tax liability. Because no changes are necessary to proposed § 1.6418–2(b)(5)(i) and (ii), these final regulations adopt these provisions without substantive change.

Proposed § 1.6418–2(b)(5)(iii) described the time by which a transfer election statement must be completed. The proposed rule provided that a transfer election statement can be completed at any time after the eligible taxpayer and transferee taxpayer have sufficient information to meet the

requirements of proposed § 1.6418–2(b)(5)(ii), but, for any year, the transfer election statement cannot be completed after the earlier of: (1) the filing of the eligible taxpayer's return for the taxable year for which the specified credit portion is determined with respect to the eligible credit; or (2) the filing of the transferee taxpayer's return for the year in which the specified credit portion is taken into account. Because no comments were received on proposed § 1.6418–2(b)(5)(iii), these final regulations adopt this provision without change.

Proposed § 1.6418–2(b)(5)(iv) would have defined required minimum documentation as the minimum documentation that the eligible taxpayer is required to provide to a transferee taxpayer. This documentation included: (1) information that validates the existence of the eligible credit property; (2) if applicable, documentation substantiating that the eligible taxpayer has satisfied the requirements to include any bonus credit amounts (as defined in proposed § 1.6418–1(c)(3)); and (3) evidence of the eligible taxpayer's qualifying costs in the case of a transfer of an eligible credit that is part of the investment credit or the amount of qualifying production activities and sales amounts, in the case of a transfer of an eligible credit that is a production credit. Proposed § 1.6418–2(b)(5)(v) would have specified that a transferee taxpayer, consistent with § 1.6001–1(e), would be required to retain the required minimum documentation provided by the eligible taxpayer so long as the contents thereof may become material in the administration of any internal revenue law.

Several commenters recommended that the final regulations increase the amount of required minimum documentation that an eligible taxpayer must provide to a transferee taxpayer to make a valid transfer election under section 6418(a). One commenter urged that all of the records that would be necessary for an eligible taxpayer to substantiate the claimed tax credit should be provided to the transferee taxpayer. Other commenters stated that more robust minimum documentation requirements should be imposed, including specific disclosure requirements and minimum documentation that an eligible taxpayer must provide to a transferee taxpayer concerning compliance with labor laws and an affirmation that the eligible taxpayer has undertaken best efforts to establish compliance. Another commenter asked for confirmation that the required minimum documentation is the same for all taxpayers.

In providing for the required minimum documentation that an eligible taxpayer must provide to a transferee taxpayer, the intention was to require a baseline of information that is necessary for validating an eligible taxpayer's claim of eligibility to an eligible credit, while not overburdening the eligible taxpayer with production requirements or altering the arm's length arrangement between the parties. Further, the proposed regulations did not limit the amount or type of information that a transferee taxpayer can require prior to agreeing to an eligible credit transfer. This means that while the required minimum documentation requirements are the same for all taxpayers, any particular agreement between an eligible taxpayer and transferee taxpayer may go beyond the required minimum documentation based on the arrangement of the parties. The proposed regulations allowed sufficient flexibility for market participants to determine if more information is necessary in a particular transaction, while balancing the burden of producing the required minimum documentation required to make a transfer election. Thus, these final regulations adopt proposed § 1.6418–2(b)(5)(iv) and (v) without substantive change.

Another commenter requested clarification that any responsibility to engage in regular reporting of certified payroll, apprentice labor hour reports, or other obligation under the prevailing wage and apprenticeship requirements for transferred specified credit portions remain with the eligible taxpayer. Because an eligible taxpayer determines any increased credit amount applicable to the prevailing wage and apprenticeship requirements, proposed regulations under section 45 would provide that the requirements relevant to determining the credit, including the correction and penalty provisions described in section 45(b)(7)(B) and 45(b)(8)(D), would remain with the eligible taxpayer who determined the credit. On August 30, 2023, the Treasury Department and the IRS published proposed regulations under section 45 (REG–100908–23) in the **Federal Register** (88 FR 60018) (section 45 proposed regulations) that would also provide that the general recordkeeping requirements for prevailing wage and apprenticeship (PWA) requirements would remain with an eligible taxpayer who transfers a specified credit portion that includes an increased credit amount. The section 45 proposed regulations would not require regular reporting of certified payroll or apprentice labor hour reports to the IRS. The responsibility of determining a credit is initially with the eligible taxpayer, and the transfer of an eligible credit does not relieve an eligible taxpayer of this responsibility or the responsibility to substantiate. Thus, the responsibility for substantiating a PWA increased credit amount does not shift to the transferee taxpayer, although a transferee taxpayer may be treated as the relevant taxpayer for other purposes under the IRA under section 6418(a). In light of the section 45 proposed regulations, the Treasury Department and the IRS have determined that no clarification is needed under proposed § 1.6418–2(b)(5)(iv) and (v) and thus, these final regulations adopt these provisions without substantive change.

C. Limitations After a Transfer Election Is Made

Proposed § 1.6418–2(c)(1) would have provided that a transfer election with respect to a specified credit portion is irrevocable. No comments were received on this rule, and these final regulations adopt the rule without change.

Consistent with section 6418(e)(2), proposed § 1.6418–2(c)(2) would have provided that a specified credit portion may only be transferred pursuant to a transfer election once. A transferee taxpayer cannot make a transfer election of any specified credit portion transferred to the transferee taxpayer. As described in the Explanation of Provisions in the preamble to the proposed regulations, the proposed rule would have disallowed any arrangement in which the Federal income tax ownership of a specified credit portion transfers first from an eligible taxpayer to a dealer or intermediary and then, ultimately, to a transferee taxpayer. In contrast, the Explanation of Provisions in the preamble to the proposed regulations provided that an arrangement using a broker to match eligible taxpayers and transferee taxpayers should not violate the no additional transfer rule, assuming the arrangement at no point transfers the Federal income tax ownership of a specified credit portion to the broker or any taxpayer other than the transferee taxpayer.

Commenters advocated for the final regulations to allow certain transactions with brokers, or other taxpayers, that were disallowed under proposed § 1.6418–2(c)(2) based on the no additional transfer rule of section 6418(e)(2). Those commenters posited that allowing such transactions would increase the number of participants entering the credit purchasing market. Another commenter recommended that

the final regulations apply the no additional transfer rule in proposed § 1.6418–2(c)(2) to prohibit only successive transfers made by a transferee taxpayer specified in the transfer election, assuming the intent of the rule is not to prohibit the development of a liquid trading market or derivative activity by third parties other than the eligible taxpayer. The commenter stated that if the intent of the rule is to prevent the development of such a market or activities, then the final regulations should contain clear and administrable rules based upon the other timing rules provided in the proposed regulations because applying normal ''benefits and burdens of ownership'' principles, as described in the Explanation of Provisions in the preamble to the proposed regulations, to transfers of eligible credits is not workable.

The Treasury Department and the IRS agree that it is unnecessary to apply benefits and burdens of ownership principles to transfers of eligible credits under section 6418, but no changes are needed to proposed § 1.6418–2(c)(2) because it does not reference those principles. To clarify the rules, to make a transfer election, all the requirements of § 1.6418–2(b) must be satisfied. Until the requirements are satisfied, then there is no valid transfer, no transferee taxpayer, and the requirements of § 1.6418–2(c)(2) are not applicable. To the extent there are brokers or other taxpayers providing liquidity, it is noteworthy that any payments received by those taxpayers related to eligible credits will be taxable because the provisions of section 6418 will not prevent the inclusion of gross income for such taxpayers, or for any amounts received by an eligible taxpayer other than amounts paid by a transferee taxpayer in consideration for the eligible credit. Further, if brokers, or others, are transferred a specified credit portion after satisfying the rules of § 1.6418–2(b) such that they are considered transferee taxpayers, then the prohibition of section 6418(e)(2) and the requirements of § 1.6418–2(c)(2) will prevent a second transfer by such transferee taxpayer.

A commenter recommended that the final regulations clarify that agreements for the right to purchase eligible credits may be transferred and are not subject to the rule in proposed § 1.6418–2(c)(2). Specifically, the commenter raised that the statutory language prohibiting multiple transfers with respect to any portion of an eligible credit does not prohibit a transferee taxpayer that entered into an agreement with an eligible taxpayer for the right to purchase eligible credits for a number of years from transferring that right to another transferee taxpayer as long as the eligible credits themselves have not been transferred to the original transferee taxpayer first. These final regulations do not adopt a specific rule related to this situation because it describes a transaction that is outside of section 6418. As previously described, until the requirements of a valid transfer election are satisfied, then there is no valid transfer and no transferee taxpayer.

Several commenters asked for clarity on when a transfer has occurred or recommended the point at which a transfer has occurred. For example, one commenter recommended a rule that once the amount of the credit has been determined, the specified credit portion is considered to have been transferred on the earliest date on which payment for credit has been made, the last day of the eligible taxpayer's taxable year, or (if earlier) the date the transfer election statement has been filed. To clarify, a transfer of a specified credit portion does not technically occur until an eligible taxpayer satisfies all the requirements in § 1.6418–2(b) to make a valid transfer election. However, it is important to note that the technical transfer date does not necessarily control for other purposes of section 6418. For example, under the paid in cash rule, amounts can be paid with respect to the specified credit portion as early as the beginning of the taxable year in which the related eligible credit is determined.

D. Determining the Eligible Credit

Section 6418(a) states that an eligible taxpayer may elect to transfer an eligible credit determined with respect to such taxpayer. Proposed § 1.6418–2(d) would have provided rules to clarify how an eligible taxpayer determines an eligible credit. Under proposed § 1.6418–2(d)(1), an eligible taxpayer can only transfer eligible credits determined with respect to the eligible taxpayer. The proposed regulations would have provided that, for an eligible credit to be determined with respect to an eligible taxpayer, the eligible taxpayer must own the underlying eligible credit property or, if ownership is not required, conduct the activities giving rise to the underlying eligible credit.

A commenter suggested that, in the absence of clear statutory language indicating that ownership of underlying eligible credit property or conducting activities giving rise to the underlying eligible credit is a prerequisite to transferability, such requirements should not be imposed under proposed § 1.6418–2(d)(1). The text of section 6418(a), which requires the eligible credit to be determined with respect to the eligible taxpayer, and the text of the underlying eligible credit provisions confirm the requirement that ownership of underlying eligible credit property or conducting activities giving rise to the underlying eligible credit is a prerequisite to transferability. However, as discussed in part 2.A of this Summary of Comments and Explanation of Revisions, these final regulations clarify that the only eligible credit for which an eligible taxpayer does not have to own an underlying eligible credit property, and instead can merely conduct activities, is section 45X. This revision should help clarify the ''determined with respect to'' requirements of section 6418.

A commenter noted that section 50(b)(1) limits the use of certain eligible credits in the territories and requested that the final regulations provide an exception to section 50(b)(1) to allow eligible taxpayers in U.S. territories to transfer all eligible credits. Since before the enactment of the IRA, section 50(b)(1) has limited the use of certain credits (including ITCs, vehicle-related credits, and energy efficiency incentives) for property used in the U.S. territories. Section 50(b)(1) provides that no credit can be determined with respect to any property that is used predominantly outside the United States [1] unless section 168(g)(4)(G) applies. Section 168(g)(4)(G) provides an exception for any property that is owned by a domestic corporation or by a United States citizen other than a citizen entitled to the benefits of sections 931 or 933, and that is used predominantly in a possession of the United States by such a corporation or such a citizen, or by a corporation created or organized in, or under the law of, a possession of the United States. The IRA did not amend these provisions; instead, the IRA specifically referenced section 50(b)(1) in section 30C and did not exclude section 48, 48C, or 48E from the application of section 50(b)(1). Without specific language in section 6418 or in the underlying eligible credits addressing section 50(b)(1), or other compelling evidence of Congressional intent, a special rule turning off the application of section 50(b)(1) is not supported by the Code. Therefore, these final regulations do not adopt this recommendation.

[1] Under section 7701(a)(9), ''[t]he term 'United States' when used in a geographical sense includes only the States and the District of Columbia.''

E. Treatment of Payments Made in Connection With a Transfer Election

Section 6418(b)(1) through (3) provides rules related to the treatment of payments made in connection with a transfer. Proposed § 1.6418–2(e)(1) through (4) would have provided guidance related to these rules, including that such amounts are required to be paid in cash, are not includable in the gross income of the eligible taxpayer and are not deductible by the transferee taxpayer, as well as an anti-abuse rule that included examples illustrating the anti-abuse rule.

1. Cash Requirement

Section 6418(b)(1) requires that any amount paid by a transferee taxpayer for an eligible credit must be paid in cash. Consistent with section 6418(b)(1), proposed § 1.6418–2(e)(1) would have provided that an amount paid by a transferee taxpayer to an eligible taxpayer would be consideration for a transfer of a specified credit portion only if it is paid in cash (as defined in proposed § 1.6418–1(f)), directly relates to the specified credit portion, and is not described in proposed § 1.6418–5(a)(3) (describing payments related to an excessive credit transfer). Consistent with section 6418(b)(2), proposed § 1.6418–2(e)(2) would have provided that any amount paid to an eligible taxpayer as consideration for a transfer of a specified credit portion is not includible in the gross income of the eligible taxpayer. Correspondingly and consistent with section 6418(b)(3), proposed § 1.6418–2(e)(3) would have provided that no deduction is allowed to the transferee taxpayer for consideration that is paid as consideration for a transfer of a specified credit portion.

2. Anti-Abuse Provision

Section 6418(h) authorizes the Secretary to issue regulations or other guidance that may be necessary to carry out the purposes of section 6418. To prevent transactions contrary to the purposes of section 6418, the proposed regulations would have included an anti-abuse provision in proposed § 1.6418–2(e)(4). This rule would have provided that a transfer election of any specified credit portion, and therefore the transfer of that specified credit portion to a transferee taxpayer, may be disallowed, or the Federal income tax consequences of any transaction(s) effecting such a transfer may be recharacterized, in circumstances in which the parties to the transaction have engaged in the transaction or a series of transactions with the principal purpose of avoiding any Federal tax liability beyond the intent of section 6418. For example, under the proposed rule, an amount of cash paid by a transferee taxpayer would not be considered as paid in connection with the transfer of a specified credit portion in proposed § 1.6418–2(e)(1) if a principal purpose of a transaction or series of transactions was to allow an eligible taxpayer to avoid gross income. Conversely, an amount of cash paid by a transferee taxpayer would have been considered paid in connection with the transfer of a specified credit portion under proposed § 1.6418–2(e)(1) if a principal purpose of a transaction or series of transactions was to increase a Federal income tax deduction of a transferee taxpayer.

The proposed regulations included two examples in § 1.6418–2(e)(4)(ii) and (iii) to illustrate the application of the anti-abuse rule. In the first example, to avoid recognizing gross income, the eligible taxpayer (Taxpayer A) undercharges for services to the transferee taxpayer (Customer B) in combination with the transfer of a specified credit portion, and so the transaction is recharacterized. Specifically, Taxpayer A normally charges $20 for the same services without the purchase of the eligible credit, and the average transfer price of the eligible credit between unrelated parties is $80 paid in cash for $100 of an eligible credit. The example provides that Taxpayer A instead charges Customer B $100 for the eligible credit and $0 for the services. In the second example, to increase a transferee taxpayer's (Customer D) deduction, an eligible taxpayer (Taxpayer C) overcharges for property and undercharges for the eligible credit. Specifically, Taxpayer C normally charges $20 for the same property without the transfer of the eligible credit, and the average transfer price of an eligible credit between unrelated parties is $80 paid in cash for $100 of the eligible credit. The example provides that Taxpayer C instead charges Customer D $80 for the property and $20 for the eligible credit. In both examples, the proposed regulations would have recharacterized the transactions.

A number of commenters made suggestions related to the proposed anti-abuse rule and examples. One commenter urged the Treasury Department and the IRS to take all possible precautionary measures to protect taxpayer interests and prevent abuse. Another commenter, while acknowledging that concerns raised by the anti-abuse rule and the examples are fair and appropriate, recommended as an alternative that the final regulations only include the general anti-abuse rule and remove the specific rules and examples. The commenter suggested that the IRS could rely on generally applicable principles and the anti-abuse rule to recharacterize abusive transactions and separately issue sub-regulatory guidance to provide safe harbors for cases in which the anti-abuse rule will not be asserted. The commenter also suggested that the IRS could issue further clarifying guidance if a publicly available and readily commoditized market develops. While the commenter did not expressly describe the specific rules it recommended be removed, the Treasury Department and the IRS infer that the commenter was referring to the language describing situations that had a principal purpose of eligible taxpayers avoiding the recognition of gross income or of transferee taxpayers increasing deductions. Other commenters, however, recommended that the final regulations include additional specific examples or safe harbors to determine those situations that would not be considered abusive. In considering all of these commenters' views, the Treasury Department and IRS have determined that taxpayers would benefit from having fact patterns in these final regulations that are likely to represent situations in which abuse could be present. Thus, these final regulations adopt the anti-abuse provision of the proposed regulations, but with certain revisions in response to commenters that are described in the following paragraphs.

A commenter noted a discrepancy in the language of the anti-abuse rule in proposed § 1.6418–2(e)(4)(i), making it unclear whether the standard of the anti-abuse rule was that parties to the transaction have engaged in the transaction or a series of transactions with ''the'' or ''a'' principal purpose of tax avoidance. As noted by the commenter, the use of ''the'' or ''a'' represent different standards. To demonstrate the difference, the commenter compared the regulations under section 269 of the Code (employing a ''the principal purpose'' standard) with the regulations under section 881 of the Code (section 881 regulations) (employing a ''one of the principal purposes'' standard). The proposed rule was intended to apply the anti-abuse provision if a transaction was entered into with ''a'' principal purpose of avoidance of tax beyond the intent of section 6418. In response to the comment, these final regulations are

clarified. This ''a'' principal purpose standard is similar to other anti-abuse standards, such as the standard in the section 881 regulations cited by the commenter or the anti-abuse rule in § 1.45D–1(g) (relating to the new markets tax credit determined under section 45D (section 45D credit)). This standard is appropriate based on the goals of preventing fraud and improper payments and in accordance with section 6418(h) to provide rules necessary to carry out the purposes of section 6418.

Another commenter requested clarification on the meaning of the phrase ''will be considered paid'' in proposed § 1.6418–2(e)(4)(i), noting that the proposed regulations would have provided that an ''amount of cash paid by a transferee taxpayer will not be considered as paid in connection with the transfer of a specified credit portion under paragraph (e)(1) of this section if a principal purpose of a transaction or series of transactions is to allow an eligible taxpayer to avoid gross income.'' The commenter stated, however, that the next sentence in proposed § 1.6418–2(e)(4)(i) provides: ''[c]onversely, an amount of cash paid by a transferee taxpayer *will be considered paid* in connection with the transfer of a specified credit portion under paragraph (e)(1) of this section if a principal purpose of a transaction or series of transactions is to increase a Federal income tax deduction of a transferee taxpayer [emphasis added].'' The commenter believed that the ''will be considered paid'' in the quoted second sentence should read as ''will not be considered paid'' similar to the quoted first sentence. The Treasury Department and the IRS clarify that the proposed rule is written as intended, and no changes to the proposed rule are made based on this comment. The quoted second sentence is describing a situation in which a transferee taxpayer paid less for an eligible credit and more for an item or service that resulted in a deduction. In this scenario, it is correct that the amount ''will be considered paid'' in connection with the transfer of the specified credit portion, and not with respect to the purchase of the item that was deductible.

Commenters requested clarification of the language in the examples in proposed § 1.6418–2(e)(4)(ii) and (iii) that referred to the ''the average transfer price of the eligible credit between unrelated parties'' in determining whether the transactions are subject to recharacterization under the proposed anti-abuse rule. Commenters raised concerns about the availability of pricing information, including specifically in the case of the section 45U credit. A commenter thought that there will be insufficient publicly available pricing information, and if the available data are limited and incomplete, price averages will not yield reliable results. That same commenter noted that if the IRS develops the requisite data to determine an average transfer price for each eligible credit, organizing such data and publishing it regularly would be administratively burdensome. Further, commenters were concerned that the average price would not take into account the facts and circumstances of an arrangement, which commenters believed relevant for determining price. The commenter recommended changing ''the average transfer price of the eligible credit between unrelated parties'' to ''an arm's length price of the eligible credit without regard to other commercial relationships'' could solve potential issues with the language in the proposed regulations. The commenter stated that the recommendation would also resolve a separate comment related to the use of the term ''unrelated party'' in the proposed regulations by clarifying that the intent was the price be determined without regard to other commercial relationships.

In response, these final regulations adopt the commenter's suggested language and revise the examples in proposed § 1.6418–2(e)(4)(ii) and (iii) accordingly. This change is made in acknowledgment that average price data may not be currently available, may take more time to develop, and will most likely be dependent on the facts and circumstances of the transaction (for example, the risk profile of the project). The language suggested by the commenter will still allow average transfer price data to be used to the extent it is relevant. The intent of using an average transfer price was to suggest an objective criterion for evaluating a transaction, along with using the pricing information of the eligible taxpayer in the determination. While the language ''an arm's length price of the eligible credit without regard to other commercial relationships'' has the potential to add more subjectivity to the determination, concerns with respect to determining the average transfer price of a certain eligible credit, including those with limited markets, outweigh any benefit with respect to retaining a potentially more objective standard.

Another commenter requested clarification on whether a transfer of a credit for cash consideration could ever be fully respected in cases in which the cash consideration for such credit transfer is greater or less than the average transfer price of the eligible credit between unrelated parties. Any deviation from an average transfer price of an eligible credit should not necessarily require recharacterization under the anti-abuse rule; however, the revisions made to the examples in proposed § 1.6418–2(e)(4)(ii) and (iii) should help clarify this issue. The intent of the anti-abuse rule is to allow recharacterization if the price paid is not economically supportable and is unreasonable based on the facts and circumstances of the transaction.

Another commenter asked that the final regulations include considerations of whether an eligible taxpayer is viewed as transferring credits at a discount without avoiding tax liabilities. For example, if an eligible taxpayer is willing to transfer eligible credits at a discount and receive income from product sales or services that is in accordance with such eligible taxpayer's acceptable investment rate of return, the commenter wanted to know whether the anti-abuse rule would be applicable. In the commenter's hypothetical, the eligible taxpayer appears to be decreasing the price of eligible credits to encourage customers to purchase products or services but not making a corresponding increase to the price of its products or services, which could avoid recognizing gross income. However, the facts and circumstances would dictate whether the eligible taxpayer and the transferee taxpayer were engaging in the transaction with a principal purpose of avoiding any Federal income tax liability beyond the intent of section 6418.

The Treasury Department and the IRS have concluded that it is premature to adopt any safe harbor or a list of abuse examples in these final regulations in § 1.6418–2(e)(4) but will continue to study transactions between eligible taxpayers and transferee taxpayers to determine if it is appropriate to adopt an objective safe harbor or clarify other examples of abusive practices.

F. Transferee Taxpayer's Treatment of Eligible Credit

1. Taxable Year

Pursuant to section 6418(d), a transferee taxpayer takes the transferred eligible credit into account in its first taxable year ending with, or after, the eligible taxpayer's taxable year with respect to which the transferred eligible credit was determined. Proposed § 1.6418–2(f)(1) would have adopted this rule and further explained that to the extent the taxable years of an eligible taxpayer and a transferee taxpayer end on the same date, the

transferee taxpayer will take the specified credit portion into account in that taxable year. To the extent the taxable years of an eligible taxpayer and a transferee taxpayer end on different dates, the transferee taxpayer will take the specified credit portion into account in the first taxable year that ends after the taxable year of the eligible taxpayer.

Commenters requested clarification on whether a taxpayer that has a 52–53-week taxable year can rely on § 1.441–2(c)(1) to allow its taxable year that otherwise ends the last Saturday in December to be treated as ending on December 31. Otherwise, a transferee taxpayer with a 52–53-week taxable year would have to wait until the following taxable year to take into account an eligible credit that was transferred by an eligible taxpayer with a calendar year. A similar delay could result if the eligible taxpayer had a 52–53-week taxable year ending in January and the transferee taxpayer has a taxable year ending on December 31. Section 1.441–2(c)(1) provides, in relevant part, that for purposes of determining the effective date (for example, of legislative, regulatory, or administrative changes) or the applicability of any provision of the internal revenue laws that is expressed in terms of taxable years beginning, including, or ending with reference to the first or last day of a specified calendar month, a 52–53-week taxable year is deemed to begin on the first day of the calendar month nearest to the first day of the 52–53-week taxable year, and is deemed to end or close on the last day of the calendar month nearest to the last day of the 52–53-week taxable year, as the case may be. While the fact patterns from commenters do not fall within the explicit language of § 1.441–2(c)(1), the Treasury Department and the IRS conclude it is consistent to adopt a similar rule with respect to taxable year ends for purposes of section 6418(d). Thus, these final regulations include a rule in § 1.6418–2(f)(1)(ii) providing that, for purposes of determining the taxable year in which a credit is taken into account under section 6418(d) and § 1.6418–2(f)(1)(i), a 52–53-week taxable year of an eligible taxpayer and transferee taxpayer is deemed to end on or close on the last day of the calendar month nearest to the last day of the 52–53-week taxable year, as the case may be. Thus, in the fact patterns described by commenters, the transferee taxpayer and the eligible taxpayer would have the same year end, and the transferee taxpayer would not have to wait until the following year-end to take the eligible credit into account.

Another commenter asked when a transferee taxpayer with a taxable year that is a calendar year can take into account an eligible credit transferred from an eligible taxpayer that has a fiscal year ending June 30, if the eligible taxpayer's project was placed in service on November 1, 2023, and the eligible taxpayer proposes to transfer the eligible credit to the transferee taxpayer on November 15, 2023 (and assuming all other requirements of section 6418 were met). It appears this comment is seeking clarity on whether it is possible for an eligible taxpayer to determine an eligible credit during its taxable year beginning July 1, 2023, and ending June 30, 2024, and transfer the eligible credit in November 2023 to a transferee taxpayer with a taxable year ending December 31, 2023, for the transferee taxpayer to use in calculating its 2023 tax liability. Section 6418(d)(1) requires that a transferee taxpayer take a specified credit portion into account in a taxable year ending with or after the taxable year of the eligible taxpayer to which the eligible credit was determined. In this fact pattern, the transferee taxpayer's taxable year ends after the eligible taxpayer's taxable year. The transferee taxpayer cannot take into account the eligible credit until its first taxable year ending after June 30, 2024, meaning that the transferee taxpayer would have to wait until it filed its 2024 tax return (not considering whether the transferee taxpayer was able to use the eligible credit against its estimated tax payments as described in part II.F.5 of this Summary of Comments and Explanation of Revisions). The eligible taxpayer's taxable year end of June 30, 2023, does not impact this analysis, as there was no eligible credit determined with respect to the eligible taxpayer in that taxable year. Further, even if a credit was determined in the taxable year ending June 30, 2023, because section 6418 only applies to taxable years beginning after December 31, 2022, no eligible credits generated in such year are eligible to be transferred.

2. No Gross Income for a Transferee Taxpayer Upon Claiming a Transferred Specified Credit Portion

Proposed § 1.6418–2(f)(2) would have provided that a transferee taxpayer does not have gross income upon claiming a transferred specified credit portion even if the amount of cash paid to the eligible taxpayer was less than the amount of the transferred specified credit portion, assuming all other requirements of section 6418 are met. For example, a transferee taxpayer who paid $9X for $10X of a specified credit portion that the transferee taxpayer then claims on its return does not result in the $1X difference being included in the gross income of the transferee taxpayer.

A commenter suggested that the proposed rule conflicted with *Palmer* v. *Commissioner,* 302 U.S. 63 (1937), which held that the purpose of a bargain purchase determines its tax treatment; that is, if it is intended as compensation, then it is so treated for Federal tax purposes. Based on the case, the commenter thought that it is not possible to determine that a bargain purchase of a tax credit is not gross income to the purchaser, as the proposed regulations provided, without examining the facts and circumstances surrounding the transaction.

Proposed § 1.6418–2(f)(2) does not conflict with *Palmer.* The proposed rule presumes that the eligible taxpayer and the transferee taxpayer negotiated the consideration paid for the specified credit portion at arm's length and that the difference between the specified credit portion and the consideration paid for the credit (the ''discount'') reflects the transferee taxpayer's assumption of the risk of an excess credit transfer or recapture event. The proposed rule does not preclude the IRS from parsing the net consideration paid for the specified credit portion and analyzing whether the net consideration reflects a reduction due to an amount separately owed by the transferor to the transferee due to the receipt of services or property from the transferee. In such situation, the proposed rule does not preclude the IRS from asserting that a portion of the discount is income to the transferee taxpayer under *Palmer* or the anti-abuse rule in § 1.6418–2(e)(4) if a portion of the discount, in fact, constitutes compensation to the transferee taxpayer under section 61. Section 6418(a) is unambiguous that the transferee taxpayer is treated as the eligible taxpayer for purposes of the Code. Because the eligible taxpayer does not recognize gross income from generating or claiming a transferred specified credit portion under the Code, the Treasury Department and the IRS interpret section 6418(a) to provide the transferee taxpayer with the same treatment upon claiming a transferred specified credit portion acquired at a discount. Section 6418(a) is also unambiguous that the income exclusion is limited to the claiming of the eligible credit and does not cover compensation paid to the transferee taxpayer.

For these reasons, these final regulations adopt proposed § 1.6418–2(f)(2) without substantive change.

3. Transferee Taxpayer Treated as the Eligible Taxpayer

Consistent with the language in section 6418(a), proposed § 1.6418–2(f)(3)(i) would have provided that a transferee taxpayer (and not the eligible taxpayer) is treated as the taxpayer for purposes of the Code with respect to the transferred specified credit portion. Proposed § 1.6418–2(f)(3)(i) further explained that an eligible taxpayer must apply the rules necessary to determine the amount of an eligible credit prior to making the transfer election for a specified credit portion, and therefore a transferee taxpayer does not re-apply rules that relate to a determination of an eligible credit, such as the rules in sections 49 or 50(b). However, a transferee taxpayer must apply rules that relate to computing the amount of the specified credit portion that is allowed to be claimed in the taxable year by the transferee taxpayer, such as the rules in sections 38 or 469, as applicable.

a. Passive Credit Rules Generally

Proposed § 1.6418–2(f)(3)(ii) provided a more specific rule regarding application of section 469 to a transferee taxpayer. This proposed rule provided that a specified credit portion transferred to a transferee taxpayer is treated as determined in connection with the conduct of a trade or business and, if applicable, such transferred specified credit portion is subject to the rules in section 469 (passive credit rules).

Many comments were received regarding the application of section 469 to transferred specified credit portions. One commenter supported applying the passive credit rules to transferee taxpayers and believed that a more restrictive rule would better prevent potential fraud and abuse. Similarly, another commenter raised that allowing individuals to be credit purchasers raises important potential concerns about fraud and abuse since individuals, particularly those who are less affluent, may have less ability to perform due diligence on the transferred eligible credits and may become targets of fraudulent schemes. Most commenters, however, asserted that the passive credit rules should not apply to transferee taxpayers or that the rules should only apply in limited circumstances.

Some commenters argued that applying the rules will limit the market of potential purchasers of eligible credits to corporate entities with large tax liabilities and thus, exclude other taxpayers as potential investors. Other commenters contended that if the passive credit rules did not apply to transferee taxpayers, participation of individuals could materially increase, which would strengthen the transferability market and support the IRA's renewable energy and job creation goals. One commenter supported providing a carveout from the application of the passive credit rules for projects that generate less than 5 megawatts of energy. A few commenters requested that if the application of the passive credit rules remains, the Treasury Department and the IRS should allow for some amount of non-passive income tax liability flowing from operating S corporations and limited liability companies to be eligible to be offset by transferred eligible credits.

Many commenters addressed the rule in proposed § 1.6418–2(f)(3)(ii) that would treat a specified credit portion transferred to a transferee taxpayer as determined in connection with the conduct of a trade or business. One commenter generally supported the position that an eligible credit is earned in connection with the conduct of a trade or business, as that reflects how an eligible credit would arise. Other commenters, however, contended that treating transferred specified credit portions as earned in connection with a trade or business is inconsistent with the language in section 6418(a), which states that the transferee taxpayer is treated as the taxpayer with respect to a transferred credit. Some commenters stated that the language in section 6418(a) should be read as only transferring the rights of the credit to the transferee rather than subjecting the transferee to the passive credit rules. Another commenter argued that section 469 cannot apply to an activity that is not owned directly, or indirectly, by the taxpayer. A few commenters urged that instead of treating transferred specified credit portions as determined in connection with the conduct of a trade or business, it would be appropriate to treat transferee taxpayers as engaged in an investment activity and specified credit portions as determined in connection with such investment activity. As support for this position, these commenters cited Rev. Rul. 2010–16, 2010–26 I.R.B. 769, which addresses the application of the passive credit rules to section 45D credits earned through certain factual situations. Although unclear, another commenter appeared to assert that a transferred specified credit portion should be treated as a capital asset under section 1221 to a transferee taxpayer and that *Palmer* v. *Commissioner, supra,* is misapplied.

The language in section 6418 is most straightforwardly understood to not support disregarding the passive credit rules for transferred specified credit portions or applying the rules in a different manner than they apply to other general business credits arising in a trade or business. In enacting the novel credit delivery mechanisms of sections 6417 and 6418 as part of the IRA, Congress considered the application of the rules governing the determination and the utilization of tax credits. In cases in which Congress desired to alter the application of certain rules, they provided as such. For example, Congress generally turned off section 38(c) and sections 50(b)(3) and (4)(A)(i) in the case of elective pay under section 6417. Like section 38(c), the application of section 469 can materially affect whether a taxpayer can use tax credits to offset its tax liability. There is no carveout for section 469 in section 6418. Instead, section 469 provides in relevant part that a credit is subject to the passive credit rules if the credit arises in the conduct of a trade or business in which the taxpayer does not materially participate in the year to which it is attributable, and the credit is a general business credit under section 38. All of the eligible credits listed in section 6418(d) arise in the conduct of a trade or business and are general business credits under section 38. As a result, section 469 applies to the use of such eligible credits unless Congress provides otherwise, and commenters did not point to strong statutory or other evidence that Congress intended a different result. Moreover, any differences in the application of the passive credit rules among taxpayers is a result of section 469(a) and not the result of section 6418 or the proposed regulations.

Also, the application of section 469 to a transferee taxpayer is not inconsistent with the language in section 6418(a) that provides a transferee taxpayer ''shall be treated as the taxpayer'' for purposes of the Code with respect to a transferred credit. Absent section 6418, any taxpayer that has determined a general business credit under section 38 in the conduct of a trade or business is subject to section 469. While section 469 may not apply, for example, because a taxpayer is not a person described in section 469(a)(2), or may not result in a passive activity credit because a taxpayer materially participated in the trade or business or has sufficient passive activity income, all taxpayers have to consider whether section 469 is applicable to the use of any general

business credit arising in the conduct of a trade or business. Thus, it is not inconsistent to apply section 469 to a transferee taxpayer that is treated as the taxpayer for purposes of the Code with respect to a transferred credit. Moreover, an eligible credit generated through the conduct of a trade or business and transferred does not lose its status as a section 38 credit or its status of having arisen in a trade or business solely because the credit is transferred. If such attributes did not transfer under section 6418, eligible credits earned and used by eligible taxpayers would be subject to different limitations than transferred eligible credits used by transferee taxpayers. Lastly, the Treasury Department and the IRS agree with commenters that not applying the passive credit rules to transferred specified credit portions could increase the risk of fraud and abuse.

It is also inappropriate to treat transferred specified credit portions as determined in connection with the conduct of an investment activity or as a capital asset. Specifically, the facts and analysis in Rev. Rul. 2010–16 are distinguishable from transfers of specified credit portions under section 6418. Rev. Rul. 2010–16 held that if an acquisition, either directly or indirectly through a partnership, of a qualified equity investment in a community development entity (CDE) is not in connection with the conduct of a trade or business (or in anticipation of a trade or business), the section 45D credit will not be a passive activity credit under section 469. The determination of a section 45D credit does not require the conduct of a trade or business. Instead, a section 45D credit is determined based on the percentage of the amount paid to a CDE for a qualified equity investment at original issue and can be determined through a mere investment activity. Under the facts of Rev. Rul. 2010–16, the section 45D credit was not a passive activity credit under section 469 to either the individual or the partnership investors because it did not arise in the conduct of a trade or business. Conversely, eligible credits under section 6418 can only be determined (or arise) in connection with the conduct of a trade or business. Moreover, eligible credits are not determined through (or do not arise in connection with) an investment activity by a transferee taxpayer. Instead, all eligible credits are determined with respect to (or arise in connection with) the conduct of a trade or business owned by an eligible taxpayer. Eligible credits are transferred after they are determined. Thus, they cannot be redetermined in connection with an investment activity by a transferee. For these reasons, the final regulations do not adopt commenters' suggestions to not apply the passive credit rules to transferred specified credit portions or to apply the passive credit rules in a different manner than as provided in the proposed regulations. For a discussion of the application of *Palmer* v. *Commissioner, supra,* to section 6418, *see* part II.F.2 of this Summary of Comments and Explanation of Revisions.

A comment was received stating that the proposed regulations were silent on the rule of section 48(a)(3)(C) requiring the property to be used in a trade or business or held for the production of income. Any rules applicable to the underlying eligible credits are beyond the scope of the final regulations; however, the Treasury Department and the IRS note that any rules that relate to the determination of the eligible credit apply to the eligible taxpayer as described in proposed § 1.6418–2(d).

b. Material Participation and Grouping Rules

Proposed § 1.6418–2(f)(3)(ii) provided that in applying section 469, a transferee taxpayer is not considered to own an interest in the eligible taxpayer's trade or business at the time the work was done (as required for material participation under § 1.469–5(f)(1)) (material participation rules). Accordingly, a transferee taxpayer will not ordinarily materially participate within the meaning of section 469(h) in order to be treated as participating in the activity. Proposed § 1.6418–2(f)(3)(ii) also provided that a transferee taxpayer cannot change the characterization of its participation (or lack thereof) in the eligible taxpayer's trade or business by using any of the grouping rules under § 1.469–4(c) (grouping rules). Generally, § 1.469–4(c) allows a taxpayer to satisfy the material participation standard for a specific activity by virtue of having materially participated in a separate but related trade or business.

Comments were received in connection with the application of the material participation and grouping rules under section 469 to transferred specified credit portions. One commenter supported treating a transferee as not materially participating in the trade or business that generates an eligible credit if they did not actually do so. Other commenters asserted that the final rules should clarify that a transferee taxpayer that actually owns an interest in an eligible taxpayer, and materially participates in the credit generating activity, is treated as owning an interest in the eligible taxpayer's trade or business at the time the work was done. One commenter requested that transferee taxpayers that conduct an activity directly relating to and necessary for the generation of an eligible credit (but do not own an interest in the eligible taxpayer's credit generating trade or business) be treated as materially participating in the credit generating activity for purposes of section 469. Another commenter supported an approach that would permit taxpayers subject to the passive credit rules that satisfy the material participation requirement with respect to a specific activity (but do not own an interest in the activity that generates to the specified credit portion) to treat purchased credits from that activity as nonpassive. The same commenter raised that the application of the grouping rules under § 1.469–4(c) could be used to expand the potential purchasers of credits but acknowledged that this approach would be difficult to administer. Other commenters suggested that the language in section 6418(a) treating the transferee taxpayer as the taxpayer for purposes of the Code with respect to the transferred specified credit portion supports attributing the activities or all characteristics of an eligible taxpayer to a transferee taxpayer for purposes of applying the passive credit rules.

The Treasury Department and the IRS agree that in the limited circumstance of a transferee taxpayer who materially participates in an eligible credit generating activity within the meaning of section 469(h) in which the transferee taxpayer owns an interest at the time the work is done, the transferee taxpayer should be permitted to purchase eligible credits generated from the activity (assuming the transferee taxpayer is not related to the eligible taxpayer within the meaning of section 267(b) or section 707(b)(1)) and treat those purchased credits as not arising in connection with a passive activity. It is not workable to expand the material participation rules under section 469 for purposes of transferred specified credit portions in a meaningful manner without substantially increasing administrative burdens. For example, such a view would presumably require ownership of the underlying eligible credit property to be attributed to a transferee taxpayer. This formulation would be impracticable for purposes of section 50(c) and section 6418(g)(3)(A), which require an eligible taxpayer to make basis adjustments for transferred ITCs. Commenters did not address how to overcome the technical and

administrative complexities in attributing the activities or attributes of an eligible taxpayer to a transferee taxpayer for purposes of applying the passive credit rules. Additionally, allowing a transferee taxpayer to change the characterization of an eligible credit based on grouping with its own activities is inconsistent with the grouping rules under § 1.469–4(c) and would create significant administrative complexity. As such, these final regulations clarify that a transferee taxpayer who directly owns an interest in an eligible taxpayer's trade or business at the time the work was done (as required for the material participation rules), is not deemed to fail the requirements of section 469(h). However, these final regulations do not adopt commenters' suggestions to expand the material participation or grouping rules for purposes of applying the passive credit rules to transferred specified credit portions.

Lastly, commenters wanted confirmation that an individual transferee taxpayer can use eligible credits acquired as a result of a transfer election to offset passive income tax liability if the approach from the proposed regulations is adopted. The Treasury Department and the IRS confirm that if an individual transferee taxpayer does not materially participate (within the meaning of §§ 1.469–5 and 1.469–5T) in the activity that generates a specified credit portion, a transferred specified credit portion will be treated to the transferee taxpayer as arising in connection with a passive activity.

4. Transferee Taxpayer Requirements To Take Into Account a Transferred Specified Credit Portion

Section 6418(d) provides the taxable year that a transferee taxpayer takes a transferred eligible credit into account but does not provide rules on how a transferee taxpayer can take a transferred specified credit portion into account. To that end, proposed § 1.6418–2(f)(4) would have required (1) a properly completed Form 3800, General Business Credit (or its successor), taking into account a transferred eligible credit as a current general business credit, including all registration number(s) related to the transferred eligible credit; (2) the transfer election statement described earlier in this preamble attached to the return; and (3) any other information related to the transfer election specified in guidance. Because no comments were received on proposed § 1.6418–2(f)(4), these final regulations adopt this provision without change.

5. Estimated Tax Payments

The preamble to the proposed regulations explained that a transferee taxpayer could take into account a specified credit portion that it has purchased, or intends to purchase, to calculate its estimated tax payments, though the transferee taxpayer remains liable for any additions to tax in accordance with sections 6654 and 6655 of the Code to the extent the transferee taxpayer has an underpayment of estimated tax.

Commenters generally acknowledged that the preamble to the proposed regulations provided that transferred credits could be taken into account for purposes of calculating estimated tax but asked that the final regulations include a specific rule on how transferred credits should be taken into account. Commenters also offered particular circumstances for the Treasury Department and the IRS to consider in formulating a potential rule regarding transferred credits and estimated tax. One commenter requested that credits purchased in the first quarter could be applied against the transferee taxpayer's first quarter estimated tax payment if the taxpayer relied on a ''prior year safe harbor'' under section 6655(d)(2)(B). Another commenter requested clarification that the transferred credits should apply to a transferee's tax liability when the credit is determined. Another commenter requested that the final regulations should permit a transferee taxpayer to make an election to take into account the specified credit portion in the first taxable year in which such credit was determined by the eligible taxpayer.

The addition of a specific rule on estimated tax payments is unnecessary. The appropriateness of a transferee taxpayer taking the eligible credit into account for purposes of determining its quarterly estimated tax liability depends on the facts and circumstances. Nevertheless, as a clarification, because section 6418 generally contemplates a transferee taxpayer effectively stepping in the shoes of the eligible taxpayer from whom the transferee taxpayer was transferred the eligible credit, it follows that a transferee taxpayer can take into account the eligible credit for purposes of determining its quarterly estimated tax liability no earlier than an eligible taxpayer would. Further, if a transferee taxpayer is required to take a transferred eligible credit into account in a taxable year that has not yet begun because of the application of section 6418(d) and § 1.6418–2(f)(1), then a transferee taxpayer cannot take the eligible credit into account for purposes of determining quarterly estimated tax liability until after the start of that later year. As noted in the preamble to the proposed regulations and confirmed in this part II.F.5 of the Summary of Comments and Explanation of Revisions, the transferee taxpayer remains liable for any additions to tax in accordance with sections 6654 and 6655 to the extent the transferee taxpayer has an underpayment of estimated tax.

For example, if a calendar year eligible taxpayer enters into an agreement with a calendar year transferee taxpayer during calendar year 2024 to transfer an eligible credit, and such credit is determined with respect to the eligible taxpayer in calendar year 2024, then assuming a timely and complete transfer election is made, the transferee taxpayer can take the transferred credit into account when calculating the required annual payment and quarterly estimated tax installments for calendar year 2024. The transferee taxpayer cannot treat the transferred credit as a payment of estimated tax. If any portion of the eligible credit that is ultimately transferred to a transferee taxpayer under section 6418(a) is subsequently adjusted to an amount less than what was agreed upon by the eligible taxpayer and the transferee taxpayer in calendar year 2024, the transferee taxpayer may be liable for any additions to tax under sections 6654 or 6655, given the reduced credit amount being transferred.

Commenters requested clarification of the phrase ''intends to purchase'' as used in the preamble to the proposed regulations. The phrase captures a situation in which the taxpayer plans to complete a transaction that meets the requirements of proposed § 1.6418–2(b) so that the taxpayer would qualify as a transferee taxpayer with respect to a specified credit portion, but has not yet done so. This phrase illustrates that all the requirements of proposed § 1.6418–2(b) do not have to be met for a transferee taxpayer to take the expected eligible credit into account in its estimated tax calculations, though the transferee taxpayer remains liable for any additions to tax in accordance with sections 6654 and 6655 of the Code to the extent the transferee taxpayer has an underpayment of estimated tax if the eligible credit is not obtained as expected.

6. Chaining

Multiple commenters responding to the section 6418 proposed regulations, as well as the section 6417 proposed regulations, requested that a transferee

taxpayer that is also an applicable entity under section 6417 be permitted to make an elective payment election under section 6417(a) for a credit that the transferee taxpayer purchased from an eligible taxpayer under section 6418(a) (referred to in the section 6417 regulations as ''chaining''). These comments are outside of the scope of these final regulations because they ask a question that can only be resolved under section 6417. As explained in the preamble to TD 9988, the Treasury Department and the IRS note that § 1.6417–2(c)(4) specifically does not adopt commenters' recommendations. However, the Treasury Department and the IRS also published Notice 2024–27, 2024–12 IRB 715, which requests comments on situations in which a section 6417(a) election could be made for credits purchased in transfers under section 6418(a). Written comments submitted pursuant to procedures described in Notice 2024–27 are due by December 1, 2024.

III. Additional Rules for Partnerships and S Corporations

Section 6418(c)(2) provides that, in the case of any facility or property held directly by a partnership or an S corporation, any election under section 6418(a) is made by such partnership or S corporation. Section 6418(c)(1)(A) and (B) describes the treatment of a transfer election made by a partnership or an S corporation, and proposed § 1.6418–3 would have provided additional rules for partnerships or S corporations that are eligible taxpayers or transferee taxpayers.

A. Rules Applicable to Both Partnerships and S Corporations

Proposed § 1.6418–3(a)(1) through (6) provided certain rules that are applicable to both partnerships and S corporations. Proposed § 1.6418–3(a)(1) provided generally that a partnership or an S corporation may qualify as an eligible taxpayer or a transferee taxpayer, assuming all other relevant requirements in section 6418 are met. Proposed § 1.6418–3(a)(2) provided that in the case of any specified credit portion determined with respect to any eligible credit property held directly by a partnership or an S corporation, if such partnership or S corporation makes a transfer election with respect to such specified credit portion, (i) any amount of cash payment received as consideration for the transferred specified credit portion will be treated as tax exempt income for purposes of sections 705 and 1366 of the Code, and (ii) a partner's distributive share of such tax exempt income will be as described in proposed § 1.6418–3(b)(1) and (2). Proposed § 1.6418–3(a)(3) clarified that in the case of an eligible credit property held directly by a partnership or an S corporation, no transfer election by any partner or S corporation shareholder is allowed. Proposed § 1.6418–3(a)(4) clarified that the language in section 6418(c) requiring an eligible credit property to be ''held directly'' by a transferor partnership or transferor S corporation allows for such eligible credit property to be owned by an entity disregarded as separate from the transferor partnership or transferor S corporation for Federal income tax purposes. Proposed § 1.6418–3(a)(5) provided that any tax exempt income resulting from the receipt of consideration for the transfer of a specified credit portion by a transferor partnership or transferor S corporation is treated as arising from an investment activity and not from the conduct of a trade or business within the meaning of section 469(c)(1)(A). Additionally, the proposed regulations provided that any tax exempt income is not treated as passive income to any direct or indirect partners or shareholders who do not materially participate within the meaning of section 469(c)(1)(B). Lastly, proposed § 1.6418–3(a)(6)(i) provided that the disposition of a partner's interest under § 1.47–6(a)(2) or the disposition of an S corporation shareholder's interest under § 1.47–4(a)(2) in a transferor partnership or an S corporation, respectively, does not result in recapture under section 6418(g)(3)(B) to which a transferee taxpayer is liable. Likewise, proposed § 1.6418–3(a)(6)(ii) provided that a change in the nonqualified nonrecourse financing (as defined in section 49(a)(1)(D)) amount of any partner or shareholder of a transferor partnership or transferor S corporation, respectively, after the close of the taxable year in which the investment credit property is placed in service and the specified credit portion is determined, is disregarded for purposes of section 6418(g)(3)(B). That is, only the applicable partner in the transferor partnership or shareholder in the transferor S corporation is liable for recapture in such a circumstance. As such, notification by the transferor partnership or transferor S corporation to the transferee taxpayer of a section 49 recapture event is not required. Because there were no comments related to the provisions described in this paragraph, the proposed regulations are adopted without change in these final regulations.

B. Rules Solely Applicable to Transferor and Transferee Partnerships

Section 6418(c)(1)(A) provides that any amount received as consideration for a transfer of eligible credits by a transferor partnership is treated as tax exempt income for purposes of section 705. Section 6418(c)(1)(B) provides that a partner's distributive share of such tax exempt income is based on such partner's distributive share of the otherwise eligible credit for each taxable year. Proposed § 1.6418–3(b)(1) provided that a transferor partnership must generally determine a partner's distributive share of any tax exempt income resulting from the receipt of consideration by a transferor partnership for a transferred specified credit portion based on such partner's proportionate distributive share of the eligible credit that would otherwise have been allocated to such partner absent the transfer of the specified credit portion (otherwise eligible credit). The proposed regulations noted that a partner's distributive share of an otherwise eligible credit is determined under §§ 1.46–3(f) and 1.704–1(b)(4)(ii). The proposed regulations further clarified that any tax exempt income resulting from the receipt of consideration by a transferor partnership for a transferred specified credit portion is treated as received or accrued, including for purposes of section 705, as of the date the specified credit portion is determined with respect to the transferor partnership (such as, for investment credit property, the date the property is placed in service).

Proposed § 1.6418–3(b)(2) provided a special rule for allocations of tax exempt income and eligible credits resulting from a transfer of a specified credit portion of less than all eligible credits determined with respect to an eligible credit property held by a transferor partnership. This special rule permitted tax exempt income resulting from the receipt of consideration for a transfer of one or more specified credit portion(s) of less than all eligible credits from an eligible credit property to, generally, be allocated to those partners that desired to transfer their distributive share of the underlying credits. To take advantage of this special rule, the proposed regulations provided that a transferor partnership would first determine each partner's distributive share of the otherwise eligible credits determined with respect to such eligible credit property in accordance with §§ 1.46–3(f) and 1.704–1(b)(4)(ii). This amount is referred to as a ''partner's eligible credit amount.'' Thereafter, the transferor

partnership would determine, either in a manner described in the partnership agreement or as the partners may agree, the portion of each partner's eligible credit amount to be transferred and the portion of each partner's eligible credit amount to be retained and allocated to such partner. Following the transfer of the specified credit portion(s), the transferor partnership would be permitted to allocate to each partner its agreed upon share of eligible credits, tax exempt income resulting from the receipt of consideration for the transferred specified credit portion(s), or both, as the case may be; provided that, the amount of eligible credits allocated to each partner did not exceed such partner's eligible credit amount and the amount of tax exempt income allocated to each partner would equal such partner's proportionate share of tax exempt income resulting from the transfer(s). Each partner's proportionate share of tax exempt income resulting from the transfer(s) would be equal to the total tax exempt income resulting from the transfer(s) of the specified credit portion(s) multiplied by a fraction, (i) the numerator of which would be a partner's total eligible credit amount minus the amount of eligible credits actually allocated to the partner with respect to the eligible credit property for the taxable year, and (ii) the denominator of which would be the total amount of the specified credit portion(s) transferred by the partnership with respect to the eligible credit property for the taxable year. The proposed regulations provided examples of this rule.

A commenter generally supported the partnership allocation rules in the proposed regulations, although there was a non-specific question related to the administrability of the proposed rules in the tax credit industry. The Treasury Department and the IRS appreciate that the partnership allocation rules under section 6418 could be considered complex and difficult to administer, but any such complexity of those rules is warranted given the flexibility they provide to taxpayers operating through transferor partnerships.

A commenter requested clarifying language and an example showing that the varying annual election and separate determination of each partner's eligible credit amount to be transferred under section 6418 and the portion of each partner's eligible credit amount to be retained and allocated to such partner and related allocations of tax exempt income can be made or revised at any time during the taxable year the eligible credit is generated and the following taxable year up to the due date of the partnership return for the taxable year under sections 706 and 761. Section 761(c) provides that for purposes of subchapter K of chapter 1 of the Code, a partnership agreement includes any modifications of the agreement made on or before the due date (not including extensions) of the partnership return for the taxable year, which are agreed to by all the partners or are adopted in accordance with the provisions of the agreement. The effect of section 761(c) is that a partnership is allowed to change its partners' distributive shares of income, gain, loss, deductions or credits for a taxable year (assuming such allocations are compliant with section 704(b)) up until the due date (not including extensions) for the partnership's tax return for such year. Proposed § 1.6418–3(b)(2)(ii) would have provided that a transferor partnership may determine, in any manner described in the partnership agreement, or as the partners may agree, the portion of each partner's eligible credit amount to be transferred, and the portion of each partner's eligible credit amount to be retained and allocated to such partner. Assuming the agreement between the partners as to the portion of each partner's eligible credit amount to be transferred, and the portion of each partner's eligible credit amount to be retained and allocated to such partner, is properly treated as part of the partnership's agreement, such amounts can be made or revised under section 761(c) up until the due date (not including extensions) of the partnership's annual tax return. As such, there would already be considerable flexibility under the proposed regulations, and that additional language or an example is unnecessary to address this commenter's request.

Proposed § 1.6418–3(b)(4)(i) would have provided that a partnership may qualify as a transferee partnership to the extent it is not related (within the meaning of section 267(b) or 707(b)(1)) to an eligible taxpayer. The proposed regulations also would have provided that while a transferee partnership is subject to the no additional transfer rule, an allocation of a transferred specified credit portion to a direct or indirect partner of a transferee partnership under section 704(b) is not a transfer for purposes of section 6418. Proposed § 1.6418–3(b)(4)(ii) would have provided that a cash payment by a transferee partnership as consideration for a transferred specified credit portion is treated as an expenditure described in section 705(a)(2)(B). Proposed § 1.6418–3(b)(4)(iii) would have provided that each partner's distributive share of any transferred specified credit portion is based on such partner's distributive share of the section 705(a)(2)(B) expenditures used to fund the purchase of such transferred specified credit portion. Under the proposed regulations, each partner's distributive share of the section 705(a)(2)(B) expenditures used to fund the purchase of any transferred specified credit portion would be determined by the partnership agreement. Or, if the partnership agreement did not provide for the allocation of such nondeductible expenditures, then each partner's distributive share would be based on the transferee partnership's general allocation of nondeductible expenditures.

To prevent avoidance of the no additional transfer rule in proposed § 1.6418–2(c)(2), the proposed regulations in proposed § 1.6418–3(b)(4)(iv) would have provided that a transferred specified credit portion purchased by a transferee partnership is treated as an extraordinary item under § 1.706–4(e) (and would have included a proposed addition to § 1.706–4(e) confirming a transferred specified credit portion is an extraordinary item). The proposed regulations further would have provided that if the transferee partnership and eligible taxpayer have the same taxable years, such extraordinary item is deemed to occur on the date the transferee partnership first makes a cash payment to an eligible taxpayer for any transferred specified credit portion. The proposed regulations also would have provided that if the transferee partnership and eligible taxpayer have different taxable years, the extraordinary item is deemed to occur on the later of the first date the transferee partnership takes the transferred specified credit portion into account under section 6418(d), or the first date that the transferee partnership made a cash payment to the eligible taxpayer for the transferred specified credit portion.

Lastly, proposed § 1.6418–3(b)(4)(v) would have provided that if an upper-tier partnership is a direct or indirect partner of a transferee partnership and directly or indirectly receives an allocation of a transferred specified credit portion, the upper-tier partnership is not an eligible taxpayer under section 6418 with respect to the transferred specified credit portion. The proposed regulations would have provided that an upper-tier partnership must determine each partner's distributive share of the transferred specified credit portion in accordance

with rules in proposed § 1.6418–3(b)(4)(iii) and (iv) and must report the credits to its partners in accordance with guidance.

A commenter recommended that the final regulations avoid excluding partners from credit allocations due to the extraordinary items rule of proposed § 1.6418–3(b)(4)(iv) if a new partner is admitted to the partnership after the transferee taxpayer signs a credit purchase agreement but before any cash payments have been made. The commenter's concern was with respect to the application of proposed § 1.6418–1(f)(3) to a partnership. This provision stated that the term ''paid in cash'' means a payment in U.S. dollars and ''[m]ay include a transferee taxpayer's contractual commitment to purchase eligible credits with United States dollars in advance of the date a specified credit portion is transferred to such transferee taxpayer.'' The commenter suggested that the clause in the previous sentence could be interpreted to mean that the term ''paid in cash'' means the advance contractual commitment itself, rather than the payment pursuant to the advance commitment and suggested some changes to proposed § 1.6418–1(f)(3). The paid in cash definition in proposed § 1.6418–1(f)(3) confirms that advanced commitments are permissible and do not violate the paid in cash requirement. As the commenter hypothesizes, this provision is intended to clarify that payments in U.S. dollars made at the proper time can qualify even if the payments are made pursuant to advance contractual commitments. Likewise, the Treasury Department and the IRS confirm that an advanced commitment is not by itself considered a cash payment. Thus, if a partnership has not yet made any cash payments pursuant to a commitment to purchase eligible credits, an extraordinary item has not yet arisen.

A commenter requested additional guidance in the form of examples that illustrate the transfer of partnership interests. The Treasury Department and the IRS have considered these general requests and have determined such additional guidance is not necessary. The final regulations already provide examples demonstrating the rules applicable to a transferee partnership and its partners under section 6418, including rules applicable to an upper-tier partnership that is a direct or indirect partner in a transferee partnership. However, the final regulations clarify that an upper-tier partnership's distributive share of a transferred specified credit portion is treated as an extraordinary item to the upper-tier partnership. As a result, a transferred specified credit portion must be allocated among the partners of an upper-tier partnership as of the time the transfer of the specified credit portion is treated as occurring to the transferee partnership in accordance with § 1.6418–3(b)(4)(iv) and § 1.706–4(e)(1) and (e)(2)(ix). This is the case regardless of whether the transferee partnership and the upper-tier partnership have different taxable years under section 706(b).

A commenter recommended updates to § 1.704–1(b)(3) to provide that the special allocations of tax exempt income and non-deductible expenses in the manner contemplated by the proposed regulations will be treated as having been made in accordance with the partners' interests in the partnership. The Treasury Department and the IRS have considered whether updates to § 1.704–1(b)(3) are necessary and have determined that updates to those regulations are outside the scope of final regulations for section 6418.

C. Rules Solely Applicable to Transferor and Transferee S Corporations

Section 6418(c)(1)(A) provides that any amount received as consideration for a transfer of eligible credits by a transferor S corporation is treated as tax exempt income for purposes of section 1366. Proposed § 1.6418–3(c)(1) would have provided that each shareholder of a transferor S corporation must take into account such shareholder's pro rata share (as determined under section 1377(a) of the Code) of any tax exempt income resulting from the receipt of consideration for the transfer. The proposed regulations further would have provided that any tax exempt income resulting from the receipt of consideration by a transferor S corporation for a transferred specified credit portion is treated as received or accrued, including for purposes of section 1366 of the Code, as of the date the specified credit portion is determined with respect to the transferor S corporation (such as, for investment credit property, the date the property is placed in service).

Proposed § 1.6418–3(c)(2)(i) would have provided that an S corporation may qualify as a transferee taxpayer to the extent it is not related (within the meaning of section 267(b) or 707(b)(1)) to an eligible taxpayer. The proposed regulations also would have provided that while a transferee S corporation is subject to the no additional transfer rule, an allocation of a transferred specified credit portion to a direct or indirect shareholder of a transferee S corporation is not a transfer for purposes of section 6418. Proposed § 1.6418–3(c)(2)(ii) would have provided that a cash payment by a transferee S corporation as consideration for a transferred specified credit portion is treated as an expenditure described in section 1367(a)(2)(D) of the Code. Proposed § 1.6418–3(c)(2)(iii) would have provided that each shareholder of a transferee S corporation must take into account such shareholder's pro rata share (as determined under section 1377(a)) of any transferred specified credit portion. The proposed regulations further would have provided that if a transferee S corporation and eligible taxpayer have the same taxable years, the transfer of a specified credit portion is treated as occurring to a transferee S corporation during the transferee S corporation's permitted year (as defined under section 1378(b)) or the taxable year elected under section 444 that the transferee S corporation first makes a cash payment as consideration to the eligible taxpayer for the specified credit portion. The proposed regulations also would have provided that if a transferee S corporation and eligible taxpayer have different taxable years, then the transfer of a specified credit portion is treated as occurring to a transferee S corporation during the transferee S corporation's first permitted year (as defined under sections 444 and 1378(b)) ending with or after, the taxable year of the eligible taxpayer to which the transferred specified credit portion was determined. Because there were no comments related to the provisions described in this paragraph, the proposed regulations are adopted without change in these final regulations.

D. Elections for Transferor Partnerships and Transferor S Corporations

Proposed § 1.6418–3(d) would have provided specific rules relating to elections for transferor partnerships or transferor S corporations. Proposed § 1.6418–3(d)(1) would have provided that a transfer election is made on the basis of an eligible credit property and only applies to the specified credit portion identified in the transfer election by such partnership or S corporation in the taxable year for which the election is made. Proposed § 1.6418–3(d)(2) would have provided that a transfer election for a specified credit portion must be made in the manner provided in proposed § 1.6418–2(b)(1) through (3), including that all documents required in proposed § 1.6418–2(b)(1) through (3) must be attached to the partnership or S corporation return for the taxable year during which the transferred specified

credit portion was determined. The proposed regulations further would have provided that for the transfer election to be valid, the return must be filed not later than the time prescribed by §§ 1.6031(a)–1(e) and 1.6037–1(b) (including extensions of time) for filing the return for such taxable year. Additionally, the proposed regulations would have provided that no transfer election may be made or revised on an amended return or by filing an AAR and that no 9100 relief would be available for a transfer election that is not timely filed. Lastly, proposed § 1.6418–3(d)(3) would have provided that a transfer election by a partnership or an S corporation is irrevocable. As described in greater detail in part II.B.4 of this Summary of Comments and Explanation of Revisions, these final regulations modify proposed § 1.6418–2(b)(4) to permit an automatic six-month extension of time under § 301.9100–2(b) to make the election prescribed in section 6418(e)(1). Consistent with that modification, these final regulations also modify proposed § 1.6418–3(d)(2) to provide for late-election relief under § 301.9100–2(b) for a partnership or an S corporation making a transfer election and permit, based on some commenters' requests, that a partnership or an S corporation, much like any other eligible taxpayer, may correct a numerical error with respect to a properly claimed transfer election on an amended return or AAR. The partnership's or S corporation's original return must have been signed under penalties of perjury and must have contained all of the information, including a registration number, required by these final regulations. The final regulations clarify that in order to correct an error on an amended return or AAR, a partnership or an S corporation must have made an error in the information included on the original return such that there is a substantive item to correct. A partnership or an S corporation cannot correct a blank item or an item that is described as being ''available upon request.''

IV. Additional Information and Registration

Section 6418(g)(1) provides that as a condition of, and prior to, any transfer of any portion of an eligible credit under section 6418, the Secretary may require such information (including, in such form or manner as is determined appropriate by the Secretary, such information returns) or registration as the Secretary deems necessary for purposes of preventing duplication, fraud, improper payments, or excessive payments under this section. Proposed § 1.6418–4 would have addressed these requirements by adding a pre-filing registration process, and § 1.6418–4T, issued contemporaneously, put those rules into effect for taxable years ending on or after June 21, 2023. Because the temporary regulations are removed, this part IV discusses the proposed regulations rather than the temporary regulations, which are identical.

Proposed § 1.6418–4(a)–(c) would have provided the mandatory pre-filing registration process that, except as provided in guidance, an eligible taxpayer would be required to complete as a condition of, and prior to, the transfer of an eligible credit under proposed § 1.6418–2 or § 1.6418–3.

Proposed § 1.6418–4(a) would have provided an overview of the pre-filing registration process. Proposed § 1.6418–4(b) would have included the pre-filing registration requirements, including: (1) manner of pre-filing registration; (2) pre-filing registration and election for members of a consolidated group; (3) timing of pre-filing registration; (4) that each eligible credit property must have its own registration number; and (5) information required to complete the pre-filing registration process. Proposed § 1.6418–4(c) would have provided rules related to the registration number, including: (1) general rules; (2) that the registration number is valid for only one taxable year; (3) renewing registration numbers; (4) amendment of previously submitted registration information if a change occurs before the registration number is used; and (5) that the registration number is required to be reported by an eligible taxpayer and transferee taxpayer.

Several commenters requested that the IRS implement a streamlined process for registration, including registration for multiple properties. Several commenters provided suggestions for alternatives to a registration process, such as creating a registry of tax credits, an election out of pre-filing registration, or utilizing the current process for matching transactions. Section 6418(g)(1) provides that the Secretary may implement a registration process she deems necessary for purposes of preventing duplication, fraud, or improper or excessive transfers of eligible credits. Proposed § 1.6418–4(a) would have required an eligible taxpayer to satisfy the pre-filing registration requirements of proposed § 1.6418–4(b) as a condition of, and prior to, making a transfer election under section 6418(a). The Treasury Department and the IRS recognize the concerns of eligible taxpayers needing an efficient registration process to transfer eligible credits but must mitigate opportunities for fraud. The IRS will consider ways outside of these final regulations to make the pre-filing registration process more streamlined for eligible taxpayers, and the IRS will continue to monitor the pre-filing registration process to determine whether there are areas in which more efficiencies in the pre-filing registration process can be created. However, these final regulations finalize proposed § 1.6418–4(a) without change.

Several commenters recommended that the final regulations allow transfers under section 6418(a) without a registration requirement if the pre-filing registration application had been submitted. The Treasury Department and the IRS understand commenters' recommendations were made prior to the pre-filing registration portal being open; however, pre-filing registration is necessary to help meet the government's compelling interest to prevent fraud and duplication while also allowing for a more efficient processing and payment upon filing of the return. These final regulations do not adopt this suggestion because the timing of the submission is only one issue. The quality and accuracy of information of the provided information is also important, and so only submitting an application is an insufficient guardrail.

Several commenters stated that the registration process might create burdens for taxpayers that could prevent their participation in transfer opportunities. A commenter stated that the documentation and process related to acquiring a registration number should account for the fact that, while there are many large taxpayers that may be selling tax credits, the transfer market will include many smaller taxpayers as well. The Treasury Department and the IRS understand commenters' concerns about the need for resources to complete the pre-filing registration process; however, as described previously, pre-filing registration is necessary to help meet the government's compelling interest to prevent fraud and duplication while also allowing for a more efficient processing of the eligible taxpayer's return and the transferee taxpayer's return. The information requested during the pre-filing registration process is also information that the eligible taxpayer should have available after having engaged in an activity for which an eligible credit is determined. Further, for smaller eligible taxpayers that engage in fewer projects, the pre-filing registration process will be less complex. For example, an eligible taxpayer with one eligible credit property for which an eligible credit is

determined during the taxable year will have a more streamlined registration process than will an eligible taxpayer with multiple eligible credit properties for which multiple eligible credits are determined during the taxable year. Finally, the IRS is committed to ongoing efforts to provide guidance to help taxpayers understand how to qualify for the underlying credits, how to meet the pre-filing registration requirements, and how to complete the transfer election process. These efforts, among others undertaken by the IRS, should address the commenters' concerns. Thus, these final regulations adopt the pre-filing registration process as proposed.

Commenters recommended a time limit for registration approval. A commenter urged the IRS to provide registration numbers as quickly as possible and publicly share estimates for issuing registration numbers to incentivize efficiency. Another commenter urged that the IRS be required to clarify reasons for delay in issuing a registration number and provide relief from estimated tax penalties due to the delay. Several commenters recommended that the final regulations create specific exceptions to the pre-filing registration requirement, such as a transition rule allowing transferee taxpayers to take eligible credits into account on the transferee taxpayer's 2023 tax return without a registration number for the eligible credits if a pre-registration application has been submitted by the eligible taxpayer. These final regulations do not adopt these suggestions for a time limit or a transition rule for a 2023 taxable year. Instead, the Treasury Department and the IRS recommend that taxpayers with these sorts of questions consult the current version of Publication 5884, *Inflation Reduction Act (IRA) and CHIPS Act of 2022 (CHIPS) Pre-Filing Registration Tool User Guide and Instructions,* for the latest guidance on the pre-filing registration process. In April 2024, Publication 5884 stated:

> Even though registration is not possible prior to the beginning of the tax year in which the credit will be earned, the IRS recommends that taxpayers register as soon as reasonably practicable during the tax year. The current recommendation is to submit the pre-filing registration at least 120 days prior to when the organization or entity plans to file its tax return. This should allow time for IRS review, and for the taxpayer to respond if the IRS requires additional information before issuing the registration numbers.

This information in Publication 5884 should also help other commenters that asked for clarification on the timeline for such a pre-filing registration process, including the lead-time required to initiate the process before the anticipated date of filing the applicable tax return.

One commenter suggested that the proposed regulations failure to mention bonus credits in proposed § 1.6418–4 means it is ambiguous whether eligible taxpayers must separately declare their intent to elect to transfer a bonus credit. The commenter strongly encouraged that the final regulations resolve this ambiguity and clearly specify that such an intent must be separately reported. However, as explained in part I.D of the Summary of Comments and Explanation of Revisions, bonus credits are not separately transferred from an eligible credit. Further, these final regulations do not adopt these proposed revisions to the proposed regulations because the pre-filing registration process is primarily intended to verify that the applicant is an eligible taxpayer and that the registered property is an eligible credit property. Calculation of the credit amount (including qualifying for any bonus amounts that would increase the base credit amount) is done on an annual return. However, the Treasury Department and the IRS will monitor the pre-filing registration process to determine whether requesting additional information is needed to prevent duplication, fraud, improper payments, or excessive credit transfers under section 6418.

Several commenters requested clarification of the IRS's review and determination procedures after a taxpayer completes registration, including whether taxpayers may appeal any denials of registration numbers. Publication 5884 describes this process. In cases in which a pre-filing registration submission is incomplete, the IRS will attempt to contact the registrant using the information provided to indicate deficiencies with the registration prior to making a determination.

Section 7803(e)(3) of the Code provides that it is the function of the IRS Independent Office of Appeals (Appeals) to resolve Federal tax controversies without litigation. Decisions made by the IRS relating to the denial, suspension, or revocation of a registration number are not Federal tax controversies within the meaning of section 7803(e)(3) because registration is too attenuated and separate from any tax liability of the eligible taxpayer. Accordingly, once the IRS determines that a registration number should not be given, the registrant cannot appeal the denial unless the IRS and Appeals agree that such review is available and the IRS provides the time and manner for such review.

Commenters requested that the final regulations clarify documentation retention requirements, including additional rules for the types of documents to retain or the type of information to be retained. The documentation to support the existence of valid eligible credit property will vary by the credit being claimed. The pre-filing registration portal and Publication 5884 list, for each credit, a description of the types of documents that will facilitate processing of the pre-filing registration. A registrant does not need to provide all information that may be available; in fact, as of April 2024, Publication 5884 states:

> If detailed project plans or contractual agreements are the best support that the taxpayer is engaging in activities or making tax credit investments that qualify the registrant to claim a credit, the registrant should submit an extract of the document showing the name of the taxpayer, date of purchase and identifying information such as serial numbers, rather than the entire document.

However, to the extent the information provided is insufficient for purposes of the pre-filing registration process, the IRS may request further information. *See* Publication 5884.

Commenters provided suggestions of how the registration portal should be constructed and how it should function. Commenters also recommended that the IRS enable a transferee taxpayer to verify the legitimacy of a registration number by providing the eligible taxpayer's pre-filing registration information, including a truncated taxpayer identification number, into the portal. The Treasury Department and the IRS recognize that these comments were provided prior to the opening of the registration portal; however, much of the infrastructure and planning for the registration portal was in process at the time these comments were received. The Treasury Department and the IRS will continue to review the efficiency of the registration portal, including functionality responses from the public, to determine whether changes should be implemented or whether additional guidance or publications should be issued; however, these comments are outside of the scope of these final regulations.

Several commenters stated that the final regulations should allow grouping for registration and transfer either by means of the underlying Code section provisions or existing guidance. Other commenters recommended changes in the final regulations to allow for grouping based on specific types of property. The definition of eligible credit property in section 6418 is based

on the relevant rules for the underlying eligible credit, and changes to the definition of particular properties pursuant to the underlying Code sections is outside the scope of this rulemaking. If any such underlying Code section allows grouping to determine a qualified property, then grouping for purposes of a registration number is permitted. If such definition does not allow grouping, then each eligible credit property must be registered separately; however, for some eligible credits, the pre-filing registration portal allows eligible credit property information to be uploaded by way of a spreadsheet file (bulk upload). *See* Publication 5884.

A commenter specifically asked that grouping of charging properties under section 30C be permitted for registration purposes. The commenter argued that requiring the pre-registration on a single eligible credit property basis would be unduly burdensome and costly in some cases. The commenter suggested allowing taxpayers to bundle multiple projects at different locations into a single pre-registration to process and reduce transaction costs, believing in most cases that it would reflect the realities of the transfer. The Treasury Department and the IRS did not adopt the commenters recommendation regarding section 30C, as the approach recommended was determined to be too subjective, which could lead to differences in interpretation between taxpayers and the IRS. As such, the grouping of eligible credit property continues to depend on the definition of that eligible credit property under the relevant Code section and regulations implementing the underlying eligible credit. In this commenter's case, this means the rules in section 30C(c). However, it is relevant to note the pre-filing registration portal allows eligible credit property information to be uploaded by way of bulk upload for certain credits, including the section 30C credit. *See* Publication 5884.

Commenters sought clarification that the pre-filing registration process will not require designation of a qualified clean hydrogen production facility's applicable ''lifecycle greenhouse gas emissions rate'' under section 45V. Similar to the issue of grouping eligible credit properties, the definition of eligible credit property in section 6418 is based on the relevant rules for the underlying eligible credit, and clarification of the definitions contained in the underlying Code sections for particular properties is outside the scope of this rulemaking. Therefore, these final regulations do not make this recommended change.

A commenter recommended that the final regulations allow the owner of a single process train to register the eligible credit property and the owner and the disposer(s) or utilizer(s) to each make a transfer election using the same registration number for a section 45Q credit. The commenter also recommended that in this case the pre-filing registration portal allow the owner of the single process train to disclose as part of its pre-filing registration that the credit or a portion thereof will be allowed to disposer(s) or utilizer(s) under a section 45Q(f)(3)(B) election. As explained in part II.A of this Summary of Comments and Explanation of Revisions, § 1.6418–2(a)(4)(iii) of these final regulations provides that a section 45Q credit allowable to an eligible taxpayer because of an election under section 45Q(f)(3)(B) is not an eligible credit that can be transferred because the credit is not determined with respect to the eligible taxpayer. Thus, the final regulations do not adopt this recommendation.

Several commenters sought exceptions to the yearly registration requirement. A commenter requested an illustration of a specified change that would require an amendment or resubmission. The purpose of the registration process is to assist with the administrative needs of the IRS in tracking the eligible credit property and the transferred specified credit portion. Proposed § 1.6418–4(c)(2) would have stated that a registration number is valid with respect to an eligible taxpayer only for the taxable year in which the credit is determined for the eligible credit property for which the registration is completed, and for a transferee taxpayer's taxable year in which the eligible credit is taken into account under proposed § 1.6418–2(f). Additionally, proposed § 1.6418–4(c)(3) would have stated that renewal must be made in accordance with applicable guidance, including attesting that all the facts previously provided are still correct or updating any facts. Thus, any changes to the pre-filing registration process to make it be more streamlined for renewals will be addressed in applicable guidance. After reviewing this comment, the Treasury Department and the IRS have determined that a yearly registration process is still necessary to meet these administrative needs.

Proposed § 1.6418–4(b)(5)(vii)(D) would have required that, to complete the pre-filing registration process, registrants must provide information as to the beginning of construction date and the placed in service date of the eligible credit property. Commenters requested that the final regulations require registration up to sixty days before construction has begun as well as an IRS visit to the jobsite as part of the registration process for PWA purposes. The Treasury Department and the IRS have determined that a registration number should not be given before the eligible credit property is placed in service, which is an important step to ensuring that the eligible credit property qualifies for the eligible credit for which the eligible taxpayer seeks to make a transfer election. Because a credit must be determined in the taxable year of the transfer election, maintaining the proposed requirement will ensure that taxpayers are not attempting to make a transfer election in a year in which a credit is not determined. Further, this information will help the IRS prevent fraud. The Treasury Department and the IRS have also determined that it is not necessary for sound tax administration to require registration or a jobsite visit prior to construction for PWA purposes. Thus, these final regulations adopt proposed § 1.6418–4(b)(5)(vii)(D) without change.

A commenter recommended that tax professionals be allowed to assist in the registration process on behalf of eligible taxpayers. The Treasury Department and the IRS note that the proposed regulations would not have restricted a taxpayer from authorizing a representative to apply for a registration number on behalf of the taxpayer, and these final regulations similarly do not do so. *See* Publication 5884, which provides that a person who wishes to access Energy Credits Online on behalf of a taxpayer must authorize an IRS Energy Credits Online account by selecting ''Start Authorization.'' These final regulations modify proposed § 1.6418–4(c)(5) to clarify that a valid registration number is one that was assigned to the particular taxpayer during the pre-registration process.

A commenter requested guidance stating that subsequent changes in law will not impact tax credits for which the taxpayer has already applied in the pre-filing registration process. The Treasury Department and the IRS do not adopt this request. The pre-filing registration process is not a guarantee that a project will qualify for an eligible credit for which a transfer election may be made, as verification of initial pre-filing information cannot be used by the IRS to confirm compliance with the requirements of an underlying credit. Compliance with the underlying credit requirements is reported and verified in additional detail on the annual tax return, and, as those requirements are provided in Code sections outside of

section 6418, are largely outside the scope of these final regulations. Generally, for an ITC, the amount of the credit can be determined as of the placed in service date, and for a PTC, the amount of the credit is generally determined as of the end of the taxable year. Thus, for either type of credit, changes in later taxable years to the underlying Code sections would not affect an eligible taxpayer's qualification in the taxable year the credit was determined.

V. Special Rules

A. Excessive Credit Transfers

Pursuant to section 6418(g)(2)(A), if the Secretary determines that there is an excessive credit transfer to a transferee taxpayer, then the tax imposed on the transferee taxpayer by chapter 1 of the Code (chapter 1) (regardless of whether such entity would otherwise be subject to tax under chapter 1) is increased in the year of such determination by the amount of the excessive credit transfer plus 20 percent of such excessive credit transfer. Under section 6418(g)(2)(B), the additional amount of 20 percent of the excessive credit transfer does not apply if the transferee taxpayer demonstrates to the satisfaction of the Secretary that the excessive credit transfer resulted from reasonable cause. An excessive credit transfer is defined in section 6418(g)(2)(C) as, with respect to a facility or property for which an election is made under section 6418(a) for any taxable year, an amount equal to the excess of (1) the amount of the eligible credit claimed by the transferee taxpayer with respect to such facility or property for such taxable year; over (2) the amount of the eligible credit that, without application of section 6418, would be otherwise allowable under the Code with respect to such facility or property for such taxable year.

1. In General

Proposed § 1.6418–5(a)(1) would have provided a general rule that is consistent with the rule in section 6418(g)(2)(A) for any specified credit portion transferred to a transferee taxpayer pursuant to an election in proposed § 1.6418–2(a) or proposed § 1.6418–3.

2. Taxable Year of Determination

Proposed § 1.6418–5(a)(2) would have defined the taxable year of determination as the taxable year that includes the determination of the excessive credit transfer to the transferee taxpayer and not the taxable year during which the eligible credit was originally determined by the eligible taxpayer, unless those are the same taxable years.

A commenter recommended that the final regulations also describe any further procedures that apply with respect to this IRS determination or the taxable year of the determination. The commenter noted that the proposed regulations do not describe any appeal rights of the taxpayer of such determination, including the application of deficiency procedures and the right to petition the U.S. Tax Court. The commenter recommended that the final regulations clarify that appeal rights and deficiency procedures apply to any excessive credit transfer determination.

Any excessive credit transfer determination will be made by the IRS under established examination procedures and these final regulations do not except any taxpayers or any calculations from this process. An eligible taxpayer or transferee taxpayer may challenge an adverse determination by the IRS with respect to an excess credit transfer determination if the determination creates a tax deficiency, for which deficiency procedures apply, including the right to petition the U.S. Tax Court. For example, if a transferee taxpayer claimed a transferred specified credit portion, and the transferred specified credit portion was subsequently disallowed and determined by the IRS to be an excessive credit transfer, then the transferee taxpayer could protest the disallowance before Appeals and ultimately petition the U.S. Tax Court, if desired.

3. Payments Related to Excessive Credit Transfer

Proposed § 1.6418–5(a)(3) would have provided a rule that any payments made by a transferee taxpayer to an eligible taxpayer that directly relate to an excessive credit transfer (as defined in proposed § 1.6418–5(b)) are not subject to section 6418(b)(2) or proposed § 1.6418–2(e).

Several commenters recommended clarifying the tax consequences to a transferee taxpayer with respect to payments made to an eligible taxpayer that directly relate to an excessive credit transfer. In general, the commenters thought that proposed § 1.6418–5(a)(3) only addressed the eligible taxpayer side of a transaction by only referencing section 6418(b)(2). Specifically, some commenters recommended revising the rule so that section 6418(b)(3), which says that payments related to the transfer of an eligible credit are not deductible to the transferee taxpayer, would not apply in the excessive credit transfer context. For example, a commenter raised that amounts paid as consideration by a transferee taxpayer related to an excessive credit transfer should be deductible as an ordinary business expense in year of the excess credit determination, and corresponding indemnity or insurance payment received should be included as ordinary income in the year the all events test is met (for accrual method) or in the year of payment (for cash method). Another commenter stated that amounts paid by a transferee taxpayer related to an excessive credit transfer should be deductible only to the extent they exceed the amount for which there is a claim or reimbursement with a reasonable prospect of recovery. A commenter also recommended clarifying the amount of the deduction, if a deduction is possible. Lastly, a commenter asked that the final regulations provide that any indemnification payments made by an eligible taxpayer to a transferee taxpayer relating to an excessive credit transfer be deductible as an ordinary business expense under section 162(a) in the year that the liability to make the payment is taken into account under section 461, assuming the eligible taxpayer uses the accrual method.

In response to these comments, these final regulations revise proposed § 1.6418–5(a)(3) to provide that any payment made by a transferee taxpayer to an eligible taxpayer that directly relates to the excessive credit transfer (as defined in proposed § 1.6418–5(b)) is not subject to section 6418(b)(2), section 6418(b)(3), or proposed § 1.6418–2(e). Adding the reference to section 6418(b)(3) should clarify that a transferee taxpayer is not precluded from deducting the portion of the consideration paid to the eligible taxpayer for a specified credit portion that relates to an excessive credit transfer. In addition, these final regulations revise proposed § 1.6418–5(a)(3) to clarify that the amount of a payment that directly relates to an excessive credit transfer is equal to the total consideration paid in cash by the transferee taxpayer for its specified credit portion multiplied by the ratio of the amount of the excessive credit transferred to the transferee taxpayer to the amount of the transferred specified credit portion claimed by the transferee taxpayer. However, determining the timing and character of any deduction, or the impact of insurance or indemnity payments, is beyond the scope of these final regulations. General income tax principles apply to determine the timing of any deduction to a transferee

taxpayer, or gross income to an eligible taxpayer, with respect to a payment that directly relates to an excessive credit transfer. Similarly, the character of any deduction to a transferee taxpayer, or gross income to an eligible taxpayer, with respect to a payment that directly relates to an excessive credit transfer may be determined under section 6418 and general income tax principles. Finally, general income tax principles apply to determine the income tax consequences of any insurance payments received by a transferee taxpayer or indemnities paid by the eligible taxpayer to a transferee taxpayer.

4. Reasonable Cause

Section 6418(g)(2)(B) provides that, if a transferee taxpayer demonstrates to the satisfaction of the Secretary that the excessive credit transfer resulted from reasonable cause, the excessive credit transfer addition to tax described in section 6418(g)(2)(A)(ii) will not apply. Proposed § 1.6418–5(a)(4) would have provided that the determination of reasonable cause will be made based on the relevant facts and circumstances. Generally, the most important factor is the extent of the transferee taxpayer's efforts to determine that the amount of specified credit portion transferred by the eligible taxpayer to the transferee taxpayer is not more than the amount of the eligible credit determined with respect to the eligible credit property for the taxable year in which the eligible credit was determined and has not been transferred to any other taxpayer. Circumstances that may indicate reasonable cause can include, but are not limited to, review of the eligible taxpayer's records with respect to the determination of the eligible credit (including documentation evidencing eligibility for bonus credit amounts), reasonable reliance on third party expert reports, reasonable reliance on representations from the eligible taxpayer that the total specified credit portion transferred (including portions transferred to other transferee taxpayers in a case in which an eligible taxpayer makes multiple transfer elections with respect to a single eligible credit property) does not exceed the total eligible credit determined with respect to the eligible credit property for the taxable year, and review of audited financial statements provided to the Securities and Exchange Commission (and underlying information), if applicable.

The Treasury Department and the IRS received several comments regarding the definition of reasonable cause. For the reasons described further in this part V.A.4 of the Summary of Comments and Explanation of Revisions, these final regulations do not adopt the recommendations submitted by commenters, and the proposed regulations are finalized without any substantive changes on this issue.

A few commenters stated that the proposed regulations defined reasonable cause subjectively and did not sufficiently protect transferee taxpayers from an eligible taxpayer's inadequate controls or fraud, such as cases in which an eligible taxpayer provided material, false, or misleading information on which the transferee taxpayer relied. Some commenters suggested bright-line or safe harbor rules under which the reasonable cause exception would be deemed to be satisfied, such as if an eligible taxpayer provides to a transferee taxpayer a written certification that the requirements of a section 6418 transfer have been met, or if a transferee taxpayer can produce due diligence information or attestations or uses a third-party advisor for its due diligence.

A commenter requested that the final regulations provide guidance on the definition of reasonable cause for labor standards noncompliance, including that state and local governments should receive reasonable cause relief if a failure is due to labor noncompliance. Another commenter recommended transferee taxpayers be able to rely on project labor agreements for purposes of determining reasonable cause.

These final regulations do not adopt these comments because the determination of whether an excessive credit transfer was due to reasonable cause is based on full consideration of all the facts and circumstances. To the extent additional rules are needed to prevent eligible taxpayers from providing materially false or misleading information to transferee taxpayers, or to the extent additional enforcement mechanisms are needed to prevent this type of abuse, such a change is beyond the scope of these final regulations. These final regulations also do not adopt a bright-line rule or safe harbor identifying any particular action or omission as the transferee taxpayer's deemed satisfaction of the reasonable cause standard. Guidance regarding reasonable cause in the context of labor standards noncompliance is outside the scope of these final regulations.

The Treasury Department and the IRS note that section 6418(g)(2)(B) specifically places a due diligence responsibility on the transferee taxpayer. As provided in proposed § 1.6418–5(a)(4), the most important factor in demonstrating reasonable cause under section 6418 would be the transferee taxpayer's efforts in determining that the eligible taxpayer had the specified credit portion to transfer. As acknowledged by one of the commenters, the proposed regulations would have considered representations by an eligible taxpayer as part of determining whether a transferee taxpayer has demonstrated reasonable cause. Relying solely on an eligible taxpayer's representations does not align with section 6418(g)(2)(B). Moreover, reasonable cause standards are already well-established under case law and administrative and regulatory authorities. A transferee taxpayer that is subject to an excessive credit transfer may assert defenses that are commonly raised by taxpayers in other situations in which the IRS has asserted an addition to tax. Section 1.6664–4, for example, provides guidance related to reasonable cause in the context of accuracy-related penalties under section 6662. Accordingly, these final regulations do not adopt commenters' suggestions to create bright-line rules, safe harbors, or other new standards and adopt the proposed regulations without modification.

5. Recapture Events

Proposed § 1.6418–5(a)(5) clarified that a recapture event under section 45Q(f)(4) or 50(a) is not an excessive credit transfer. The Treasury Department and the IRS did not receive any comments regarding this clarification, and thus, these final regulations adopt proposed § 1.6418–5(a)(5) without change, except that, for clarity, the final regulations add section 49(b) to the list of recapture events that are not an excessive credit transfer.

6. Definition of Excessive Credit Transfer

Proposed § 1.6418–5(b)(1) would have defined an excess credit transfer consistent with section 6418(g)(2)(C) as meaning, with respect to an eligible credit property for which a transfer election is made under proposed § 1.6418–2 or § 1.6418–3 for any taxable year, an amount equal to the excess of (1) the amount of the transferred specified credit portion claimed by the transferee taxpayer with respect to such eligible credit property for such taxable year; over (2) the amount of the eligible credit that, without the application of section 6418, would be otherwise allowable under the Code with respect to such eligible credit property for such taxable year.

Proposed § 1.6418–5(b)(2) would have provided a rule for determining an excessive credit transfer if there are multiple transferees by treating the

transferees as one. The proposed regulations would have provided that all transferee taxpayers are considered one transferee for calculating whether there was an excessive credit transfer and the amount of the excessive credit transfer. If there was an excessive credit transfer, then the amount of excessive credit transferred to a specific transferee taxpayer would be equal to the total excessive credit transferred multiplied by the transferee taxpayer's portion of the total credit transferred to all transferee taxpayers. This rule would be applied on an eligible credit property basis.

A commenter recommended that the final regulations adopt a rule allowing an eligible taxpayer to determine the order of eligible credits transferred for determining an excessive credit transfer if there are multiple transferees. Specifically, the commenter recommended allowing an eligible taxpayer to choose the order in which transferred credits will be treated as excessive credit transfers. The Treasury Department and the IRS acknowledge that an ordering rule could potentially limit the number of transferee taxpayers to which an excessive credit transfer determination is made, rather than applying pro rata to all transferee taxpayers as provided in proposed § 1.6418–5(b)(2). However, inclusion of an ordering rule between an eligible taxpayer and transferee taxpayers is not described in the definition of excessive credit transfer in section 6418(g)(2)(C). The definition, by limiting excessive credit transfers to amounts claimed by a transferee taxpayer over amounts otherwise allowable, effectively only applies to the extent the disallowed credit exceeds the amount retained by an eligible taxpayer. For example, if an eligible taxpayer retained $25X of a $100X eligible credit and transferred $75X of the same eligible credit and it was later determined that only $75X of the eligible credit is otherwise allowable with respect to the relevant eligible credit property, the excess credit transfer would be $0 ($75X − $75X). The $25X of disallowed credit would be disallowed to the eligible taxpayer. Thus, the definition of an excessive credit transfer effectively includes an ordering rule so that any disallowed eligible credit first reduces the eligible credit retained by an eligible taxpayer before applying to any transferee taxpayer. However, the definition does not distinguish between different transferee taxpayers. Further, adding an ordering election would add administrative complexity that does not exist with a pro rata rule. For example, rules would be needed on whether the election is made on a single eligible credit property basis or for all eligible credit properties, and the IRS would have to create additional systems to track that such an election was made. Also, additional complexity could arise with respect to tax administration if there was a disagreement between an eligible taxpayer and transferee taxpayers as to the order of a transfer. Based on this reasoning, the Treasury Department and the IRS do not adopt the commenter's suggestion, and these final regulations adopt the definition of excessive credit transfer without change and provide clarifying language for calculating the amount of excessive credit transferred to a specific transferee taxpayer if there is more than one transferee taxpayer.

7. Examples Illustrating Excessive Credit Transfers

Proposed § 1.6418–5(b)(3) would have provided three examples to illustrate cases in which there is no excessive credit transfer, in which there is an excessive credit transfer, and in which there is an excessive credit transfer as to multiple transferees. Consistent with the modifications made to proposed § 1.6418–5(a)(3), as described in part V.A.3 of this Summary of Comments and Explanation of Revisions, the final regulations provide additional clarification to each of the three examples in § 1.6418–5(b)(3).

The Treasury Department and the IRS understand from the comment letters that partners in a transferor partnership that decide to retain their share of eligible credits generated through the partnership may refuse to consent to the partnership transferring other partners' shares of eligible credits because eligible taxpayers are first liable under the excessive credit transfer rules up to the amount of the credit retained. Commenters requested that the final regulations include an election not to apply any disallowed eligible credit amounts to an eligible taxpayer (to the extent it retained eligible credits) before triggering an excessive credit transfer. As previously described, section 6418(g)(2)(C) limits an excessive credit transfer to the amount claimed by a transferee taxpayer(s) over amounts otherwise allowable, meaning the rule only applies to the extent the disallowed credit exceeds the amount retained by an eligible taxpayer. After considering this comment, the Treasury Department and the IRS have determined that including an election not to apply the excessive credit transfer rules in specified circumstances is not consistent with the definition of an excessive credit transfer in section 6418(g)(2)(C).

Several comments were received seeking clarification on the interaction between the additions to tax for excessive credit transfers and penalties for labor standards noncompliance, as well as recommendations for additional enforcement and documentation rules. After considering these comments, the Treasury Department and the IRS have decided not to provide further clarification in these final regulations. The additions to tax imposed by section 6418 are applied in addition to other penalties imposed by the Code. Moreover, the imposition of penalties under section 45(b)(7) and (8) are addressed in the section 45 proposed regulations. The Treasury Department and the IRS will continue to study whether inequities or unfair burdens exist for taxpayers and potentially address such situations in future guidance.

B. Recapture

Unlike excessive credit transfers, recapture of a tax credit occurs if the original tax credit reported would have been correct without the occurrence of a subsequent recapture event.

Section 6418(g)(3)(B) provides that if, during any taxable year, the applicable investment credit property (as defined in section 50(a)(5)) is disposed of, or otherwise ceases to be investment credit property with respect to the eligible taxpayer, before the close of the recapture period (as described in section 50(a)(1)), then (i) such eligible taxpayer must provide notice of such occurrence to the transferee taxpayer (in such form and manner as the Secretary prescribes), and (ii) the transferee taxpayer must provide notice of the recapture amount (as defined in section 50(c)(2)), if any, to the eligible taxpayer (in such form and manner as the Secretary prescribes). The proposed regulations would have included a rule that the recapture amount is calculated and taken into account by the transferee taxpayer.

The proposed regulations would have provided guidance on the notifications that are required by the eligible taxpayer and the transferee taxpayer after a recapture event, as described in section 6418(g)(3)(B)(i) and (ii), stating that an eligible taxpayer is required to provide notification of a recapture event to a transferee taxpayer, with such notification including all of the information necessary for the transferee taxpayer to calculate the recapture amount (as defined under section 50(c)(2)).

On November 22, 2023, the Treasury Department and the IRS published

proposed regulations (REG–132569–17) in the **Federal Register** (88 FR 82188) relating to the section 48 credit that supplemented proposed § 1.6418–5 to provide guidance on the notification requirements for an eligible taxpayer and that a transferee taxpayer is responsible for any amount of tax increase under section 48(a)(10)(C). These final regulations reserve on § 1.6418–5(f) as proposed in REG–132569–17 because the Treasury Department and the IRS continue to consider comments received regarding the application of section 48(a)(10)(C). Accordingly, any comments received on § 1.6418–5(f) as proposed in REG–132569–17 will be separately addressed as part of that rulemaking.

Commenters recommended that the final regulations allocate the risk of recapture to the eligible taxpayer for several reasons, including that the eligible taxpayer would have the greatest ability to cause or prevent a recapture event. Another commenter urged that the final regulations allocate the risk of recapture to the eligible taxpayer for recapture events solely under section 50(a). Other commenters stated that placing the risk of recapture on the transferee taxpayer creates increased transactions costs, reduces the number of market participants, and distorts the market value of the transferred credits. The Treasury Department and the IRS have determined that the risk of recapture should be borne by the transferee taxpayer with respect to its specified credit portion for all types of recapture events (including those under sections 49(b) and 45Q(f)(4)) directly relating to an eligible taxpayer (that is, other than section 50(a) and 49(b) recapture events involving transfers of interests by partners in a transferor partnership or shareholders in a transferor S corporation). This determination is consistent with the statutory framework for recapture under sections 45Q(f)(4), 49(b), and 50(a), which generally imposes recapture tax on the taxpayer who claimed the credit, regardless of whether the underlying credit is determined with respect to such taxpayer (for example, whether the taxpayer owns the underlying credit property). This interpretation is also consistent with section 6418(a), which treats the transferee taxpayer (and not the eligible taxpayer) as the taxpayer for purposes of the Code with respect to a specified credit portion, and with section 6418(g)(3)(B)(ii), which requires the transferee taxpayer to provide notice of the recapture amount, if any, to the eligible taxpayer. Therefore, these final regulations adopt the proposed rule without change on this issue.

A commenter requested clarification as to the allocation of recapture liability between an eligible taxpayer and a transferee taxpayer to the extent the eligible taxpayer retains any eligible credits and whether there is an ordering rule applied similar to an excessive credit transfer. As discussed in part V.A.5 of this Summary of Comments and Explanation of Revisions section, proposed § 1.6418–5(a)(5) would have clarified that recapture tax liability is not treated in the same manner as an excessive credit transfer tax liability, and these final regulations adopt that rule without change. Under the excessive credit transfer rules, the eligible taxpayer will be subject to a credit reduction up to the amount of the eligible credit retained before a transferee taxpayer's credit is reduced. However, the position most consistent with the statutory language of the multiple Code sections involved is that the transferee taxpayer bears a proportionate share of recapture risk, without looking to the eligible taxpayer first. Consequently, the Treasury Department and the IRS have not made a change to the proposed regulations allocating recapture risk to the eligible taxpayer for any retained credits before causing a recapture event to any transferee taxpayer. However, the final regulations under § 1.6418–5(d)(3)(i) clarify that, except in the case of a partner or S corporation shareholder that has disposed of an interest in a transferor partnership or transferor S corporation and is subject to the rules relating to such disposition under § 1.47–6(a)(2) or § 1.47–4(a)(2), respectively, recapture liability applies proportionately to any transferee taxpayers and an eligible taxpayer to the extent an eligible taxpayer has retained eligible credits determined with respect to the relevant eligible credit property. The final regulations also add formulas for determining the recapture amount for which a transferee taxpayer and an eligible taxpayer is responsible for.

In addition, the final regulations clarify the effect of a partner or S corporation shareholder recapture event on the remaining amount of recapture liability for which the transferee taxpayer and the transferor partnership or transferor S corporation is responsible and provide two examples to illustrate who is responsible for recapture in the case of a sale of a portion of an interest in a transferor partnership and a subsequent sale of the investment credit property by the transferor partnership.

A commenter stated that the recapture notice requirement under proposed § 1.6418–5(d) could be burdensome, particularly to smaller taxpayers, due to the complexity and compliance needed to prepare the necessary documentation and notify the respective party of the occurrence of a recapture event or the determination of the recapture amount. The Treasury Department and the IRS note that section 6418(g)(3)(B)(i) provides these notification requirements and that the proposed regulations merely implement the statute. For these reasons, the Treasury Department and the IRS have determined that the notification requirements in the proposed regulations should be retained.

Several commenters requested that exceptions be provided to the recapture rules, for example, by limiting the scope of recapture events, such as if a project ceases to be credit eligible property, or by limiting recapture events to those causing recapture under the former grant program created under section 1603 of the American Recovery and Reinvestment Tax Act of 2009 (Pub. L. 111–5, 123 Stat. 115, 364). Section 6418(g)(3)(B) specifically provides for recapture in the event applicable investment credit property (as defined in section 50(a)(5)) is disposed of or otherwise ceases to be investment credit property with respect to the eligible taxpayer before the end of the recapture period described in section 50(a)(1). As such, providing exceptions to the operation of section 50(a) is beyond the scope of these final regulations. Consequently, the Treasury Department and the IRS decline to make the recommended changes.

Some commenters urged the Treasury Department and the IRS to mitigate instances of duplicate recapture of the same ITC. Specifically, commenters requested that to the extent an amount of an eligible ITC has been recaptured by a partner in a transferor partnership or a shareholder in a transferor S corporation under section 50(a) or section 49(b) pursuant to § 1.6418–3(a)(6), the amount of potential recapture liability remaining to a transferee taxpayer should be reduced accordingly. The Treasury Department and the IRS agree that a single ITC should not be subject to duplicate recapture. As a result, the final regulations clarify that to the extent a partner in a transferor partnership or a shareholder in a transferor S corporation recognizes an amount of tax increase under sections 50(a) or 49(b) that does not result in recapture liability to a transferee taxpayer pursuant to § 1.6418–3(a)(6), that amount reduces

the remaining amount of ITC subject to recapture for a recapture event caused directly by the transferor partnership or transferee S corporation.

Commenters also requested additional guidance and examples of the recapture rules, including a recapture event under §§ 1.6418–5(e) and 1.45Q–5. For purposes of recapture, section 6418(g)(3) cross-references to section 50(a). Thus, recapture occurs with respect to the taxable year in which an investment credit property for which an eligible credit is determined is disposed of, or otherwise ceases to be investment credit property with respect to the eligible taxpayer before the end of the recapture period. Section 45Q has similar requirements in that carbon oxide that has been sequestered, utilized, or used and to which a section 45Q credit has been determined is generally intended to remain sequestered, utilized, or used for the entire recapture period. The proposed regulations would have clarified that the rules under proposed §§ 1.6418–5(e) and 1.45Q–5 apply to a transferee taxpayer to the extent any eligible section 45Q credit is transferred under section 6418. Based on the explanations provided in the preamble to the proposed regulations, as well as this Summary of Comments and Explanation of Revisions, the Treasury Department and the IRS have decided not to provide additional guidance generally or through examples. However, the final regulations clarify that recapture liability applies proportionately to an eligible taxpayer and any transferee taxpayers to the extent an eligible taxpayer has retained any amount of an eligible credit determined with respect to a component of carbon capture equipment owned by the eligible taxpayer within a single process train described in § 1.45Q–2(c)(3).

A commenter requested examples illustrating the section 49(b) rules causing recapture to a transferee taxpayer, particularly in cases in which specified credit portions are transferred to multiple transferee taxpayers. The Treasury Department and the IRS believe examples of the interaction of sections 49 and 6418 are beyond the scope of these regulations. As such, no examples have been added to these final regulations regarding this interaction.

A commenter stated that credit buyers will prefer purchasing credits from partnerships or S corporations because owners of partnerships and S corporations may transfer their interests without triggering recapture to the transferee taxpayer and achieve the same tax result as a sale of the underlying assets. The Treasury Department and the IRS acknowledge that the recapture rules for indirect dispositions by partners in a transferor partnership or shareholders in a transferor S corporation are different than the rules for direct dispositions by an eligible taxpayer. However, these differences are generally consistent with the effect of entity versus aggregate principles throughout the Code and regulations. Consequently, no changes are necessary to the proposed regulations on this issue.

C. Ineffective Transfers

Proposed § 1.6418–5(f) states that an ineffective transfer election means that no transfer of an eligible credit has occurred for purposes of section 6418, including section 6418(b). The proposed regulations would have provided a clarification that an ineffective election is not considered an excessive credit transfer to the transferee taxpayer. This means that section 6418 would not apply to the transaction, and the tax consequences are determined under any other relevant provisions of the Code.

A commenter requested clarification of the general tax consequences of a transfer that was ineffective. The Treasury Department and the IRS have reviewed this comment and determined that the proposed regulations provide sufficient guidance for taxpayers if an ineffective transfer occurs. To avoid the risk of not addressing a specific consequence of an ineffective transfer, the proposed regulations would have stated that the tax consequences are determined under any relevant provision of the Code. Addressing those tax consequences is outside of section 6418 and is beyond the scope of these final regulations. Consequently, these final regulations adopt the rule in proposed § 1.6418–5(f) (redesignated as § 1.6418–5(g)), without including specific tax consequences.

A commenter requested that the final regulations address ineffective transfer determinations made after the transfer election deadline and the resulting conflict given that an eligible taxpayer is entitled to transfer a tax credit once. The Treasury Department and the IRS understand this comment to mean that there is a potential prohibition on a transfer if the same eligible taxpayer attempted to transfer the same eligible credit in relation to an eligible credit property, but the previous transaction was deemed to be an ineffective transaction. If a previous transaction is unwound because it is deemed to be an ineffective transaction, then no transfer has occurred. In addition to the application of existing tax rules, the eligible taxpayer would be able to make a transfer election to properly transfer the credit assuming the eligible taxpayer can satisfy the requirements for making a transfer election. Because the proposed regulations would have identified the treatment of ineffective transactions, these final regulations are adopted without change.

Another commenter suggested that the final regulations adopt a rule providing for reasonable cause relief in the event of an ineffective transfer election. These final regulations do not adopt this comment. As described in the preamble to the proposed regulations, and previously in this part V.C of the Summary of Comments and Explanation of Revisions, an ineffective transfer does not result in an excessive credit transfer to the transferee taxpayer, and so reasonable cause relief is not necessary.

D. Credit Carryforward

The proposed regulations would have provided special rules relating to the carryback and carryforward of transferred specified credit portions. Proposed § 1.6418–5(g) would have stated that a transferee taxpayer can apply the rules in section 39(a)(4) of the Code (regarding a 3-year carryback period for unused current year business credits) to a specified credit portion to the extent the specified credit portion is described in section 6417(b) (list of applicable credits, taking into account any placed in service requirements in section 6417(b)(2), (3), and (5)). The preamble to the proposed regulations provided clarity on two complementary issues related to the carryback of transferred credits stating (i) if the credit is listed in section 6417(b), then the credit is an applicable credit, and (ii) no statutory language prohibits a transferee taxpayer from using the rule in section 39(a)(4) with respect to an eligible credit.

Several commenters asked that the final regulations confirm that the transferee taxpayer should be able to carryforward an unused credit amount. These final regulations provide the requested clarification by revising proposed § 1.6418–5(g) (redesignated as § 1.6418–5(h)) so that the language now refers to both the carryback and carryforward period when describing application of the rules in section 39(a)(4).

E. Real Estate Investment Trusts

With respect to real estate investment trusts under section 856 of the Code (REITs), commenters requested that the final regulations clarify that eligible credits that have not yet been transferred are treated as real estate assets, cash, or cash items and, thus,

will not cause a REIT to fail REIT qualification under section 856(c)(4)(A) (section 856(c)(4)(A) together with section 856(c)(4)(B), the REIT Asset Test). Another commenter requested that the final regulations state that eligible credits that have not been transferred are disregarded for purposes of determining whether a REIT satisfies the REIT Asset Test. Commenters asserted that guidance is needed to avoid instances in which a REIT might fail the REIT Asset Test because it planned to make an election to transfer an eligible credit but did not do so prior to the end of a calendar quarter, when the REIT's compliance with the REIT Asset Test is measured.

The Treasury Department and the IRS recognize that REITs may be continuously earning and selling eligible credits and, therefore, need certainty with respect to this REIT qualification issue. Accordingly, § 1.6418–5(i)(1) of these final regulations addresses those comments by providing that eligible credits that have not yet been transferred pursuant to section 6418 are disregarded for purposes of the REIT Asset Test.

The preamble to the proposed regulations stated that under section 6418, the cash received by an eligible REIT as consideration for the transfer of an eligible credit is not included in that taxpayer's gross income. Because the transaction does not result in any net income, the transfer does not pose a prohibited transaction tax issue. A commenter stated that, although this clarification is appreciated, the final regulations should contain a provision that the transfer of an eligible credit pursuant to section 6418 is not a sale of property for purposes of the ''seven sales'' safe harbor in section 857(b)(6)(C)(iii)(I) or section 857(b)(6)(D)(iv)(I) of the Code. The commenter further pointed out that many eligible credit programs allow a taxpayer to earn a large number of separately transferable credits. Thus, the commenter explained, if the transfer of an eligible credit were a sale of property for these purposes, that result could cause the REIT to have so many sales that it would be taxed 100 percent on any sale of real property in which it engaged. The possibility of that 100 percent tax could effectively deter REITs from participating in any eligible credit programs.

The Treasury Department and the IRS agree that participation in the transfer of eligible credits under section 6418 should not burden all of a REIT's sales of real property. Accordingly, § 1.6418–5(i)(2) of these final regulations provides that the transfer of a specified credit portion pursuant to a valid section 6418 election is not a sale of property for purposes of section 857(b)(6)(C)(iii) and section 857(b)(6)(D)(iv) and, thus, does not count as one of the seven sales described in those provisions.

One commenter requested confirmation that receipt of (or the right to receive) an eligible credit does not result in income to an eligible taxpayer that is a REIT. Generally, Federal income tax rules do not treat a taxpayer as receiving gross income upon becoming entitled to a credit against Federal income tax. This general principle equally applies to an eligible taxpayer, including a REIT, becoming entitled to an eligible credit that it may transfer under section 6418. Accordingly, these final regulations do not include the requested rule specifically addressing REITs.

A commenter also requested confirmation that the sale of energy under sections 45 and 45Y is not a dealer sale under the REIT prohibited transactions rules of section 857(b)(6). Although, a REIT's Federal income tax treatment of the sale of energy and earning of eligible credits is outside the scope of these final regulations, the Treasury Department and the IRS note that the preamble to TD 9784 (81 FR 59849, 59856 (August 31, 2016)) (2016 preamble) stated that until additional guidance is published in the Internal Revenue Bulletin, in any taxable year in which (1) the quantity of excess electricity transferred to the utility company during the taxable year from energy-producing distinct assets that serve an inherently permanent structure does not exceed (2) the quantity of electricity purchased from the utility company during the taxable year to serve the inherently permanent structure, the IRS will not treat any net income resulting from the transfer of such excess electricity as constituting net income derived from a prohibited transaction under section 857(b)(6). Any sale of electricity that is not within the scope of the statement in the 2016 preamble should be analyzed on a facts and circumstances basis to determine whether the sale is subject to the prohibited transaction rules of section 857(b)(6).

VI. Other Comments

A. Normalization

The proposed regulations did not address the impact of the rules described in section 50(d)(2) (normalization rules) on eligible credit transfers under section 6418, which only are relevant for credits that are ITCs. Several commenters requested guidance on the application of the normalization rules. Some commenters stated that the normalization rules could not and should not apply to eligible credit transfers. One commenter suggested that there is no authority to apply the normalization rules to eligible credit transfers. Lastly a commenter stated that the normalization rules do apply to credits related to public utility property otherwise subject to the ITC normalization requirements because section 6417(g) provides, in part, that ''rules similar to the rules of section 50'' apply for purposes of section 6417. The commenter went on to state that there is not a similar provision included in section 6418 to invoke application of the normalization rules, and the wording of section 6418(a) has the opposite effect. The final regulations do not adopt a specific rule addressing the normalization rules because it is beyond the scope of the final regulations. However, the Treasury Department and the IRS clarify that an eligible taxpayer is not subject to the normalization rules with respect to any cash consideration paid by a transferee taxpayer for a specified credit portion that is described in section 6418(b)(2). Any portion of an eligible credit that is not transferred, however, would remain subject to the normalization rules as applicable.

B. Transaction Costs and Deductions

The proposed regulations did not address the Federal income tax treatment of transaction costs, either for the eligible taxpayer or the transferee taxpayer but described specific matters and considerations that the Treasury Department and the IRS are taking into account in developing rules outside of these final regulations.

Commenters recommended that the final regulations clarify the treatment of transaction costs, including categories of costs such as: legal and consulting fees; success-based fees; tax insurance; and indemnity payments. The treatment of transaction costs is beyond the scope of the section 6418 final regulations. Section 6418(b)(2) and (3) only cover the treatment of consideration that is paid for the transfer of an eligible credit. The treatment of other costs is generally governed by other Code sections, and subject to general Federal income tax principles. However, the application of other Code sections and general Federal income tax principles to determine such treatment may involve the relation-back of such costs to the credit transfer transaction and its general characterization under section 6418(a) and (b). The Treasury Department and the IRS anticipate issuing further guidance taking into account the

comments received regarding transaction costs.

Effect on Other Documents

The temporary regulations are removed effective July 1, 2024.

Special Analyses

I. Regulatory Planning and Review

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(b) 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 Office of Management and Budget (OMB) before collecting information from the public, whether such collection of information is mandatory, voluntary, or required to obtain or retain a benefit. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number.

The collections of information in these final regulations contain reporting and recordkeeping requirements. The recordkeeping requirements mentioned within these final regulations are considered general tax records under § 1.6001–1(e). These records are required for the IRS to validate that transferee taxpayers have met the regulatory requirements and are entitled to the transferred specified credit portions. For PRA purposes, general tax records are already approved by OMB under 1545–0074 for individuals and under 1545–0123 for business entities.

These final regulations also mention reporting requirements related to making transfer elections as detailed in §§ 1.6418–2 and 1.6418–3. These transfer elections will be made by eligible taxpayers as part of filing a return (such as the appropriate Form 1040, Form 1120, Form 1120–S, or Form 1065), including filling out the relevant source credit form and completing the Form 3800. The final regulation in § 1.6418–2(b)(5) describes third-party disclosures, which require eligible taxpayers and transferee taxpayers to complete transfer election statements and also require eligible taxpayers to provide required minimum documentation to transferee taxpayers as part of making a transfer election. These forms and third-party disclosures are approved under 1545–0074 for individuals and 1545–0123 for business entities.

These final regulations also describe recapture procedures as detailed in § 1.6418–5 that are required by section 6418(g)(3). The reporting of a recapture event will still be required to be reported using Form 4255, Recapture of Investment Credit. This form is approved under 1545–0074 for individuals and 1545–0123 for business entities. The final regulation is not changing or creating new collection requirements not already approved by OMB.

These final regulations mention the reporting requirement to complete pre-filing registration with IRS to be able to transfer eligible credits to a transferee taxpayer as detailed in § 1.6418–4. The pre-filing registration portal is approved under 1545–2310 for all filers.

The IRS solicited feedback on the collection requirements for reporting, recordkeeping, and pre-filing registration. Although no public comments received by the IRS were directed specifically at the PRA or on the collection requirements, several commenters generally expressed concerns about the burdens associated with the documentation requirements contained in the Proposed Rules. As described in the relevant portions of this preamble, the Treasury Department and IRS believe that the documentation requirements are necessary to administer the transfer of eligible credit under section 6418.

III. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) (RFA) imposes certain requirements with respect to Federal rules that are subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) and that are likely to have a significant economic impact on a substantial number of small entities. Unless an agency determines that a proposal is not likely to have a significant economic impact on a substantial number of small entities, section 603 of the RFA requires the agency to present a final regulatory flexibility analysis (FRFA) of the final regulations. The Treasury Department and the IRS have not determined whether the final regulations will likely have a significant economic impact on a substantial number of small entities. This determination requires further study. Because there is a possibility of significant economic impact on a substantial number of small entities, a FRFA is provided in these final regulations.

Pursuant to section 7805(f) of the Code, the proposed regulations were submitted to the Chief Counsel of Advocacy of the Small Business Administration, and no comments were received.

1. Need for and Objectives of the Rule

The final regulations provide greater clarity to eligible taxpayers that intend to make an election under section 6418 to transfer eligible credits. The final regulations also provide guidance to transferee taxpayers as to the treatment of transferred eligible credits under section 6418. The final regulations include needed definitions, the time and manner to make a transfer election, and information about the pre-filing registration process, among other items. The Treasury Department and the IRS intend and expect that providing taxpayers guidance that allows them to effectively use section 6418 to transfer eligible credits will beneficially impact various industries, deliver benefits across the economy, and reduce economy-wide greenhouse gas emissions.

In particular, section 6418 allows eligible taxpayers to transfer an eligible credit (or portion thereof) to a transferee taxpayer. Allowing eligible taxpayers without sufficient Federal income tax liability to use a business tax credit to instead transfer the tax credit to a taxpayer that has sufficient tax liability to use the credit will increase the incentive for taxpayers to invest in clean energy projects that generate eligible credits. It will also increase the amount of cash available to such taxpayers, thereby reducing the amount of financing needed for clean energy projects.

2. Significant Issues Raised by Public Comments in Response to the IRFA

There were no comments filed that specifically addressed the Proposed Rules and policies presented in the IRFA. Additionally, no comments were filed by the Chief Counsel of Advocacy of the Small Business Administration.

3. Affected Small Entities

The RFA directs agencies to provide a description of, and where feasible, an estimate of, the number of small entities that may be affected by the final regulations, if adopted. The Small Business Administration's Office of Advocacy estimates in its 2023 Frequently Asked Questions that 99.9 percent of American businesses meet its definition of a small business. The applicability of these final regulations

does not depend on the size of the business, as defined by the Small Business Administration. As described more fully in the preamble to these final regulations and in this FRFA, section 6418 and these final regulations may affect a variety of different entities across several different industries as there are 11 different eligible credits that may be transferred pursuant to a transfer election. Although there is uncertainty as to the exact number of small businesses within this group, the current estimated number of respondents to these rules is 50,000 taxpayers. The Treasury Department and the IRS expect to receive more information on the impact on small businesses once taxpayers start to make transfer elections using the guidance and procedures provided in these final regulations.

4. Impact of the Rules

The final regulations provide rules for how taxpayers can take advantage of the section 6418 credit monetization regime. Taxpayers that elect to take advantage of transferability will have administrative costs related to reading and understanding the rules in addition to recordkeeping and reporting requirements because of the pre-filing registration and tax return requirements. The costs will vary across different-sized taxpayers and across the type of project(s) in which such taxpayers are engaged.

The pre-filing registration process requires a taxpayer to register itself as intending to make a transfer election, to list all eligible credits it intends to transfer, and to list each eligible credit property that contributed to the determination of such credits. This process must be completed to receive a registration number for each eligible credit property with respect to which the eligible taxpayer intends to transfer an eligible credit. On filing the return, to make a valid transfer election, the eligible taxpayer and transferee taxpayer would be required to complete and attach a transfer election statement. The transfer election statement is generally a written document that describes the transfer of a specified credit portion between an eligible taxpayer and transferee taxpayer. Further, the eligible taxpayer is required to provide certain required minimum documentation to the transferee taxpayer, and the transferee taxpayer is required to retain the documentation for as long as it may be relevant. Many of the other requirements, such as completing the relevant source credit form and completing the Form 3800 would be required for any taxpayer that is claiming a general business credit, regardless of whether the taxpayer was transferring the credit under section 6418. Although the Treasury Department and the IRS do not have sufficient data to determine precisely the likely extent of the increased costs of compliance, the estimated burden of complying with the recordkeeping and reporting requirements are described in the Paperwork Reduction Act section of the preamble.

5. Alternatives Considered

The Treasury Department and the IRS considered alternatives to the final regulations. The final regulation requirements of pre-filing registration and the additional requirements to make a valid transfer election were designed to minimize burden while also minimizing the opportunity for duplication, fraud, improper payments, or excessive payments under section 6418. For example, in adopting these requirements, the Treasury Department and the IRS considered whether such information could be obtained strictly at filing of the relevant return. However, the Treasury Department and IRS decided that such an option would increase the opportunity for duplication, fraud, improper payments or excessive payments under section 6418. Section 6418(g)(1) specifically authorizes the IRS to require such information or registration as the Secretary deems necessary for purposes of preventing duplication, fraud, improper payments, or excessive payments under section 6418 as a condition of, and prior to, any transfer of any portion of an eligible credit. As described in the preamble to these final regulations, these final rules carry out that Congressional intent as pre-filing registration allows for the IRS to verify certain information in a timely manner and then process the annual tax return of the eligible taxpayer and the transferee taxpayer with minimal delays. Having a distinction between eligible taxpayers that are small businesses versus others making a transfer election would create a scenario in which a subset of taxpayers seeking to transfer eligible credits would not have been verified or received registration numbers, potentially delaying return processing for both eligible taxpayers and transferee taxpayers.

Another example is the final regulation requirement that eligible taxpayers and transferee taxpayers complete a transfer election statement. In determining to adopt this proposed rule, the Treasury Department and the IRS considered that such a statement would again minimize opportunity for fraud and decrease the chance of duplication but would also benefit a transferee taxpayer by allowing the filing of its return without having to wait for an eligible taxpayer to file in all cases. Further, the contents of the transfer election statement were intended to be available to eligible taxpayers, such that the size of the business should not impact greatly the time needed to prepare such statements. The Treasury Department and the IRS also considered whether any required documentation was needed to be provided by eligible taxpayers to transferee taxpayers, which the transferee taxpayers are then required to keep for so long as the contents thereof may become material in the administration of any internal revenue law. Again, this requirement was considered consistent with the goal of minimizing fraud, as the information is generally documentation to validate the existence of the eligible credit property, any bonus credits amounts, and the evidence of credit qualification. Any size business generating an eligible credit should have access to such information. Further the recordkeeping duration is consistent with general recordkeeping rules under § 1.6001–1(e). This final regulation requirement also will benefit small businesses that are transferee taxpayers as it provides a mechanism to receive such information from the eligible taxpayer.

Treasury and the IRS solicited comments on the requirements in the proposed regulations, including specifically, whether there are less burdensome alternatives that do not increase the risk of duplication, fraud, improper payments, or excessive payments under section 6418. The comments received in response to this request have been discussed in the preceding paragraphs.

5. Duplicative, Overlapping, or Conflicting Federal Rules

The final regulations do not duplicate, overlap, or conflict with any relevant Federal rules. As discussed above, the final regulations merely provide procedures and definitions to allow taxpayers to take advantage of the ability to transfer eligible credits. The Treasury Department and the IRS solicited input from interested members of the public about identifying and avoiding overlapping, duplicative, or conflicting requirements. No comments were received in response to this request.

IV. Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandate 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 (updated annually for inflation). These 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.

V. Executive Order 13132: Federalism

Executive Order 13132 (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. These final regulations do not have federalism implications and do not impose substantial, direct compliance costs on State and local governments or preempt state law within the meaning of the Executive order.

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

Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments) prohibits an agency from publishing any rule that has tribal implications if the rule either imposes substantial, direct compliance costs on Indian tribal governments, and is not required by statute, or preempts tribal law, unless the agency meets the consultation and funding requirements of section 5 of the Executive order. These final regulations do not have substantial direct effects on one or more federally recognized Indian tribes and does not impose substantial direct compliance costs on Indian tribal governments within the meaning of the Executive order.

VII. Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), the Office of Information and Regulatory Affairs has designated this rule as a major rule as defined by 5 U.S.C. 804(2).

Statement of Availability of IRS Documents

IRS notices and other guidance cited in this preamble 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 *https://www.irs.gov.*

Drafting Information

The principal authors of these final regulations are James Holmes and Jeremy Milton, Office of the Associate Chief Counsel (Passthroughs and Special Industries), IRS. 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.

Amendments to the Regulations

Accordingly, the Treasury Department and the IRS amend 26 CFR part 1 as follows:

PART 1—INCOME TAXES

■ **Paragraph 1.** The authority citation for part 1 is amended by adding an entry in numerical order for §§ 1.6418–0 through 1.6418–5 to read in part as follows:

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

* * * * *

Sections 1.6418–0 through 1.6418–5 also issued under 26 U.S.C. 6418(g)(1) and (h).

* * * * *

■ **Par. 2.** Section 1.706–4 is amended as follows:

■ 1. Redesignate paragraphs (e)(2)(ix) through (xi) as paragraphs (e)(2)(x) through (xii).

■ 2. Add new paragraph (e)(2)(ix).

■ 3. Revise and republish paragraph (g).

The addition, revision and republication read as follows:

§ 1.706–4 Determination of distributive share when a partner's interest varies.

* * * * *

(e) * * *

(2) * * *

(ix) Any specified credit portion transferred pursuant to section 6418 and §§ 1.6418–1 through 1.6418–5;

* * * * *

(g) *Applicability date.* (1) Except with respect to paragraph (c)(3) of this section, this section applies for partnership taxable years that begin on or after August 3, 2015. The rules of paragraph (c)(3) of this section apply for taxable years of partnerships other than existing publicly traded partnerships that begin on or after August 3, 2015. For purposes of the immediately preceding sentence, an existing publicly traded partnership is a partnership described in section 7704(b) that was formed prior to April 14, 2009. For purposes of this effective date provision, the termination of a publicly traded partnership under section 708(b)(1)(B) due to the sale or exchange of 50 percent or more of the total interests in partnership capital and profits is disregarded in determining whether the publicly traded partnership is an existing publicly traded partnership.

(2) Paragraph (e)(2)(ix) of this section applies to taxable years ending on or after April 30, 2024.

■ **Par. 3.** Sections 1.6418–0 through 1.6418–5 are added to read as follows:

Sec.

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* * * * *

§ 1.6418–0 Table of contents.

This section lists the captions contained in §§ 1.6418–1 through 1.6418–5.

§ 1.6418–1 Transfer of eligible credits.

(a) *Transfer of eligible credits.* An eligible taxpayer may make a transfer election under § 1.6418–2(a) to transfer any specified portion of an eligible credit determined with respect to any eligible credit property of such eligible taxpayer for any taxable year to a transferee taxpayer in accordance with section 6418 of the Code and the section 6418 regulations (defined in paragraph (g) of this section). Paragraphs (b) through (q) of this section provide definitions of terms for purposes of applying section 6418 and the section 6418 regulations. *See* § 1.6418–2 for rules and procedures under which all transfer elections must be made, limitations to making transfer elections, the treatment of payments made in connection with transfer elections, and the treatment of eligible credits transferred to transferee taxpayers. *See* § 1.6418–3 for special rules pertaining to transfer elections made by partnerships or S corporations. See § 1.6418–4 for pre-filing registration requirements and other information required to make any transfer election effective. *See* § 1.6418–5 for special rules related to the imposition of tax on excessive credit transfers, basis reductions, required notifications and impacts of the recapture of transferred credits, and rules regarding carrybacks and carryforwards.

(b) *Eligible taxpayer.* The term *eligible taxpayer* means any taxpayer (as defined in section 7701(a)(14) of the Code), other than one described in section 6417(d)(1)(A) and § 1.6417–1(b).

(c) *Eligible credit*—(1) *In general.* The term *eligible credit* is a credit described in paragraph (c)(2) of this section determined for a taxable year with respect to a single eligible credit property of an eligible taxpayer but does not include any business credit carryforward or business credit carryback determined under section 39 of the Code.

(2) *Separately determined credit amounts.* The amount of any credit described in this paragraph (c)(2) is the entire amount of the credit separately determined with respect to each single eligible credit property of the eligible taxpayer and includes any bonus credit amounts described in paragraph (c)(3) of this section determined with respect to that single eligible credit property. The eligible credits described in this paragraph (c)(2) are:

(i) *Alternative fuel vehicle refueling property.* So much of the credit for alternative fuel vehicle refueling property allowed under section 30C of the Code that, pursuant to section 30C(d)(1), is treated as a credit listed in section 38(b) of the Code (section 30C credit).

(ii) *Renewable electricity production.* The renewable electricity production credit determined under section 45(a) of the Code (section 45 credit).

(iii) *Carbon oxide sequestration.* The credit for carbon oxide sequestration determined under section 45Q(a) of the Code (section 45Q credit).

(iv) *Zero-emission nuclear power production.* The zero-emission nuclear power production credit determined under section 45U(a) of the Code (section 45U credit).

(v) *Clean hydrogen production.* The clean hydrogen production credit determined under section 45V(a) of the Code (section 45V credit).

(vi) *Advanced manufacturing production.* The advanced manufacturing production credit determined under section 45X(a) of the Code (section 45X credit).

(vii) *Clean electricity production.* The clean electricity production credit determined under section 45Y(a) of the Code (section 45Y credit).

(viii) *Clean fuel production.* The clean fuel production credit determined under section 45Z(a) of the Code (section 45Z credit).

(ix) *Energy.* The energy credit determined under section 48 of the Code (section 48 credit).

(x) *Qualifying advance energy project.* The qualifying advanced energy project credit determined under section 48C of the Code (section 48C credit).

(xi) *Clean electricity.* The clean electricity investment credit determined under section 48E of the Code (section 48E credit).

(3) *Bonus credit amounts.* The bonus credit amounts described in this paragraph (c)(3) are:

(i) In the case of a section 30C credit, the increased credit amounts for which the requirements under section 30C(g)(2)(A) and (3) are satisfied.

(ii) In the case of a section 45 credit, the increased credit amounts for which the requirements under section 45(b)(7)(A)(8), (9), and (11) are satisfied.

(iii) In the case of a section 45Q credit, the increased credit amounts for which the requirements under section 45Q(h)(3) and (4) are satisfied.

(iv) In the case of a section 45U credit, the increased credit amount for which the requirements under section 45U(d)(2) are satisfied.

(v) In the case of a section 45V credit, the increased credit amounts for which the requirements under section 45V(e)(3) and (4) are satisfied.

(vi) In the case of a section 45Y credit, the increased credit amounts for which the requirements under section 45Y(g)(7), (9), (10), and (11) are satisfied.

(vii) In the case of a section 45Z credit, the increased credit amounts for which the requirements under section 45Z(f)(6) and (7) are satisfied.

(viii) In the case of a section 48 credit, the increased credit amounts for which the requirements under section 48(a)(10), (11), (12), (14), and (e) are satisfied.

(ix) In the case of a section 48C credit, the increased credit amounts for which the requirements under section 48C(e)(5) and (6) are satisfied.

(x) In the case of a section 48E credit, the increased credit amounts for which the requirements under section 48E(a)(3)(A), (B), (d)(3), (d)(4), and (h) are satisfied.

(d) *Eligible credit property.* The term *eligible credit property* means each of the units of property of an eligible taxpayer described in paragraphs (d)(1) through (11) of this section with respect to which the amount of an eligible credit is determined:

(1) In the case of a section 30C credit, a *qualified alternative fuel vehicle refueling property* described in section 30C(c).

(2) In the case of a section 45 credit, a *qualified facility* described in section 45(d).

(3) In the case of a section 45Q credit, a component of carbon capture

equipment within a *single process train* described in § 1.45Q–2(c)(3).

(4) In the case of a section 45U credit, a *qualified nuclear power facility* described in section 45U(b)(1).

(5) In the case of a section 45V credit, a *qualified clean hydrogen production facility* described in section 45V(c)(3).

(6) In the case of a section 45X credit, a *facility* that produces eligible components, as described in guidance under sections 48C and 45X.

(7) In the case of a section 45Y credit, a *qualified facility* described in section 45Y(b)(1).

(8) In the case of a section 45Z credit, a *qualified facility* described in section 45Z(d)(4).

(9) *Section 48 property*—(i) *In general.* In the case of a section 48 credit and except as provided in paragraph (d)(9)(ii) of this section, an *energy property* described in section 48.

(ii) *Pre-filing registration and elections.* At the option of an eligible taxpayer, and to the extent consistently applied for purposes of the pre-filing registration requirements of § 1.6418–4 and the election requirements of §§ 1.6418–2 through 1.6418–3, an *energy project* as described in section 48(a)(9)(A)(ii) and defined in guidance.

(10) In the case of a section 48C credit, an *eligible property* described in section 48C(c)(2).

(11) In the case of a section 48E credit, a *qualified facility* as defined in section 48E(b)(3) or, in the case of a section 48E credit relating to a qualified investment with respect to energy storage technology, an *energy storage technology* described in section 48E(c)(2).

(e) *Guidance.* The term *guidance* means guidance published in the **Federal Register** or Internal Revenue Bulletin, as well as administrative guidance such as forms, instructions, publications, or other guidance on the IRS.gov website. *See* §§ 601.601 and 601.602 of this chapter.

(f) *Paid in cash.* The term *paid in cash* means a payment in United States dollars that—

(1) Is made by cash, check, cashier's check, money order, wire transfer, automated clearing house (ACH) transfer, or other bank transfer of immediately available funds;

(2) Is made within the period beginning on the first day of the eligible taxpayer's taxable year during which a specified credit portion is determined and ending on the due date for completing a transfer election statement (as provided in § 1.6418–2(b)(5)(iii)); and

(3) May include a transferee taxpayer's contractual commitment to purchase eligible credits with United States dollars in advance of the date a specified credit portion is transferred to such transferee taxpayer if all payments of United States dollars are made in a manner described in paragraph (f)(1) of this section during the time period described in paragraph (f)(2) of this section.

(g) *Section 6418 regulations.* The term *section 6418 regulations* means §§ 1.6418–1 through 1.6418–5.

(h) *Specified credit portion.* The term *specified credit portion* means a proportionate share (including all) of an eligible credit determined with respect to a single eligible credit property of the eligible taxpayer that is specified in a transfer election. A specified credit portion of an eligible credit must reflect a proportionate share of each bonus credit amount that is taken into account in calculating the entire amount of eligible credit determined with respect to a single eligible credit property.

(i) *Statutory references*—(1) *Chapter 1.* The term *chapter 1* means chapter 1 of the Code.

(2) *Code.* The term *Code* means the Internal Revenue Code.

(3) *Subchapter K.* The term *subchapter K* means subchapter K of chapter 1.

(j) *Transfer election.* The term *transfer election* means an election under section 6418(a) of the Code to transfer to a transferee taxpayer a specified portion of an eligible credit determined with respect to an eligible credit property in accordance with the section 6418 regulations.

(k) *Transferee partnership.* The term *transferee partnership* means a partnership for Federal tax purposes that is a transferee taxpayer.

(l) *Transferee S corporation.* The term *transferee S corporation* means an S corporation within the meaning of section 1361(a) that is a transferee taxpayer.

(m) *Transferee taxpayer.* The term *transferee taxpayer* means any taxpayer that is not related (within the meaning of section 267(b) or 707(b)(1) of the Code) to the eligible taxpayer making the transfer election to which an eligible taxpayer transfers a specified credit portion of an eligible credit.

(n) *Transferor partnership.* The term *transferor partnership* means a partnership for Federal tax purposes that is an eligible taxpayer that makes a transfer election.

(o) *Transferor S corporation.* The term *transferor S corporation* means an S corporation within the meaning of section 1361(a) that is an eligible taxpayer that makes a transfer election.

(p) *Transferred specified credit portion.* The term *transferred specified credit portion* means the specified credit portion that is transferred from an eligible taxpayer to a transferee taxpayer pursuant to a transfer election.

(q) *U.S. territory.* The term *U.S. territory* means the Commonwealth of Puerto Rico, Guam, the U.S. Virgin Islands, American Samoa, and the Commonwealth of the Northern Mariana Islands.

(r) *Applicability date.* This section applies to taxable years ending on or after April 30, 2024. For taxable years ending before April 30, 2024, taxpayers, however, may choose to apply the rules of this section and §§ 1.6418–2, –3, and –5, provided the taxpayers apply the rules in their entirety and in a consistent manner.

§ 1.6418–2 Rules for making transfer elections.

(a) *Transfer election*—(1) *In general.* An eligible taxpayer can make a transfer election as provided in this section. If a valid transfer election is made by an eligible taxpayer for any taxable year, the transferee taxpayer specified in such election (and not the eligible taxpayer) is treated as the taxpayer for purposes of the Code with respect to the specified credit portion. This paragraph (a) provides rules on the number of transfers permitted, rules for determining the eligible taxpayer in certain ownership situations, and rules describing circumstances under which no transfer election is allowed. Paragraph (b) of this section provides specific rules regarding the scope, manner, and timing of a transfer election. Paragraph (c) of this section provides rules regarding limitations applicable to transfer elections. Paragraph (d) of this section provides rules regarding an eligible taxpayer's determination of an eligible credit. Paragraph (e) of this section provides the treatment of payments in connection with a transfer election. Paragraph (f) of this section provides rules regarding a transferee taxpayer's treatment of an eligible credit following a transfer.

(2) *Multiple transfer elections permitted.* An eligible taxpayer may make multiple transfer elections to transfer one or more specified credit portion(s) to multiple transferee taxpayers, provided that the aggregate amount of specified credit portions transferred with respect to any single eligible credit property does not exceed the amount of the eligible credit determined with respect to the eligible credit property.

(3) *Transfer election in certain ownership situations*—(i) *Disregarded*

entities. If an eligible taxpayer is the sole owner (directly or indirectly) of an entity that is disregarded as separate from such eligible taxpayer for Federal income tax purposes and such entity directly holds an eligible credit property, the eligible taxpayer may make a transfer election in the manner provided in this section with respect to any eligible credit determined with respect to such eligible credit property.

(ii) *Undivided ownership interests.* If an eligible taxpayer is a co-owner of an eligible credit property through an arrangement properly treated as a tenancy-in-common for Federal income tax purposes, or through an organization that has made a valid election under section 761(a) of the Code, then the eligible taxpayer's undivided ownership share of the eligible credit property will be treated for purposes of section 6418 as a separate eligible credit property owned by such eligible taxpayer, and the eligible taxpayer may make a transfer election in the manner provided in this section for any eligible credit(s) determined with respect to such eligible credit property.

(iii) *Members of a consolidated group.* A member of a consolidated group (as defined in § 1.1502–1) is required to make a transfer election in the manner provided in this section to transfer any eligible credit determined with respect to the member. *See* § 1.1502–77 (providing rules regarding the status of the common parent as agent for its members).

(iv) *Partnerships and S corporations.* A partnership or an S corporation that determines an eligible credit with respect to any eligible credit property held directly by such partnership or S corporation may make a transfer election in the manner provided in § 1.6418–3(d) with respect to eligible credits determined with respect to such eligible credit property.

(v) *Grantors or others treated as owners of a trust.* If an eligible taxpayer is a grantor or any other person that is treated as the owner of any portion of a trust as described in section 671 of the Code, then the eligible taxpayer may make a transfer election in the manner provided in this section for eligible credits determined with respect to any eligible credit property held directly by the portion of the trust that the eligible taxpayer is treated as owning under section 671.

(4) *Circumstances under which no transfer election can be made*—(i) *Prohibition on election or transfer with respect to progress expenditures.* No transfer election can be made with respect to any amount of an eligible credit that is allowed for progress expenditures pursuant to rules similar to the rules of section 46(c)(4) and (d) (as in effect on the day before the enactment of the Revenue Reconciliation Act of 1990).

(ii) *No election allowed if eligible credit transferred for non-cash consideration.* No transfer election is allowed if an eligible taxpayer receives any consideration other than cash (as defined in § 1.6418–1(f)) in connection with the transfer of a specified credit portion.

(iii) *No election allowed if eligible credits not determined with respect to taxpayer.* No transfer election is allowed for eligible credits that are not determined with respect to an eligible taxpayer as described in paragraph (d) of this section. For example, a section 45Q credit allowable to an eligible taxpayer because of an election made under section 45Q(f)(3)(B), or a section 48 credit allowable to an eligible taxpayer because of an election made under section 50(d)(5) and § 1.48–4, although described in § 1.6418–1(c)(2), is not an eligible credit that can be transferred by the taxpayer because such credit is not determined with respect to the eligible taxpayer.

(b) *Manner and due date of making a transfer election*—(1) *In general.* An eligible taxpayer must make a transfer election to transfer a specified credit portion of an eligible credit on the basis of a single eligible credit property. For example, an eligible taxpayer that determines eligible credits with respect to two eligible credit properties would need to make a separate transfer election with respect to any specified credit portion of the eligible credit determined with respect to each eligible credit property. Any transfer election must be consistent with the eligible taxpayer's pre-filing registration under § 1.6418–4.

(2) *Specific rules for certain eligible credits.* In the case of any section 45 credit, section 45Q credit, section 45V credit, or section 45Y credit that is an eligible credit, the rules in paragraph (b)(2)(i) and (ii) of this section apply.

(i) *Separate eligible credit property.* A transfer election must be made separately with respect to each eligible credit property described in § 1.6418–1(d)(2), (3), (5), and (7), as applicable, for which an eligible credit is determined.

(ii) *Time period.* A transfer election must be made for each taxable year an eligible taxpayer elects to transfer specified credit portions with respect to such an eligible credit property during the 10-year period beginning on the date such eligible credit property was originally placed in service (or, in the case of a section 45Q credit, for each taxable year during the 12-year period beginning on the date the single process train of carbon capture equipment was originally placed in service).

(3) *Manner of making a valid transfer election.* A transfer election is made by an eligible taxpayer on the basis of each specified credit portion with respect to a single eligible credit property that is transferred to a transferee taxpayer. To make a valid transfer election, an eligible taxpayer, as part of filing an annual tax return (or a return for a short year within the meaning of section 443 of the Code (short year return)), must include the following—

(i) A properly completed relevant source credit form for the eligible credit (such as Form 7207, *Advanced Manufacturing Production Credit,* if making a transfer election for a section 45X credit) for the taxable year that the eligible credit was determined, including the registration number received during the required pre-filing registration (as described in § 1.6418–4) related to the eligible credit property with respect to which a transferred eligible credit was determined;

(ii) A properly completed Form 3800, *General Business Credit* (or its successor), including reductions necessary because of the transferred eligible credit as required by the form and instructions and the registration number received during the required pre-filing registration (as described in § 1.6418–4) related to the eligible credit property with respect to which a transferred eligible credit was determined;

(iii) A schedule attached to the Form 3800 (or its successor) showing the amount of eligible credit transferred for each eligible credit property (such as for a section 45X election, the relevant lines that include the eligible credit property reported on Form 7207), except as otherwise provided in guidance;

(iv) A transfer election statement as described in paragraph (b)(5) of this section; and

(v) Any other information related to the election specified in guidance.

(4) *Due date and original return requirement of a transfer election.* (i) *In general.* A transfer election by an eligible taxpayer with respect to a specified portion of an eligible credit must be made on an original return (including a superseding return or any revisions made on a superseding return) not later than the due date (including extensions of time) for the original return of the eligible taxpayer for the taxable year for which the eligible credit is determined. No transfer election may be made for the first time on an amended return, withdrawn on an

amended return, or made or withdrawn by filing an administrative adjustment request under section 6227 of the Code. A numerical error with respect to a properly claimed transfer election may be corrected on an amended return or by filing an administrative adjustment request under section 6227 if necessary; however, the eligible taxpayer's original return, which must be signed under penalties of perjury, must contain all of the information, including a registration number, required by the section 6418 regulations. In order to correct an error on an amended return or administrative adjustment request under section 6227, an eligible taxpayer must have made an error in the information included on the original return such that there is a substantive item to correct; an eligible taxpayer cannot correct a blank item or an item that is described as being ''available upon request.'' There is no late-election relief available under §§ 301.9100–1 or 301.9100–3 of this chapter for a transfer election that is not timely filed; however, relief under § 301.9100–2(b) may apply if the eligible taxpayer has not received an extension of time to file a return after the original due date, has timely filed a return, takes corrective action under § 301.9100–2(c) within the six-month extension period, and meets the procedural requirements outlined in § 301.9100–2(d).

(ii) *Amending the amount of the eligible credit reported*—(A) *In general.* If an eligible taxpayer, after making a transfer election in accordance with paragraph (b)(3) of this section on an original return in accordance with this paragraph (b)(4)(i) of this section, determines that the amount of the eligible credit reported on the eligible taxpayer's original return is incorrect, the eligible taxpayer may timely file an amended return, or administrative adjustment request under section 6227, if applicable, adjusting the amount of eligible credit.

(B) *Amending the amount of the credit determined to reflect an increased amount.* To the extent an eligible taxpayer corrects the amount of an eligible credit to reflect an increase in the amount of the eligible credit reported, such amount must be reflected on the credit source forms filed with the amended return, or administrative adjustment request under section 6227, if applicable, but cannot be reflected by either the eligible taxpayer or any transferee taxpayer as a transferred specified credit portion on the transfer election statement.

(C) *Amending the amount of the credit determined to reflect a decreased amount.* To the extent an eligible taxpayer corrects the amount of the eligible credit to reflect a decrease in the amount of the eligible credit reported, such amount must be reflected on the credit source forms filed with the amended return or administrative adjustment request, if applicable, and the transfer election statement reducing the amount of the credit reported in accordance with the following—

(I) The amount of such decrease first reduces the amount if any, of the eligible credit not transferred by the eligible taxpayer; and

(II) Any portion of the amount of such decrease that remains after applying the reduction described in paragraph (b)(4)(ii)(C)(I) of this section, reduces the amount reported by the transferee taxpayer, or if the eligible credit was transferred to more than one transferee taxpayer, reduces the amount of each transferee taxpayer's specified credit portion on a pro rata basis.

(D) *Treatment of cash consideration.* In the case of a decrease in the amount of the credit determined by the eligible taxpayer, any amount of the cash consideration retained by the eligible taxpayer after making an adjustment in accordance with paragraph (b)(4)(ii)(C) of this section that does not directly relate to the remaining specified credit portion must not be excluded from gross income as described in paragraph (e)(2) of this section.

(iii) *Examples.* The examples in this paragraph (b)(4)(iii) illustrate the application of paragraphs ((b)(6)(i) and (ii) of this section.

(A) *Example 1.* A, a U.S. C corporation for Federal income tax purposes (as defined in section 1361(a)(2) of the Code), qualifies as an eligible taxpayer and determines a section 45V clean hydrogen tax credit of $100X in year 1. At the end of year 1, A transfers the entire $100X of the section 45V credit to B. A timely makes a transfer election and properly reports the transaction in accordance with § 1.6418–2(b) on its original return. In year 2, A concludes that the amount of section 45V credit determined in year 1 was $120X. A may file an amended return increasing the amount of the credit reported by $20X on the appropriate credit source forms. A cannot increase the amount of the credit reported on the transfer election statement, and B cannot increase the amount of credit claimed on its return.

(B) *Example 2.* Same facts as *Example 1* except that, in year 2, A concludes that the amount of section 45V credit determined in year 1 was $80X. On an amended return, A decreases the amount of the credit reported by $20X on the appropriate credit source forms. A should then reduce the amount of the credit reported on the transfer election statement. To avoid a determination of an excessive credit transfer, B should file a qualified amended return pursuant to § 1.6664–2(c)(3) reducing the amount of credit claimed on its return by $20X.

(C) *Example 3.* C, a U.S. C corporation for Federal income tax purposes (as defined in section 1361(a)(2) of the Code), qualifies as an eligible taxpayer and determines a section 45Y clean electricity production tax credit of $100X in year 1. At the end of year 1, C transfers $80X of the 45Y credit determined to D, E, and F, with D receiving $40X, E receiving $32X, and F receiving $80X. C timely makes the transfer election and properly reports the transaction in accordance with § 1.6418–2(b) on its original return. In year 2, C concludes that the amount of section 45Y credit determined in year 1 was $60X. C files an amended return decreasing the amount of the credit reported by $40X on the appropriate credit source forms to reflect $60X of section 45Y credit on its credit source forms. As a result of the $40X decrease in the credit determined, C reduces the $20X of section 45Y retained by C to $0X, and reduces the amount of section 45Y credit transferred to D, E, and F to $30X, $24X, and F $6X, respectively (their respective pro rata shares of the reduced amount). Each of D, E, and F should file a qualified amended return under § 1.6664–2(c)(3) reducing the amount of the credit claimed on their returns to avoid a determination of an excessive credit transfer.

(5) *Transfer election statement*—(i) *In general.* A transfer election statement is a written document that describes the transfer of a specified credit portion between an eligible taxpayer and transferee taxpayer. Unless otherwise provided in guidance, an eligible taxpayer and transferee taxpayer must each attach a transfer election statement to their respective return as required under paragraphs (b)(3)(iv) and (f)(4)(ii) of this section. Unless otherwise provided in guidance, an eligible taxpayer and transferee taxpayer can use any document (such as a purchase and sale agreement) that meets the conditions in paragraph (b)(5)(ii) of this section but must label the document a ''Transfer Election Statement'' before attaching such labeled document to their respective returns. The information required in paragraph (b)(5)(ii) of this section does not otherwise limit any other information that the eligible taxpayer and transferee taxpayer may agree to provide in connection with the transfer of any specified credit portion. The statement must be signed under penalties of

perjury by an individual with authority to legally bind the eligible taxpayer. The statement must also include the written consent of an individual with authority to legally bind the transferee taxpayer.

(ii) *Information required in transfer election statement.* A transfer election statement must, at a minimum, include each of the following:

(A) Name, address, and taxpayer identification number of the transferee taxpayer and the eligible taxpayer. If the transferee taxpayer or eligible taxpayer is a member of a consolidated group, then only include information for the group member that is the transferee taxpayer or eligible taxpayer (if different from the return filer).

(B) A statement that provides the necessary information and amounts to allow the transferee taxpayer to take into account the specified credit portion with respect to the eligible credit property, including—

(*1*) A description of the eligible credit (for example, advanced manufacturing production credit for a section 45X transfer election), the total amount of the credit determined with respect to the eligible credit property, and the amount of the specified credit portion;

(*2*) The taxable year of the eligible taxpayer and the first taxable year in which the specified credit portion will be taken into account by the transferee taxpayer;

(*3*) The amount(s) of the cash consideration and date(s) on which paid by the transferee taxpayer; and

(*4*) The registration number related to the eligible credit property.

(C) Attestation that the eligible taxpayer (or any member of its consolidated group) is not related to the transferee taxpayer (or any member of its consolidated group) within the meaning of section 267(b) or 707(b)(1)).

(D) A statement or representation from the eligible taxpayer that it has or will comply with all requirements of section 6418, the section 6418 regulations, and the provisions of the Code applicable to the eligible credit, including, for example, any requirements for bonus credit amounts described in § 1.6418–1(c)(3) (if applicable).

(E) A statement or representation from the eligible taxpayer and the transferee taxpayer acknowledging the notification of recapture requirements under section 6418(g)(3) and the section 6418 regulations (if applicable).

(F) A statement or representation from the eligible taxpayer that the eligible taxpayer has provided the required minimum documentation (as described in paragraph (b)(5)(iv) of this section) to the transferee taxpayer.

(iii) *Timing of transfer election statement.* A transfer election statement can be completed at any time after the eligible taxpayer and transferee taxpayer have sufficient information to meet the requirements of paragraph (b)(5)(ii) of this section, but the transfer election statement cannot be completed for any year after the earlier of:

(A) The filing of the eligible taxpayer's return for the taxable year for which the specified credit portion is determined with respect to the eligible taxpayer; or

(B) The filing of the return of the transferee taxpayer for the year in which the specified credit portion is taken into account.

(iv) *Required minimum documentation.* The eligible taxpayer must provide to a transferee taxpayer the following minimum documentation—

(A) Information that validates the existence of the eligible credit property, which could include evidence prepared by a third party (such as a county board or other governmental entity, a utility, or an insurance provider);

(B) If applicable, documentation substantiating that the eligible taxpayer has satisfied the requirements to include any bonus credit amounts (as defined in § 1.6418–1(c)(3)) in the eligible credit that was part of the transferred specified credit portion; and

(C) Evidence of the eligible taxpayer's qualifying costs in the case of a transfer of an eligible credit that is part of the investment credit or the amount of qualifying production activities and sales amounts, as relevant, in the case of a transfer of an eligible credit that is a production credit.

(v) *Transferee recordkeeping requirement.* Consistent with § 1.6001–1(e), the transferee taxpayer must retain the required minimum documentation provided by the eligible taxpayer as long as the contents thereof may become material in the administration of any internal revenue law.

(c) *Limitations after a transfer election is made*—(1) *Irrevocable.* A transfer election with respect to a specified credit portion is irrevocable.

(2) *No additional transfers.* A specified credit portion may only be transferred pursuant to a transfer election once. A transferee taxpayer cannot make a transfer election of any specified credit portion transferred to the transferee taxpayer.

(d) *Determining the eligible credit*—(1) *In general.* An eligible taxpayer may only transfer eligible credits determined with respect to the eligible taxpayer (paragraph (a)(4) of this section disallows transfer elections in other situations). An eligible credit is determined with respect to an eligible taxpayer if the eligible taxpayer owns the underlying eligible credit property and conducts the activities giving rise to the credit or, in the case of section 45X (under which ownership of eligible credit property is not required), is considered (under the regulations under section 45X) the taxpayer with respect to which the section 45X credit is determined. All rules that relate to the determination of the eligible credit, such as the rules in sections 49 and 50(b) of the Code, apply to the eligible taxpayer and therefore can limit the amount of eligible credit determined with respect to an eligible credit property that can be transferred. Rules relating to the amount of an eligible credit that is allowed to be claimed by an eligible taxpayer, such as the rules in sections 38(c) or 469 of the Code, do not limit the eligible credit determined, but do apply to a transferee taxpayer as described in paragraph (f)(3) of this section.

(2) *Application of section 49 at-risk rules to determination of eligible credits for partnerships and S corporations.* Any amount of eligible credit determined with respect to investment credit property held directly by a transferor partnership or transferor S corporation that is eligible credit property (eligible investment credit property) must be determined by the partnership or S corporation taking into account the section 49 at-risk rules at the partner or shareholder level as of the close of the taxable year in which the eligible investment credit property is placed in service. Thus, if the credit base of an eligible investment credit property is limited to a partner or an S corporation shareholder by section 49, then the amount of the eligible credit determined by the transferor partnership or transferor S corporation is also limited. A transferor partnership or transferor S corporation that transfers any specified credit portion with respect to an eligible investment credit property must request from each of its partners or shareholders, respectively, that is subject to section 49, the amount of such partner's or shareholder's nonqualified nonrecourse financing with respect to the eligible investment credit property as of the close of the taxable year in which the property is placed in service. Additionally, the transferor partnership or transferor S corporation must attach to its tax return for the taxable year in which the eligible investment credit property is placed in service, the amount of each partner's or shareholder's section 49 limitation with

respect to any specified credit portion transferred with respect to the eligible investment credit property. Changes to at-risk amounts under section 49 for partners or S corporation shareholders after the close of the taxable year in which the eligible investment credit property is placed in service do not impact the eligible credit determined by the transferor partnership or transferor S corporation, but do impact the partner(s) or S corporation shareholder(s) as described in § 1.6418–3(a)(6)(ii).

(e) *Treatment of payments made in connection with a transfer election*—(1) *In general.* An amount paid by a transferee taxpayer to an eligible taxpayer is in connection with a transfer election with respect to a specified credit portion only if it is paid in cash (as defined in § 1.6418–1(f)), directly relates to the specified credit portion, and is not described in § 1.6418–5(a)(3) (describing payments related to an excessive credit transfer).

(2) *Not includible in gross income.* Any amount paid to an eligible taxpayer that is described in paragraph (e)(1) of this section is not includible in the gross income of the eligible taxpayer.

(3) *Not deductible.* No deduction is allowed under any provision of the Code with respect to any amount paid by a transferee taxpayer that is described in paragraph (e)(1) of this section.

(4) *Anti-abuse rule*—(i) *In general.* A transfer election of any specified credit portion, and therefore the transfer of that specified credit portion to a transferee taxpayer, may be disallowed, or the Federal income tax consequences of any transaction(s) effecting such a transfer may be recharacterized, when the parties to the transaction have engaged in the transaction or a series of transactions with a principal purpose of avoiding any Federal tax liability beyond the intent of section 6418. For example, an amount of cash paid by a transferee taxpayer will not be considered as paid in connection with the transfer of a specified credit portion under paragraph (e)(1) of this section if a principal purpose of a transaction or series of transactions is to allow an eligible taxpayer to avoid gross income. Conversely, an amount of cash paid by a transferee taxpayer will be considered paid in connection with the transfer of a specified credit portion under paragraph (e)(1) of this section if a principal purpose of a transaction or series of transactions is to increase a Federal income tax deduction of a transferee taxpayer.

(ii) *Example 1.* Taxpayer A, an eligible taxpayer, generates $100 of an eligible credit with respect to an eligible credit property in the course of its trade or business. Taxpayer A also provides services to customers. Taxpayer A offers Customer B, a transferee taxpayer that cannot deduct the cost of the services, the opportunity to be transferred $100 of eligible credit for $100 while receiving Taxpayer A's services for free. Taxpayer A normally charges $20 for the same services without the purchase of the eligible credit, and an arm's length price of the eligible credit without regard to other commercial relationships is $80 paid in cash for $100 of the eligible credit. Taxpayer A is engaged in a transaction in which it is undercharging for services to Customer B to avoid recognizing $20 of gross income. This transaction is subject to recharacterization under the anti-abuse rule in paragraph (e)(4) of this section, and Taxpayer A will be treated as transferring $100 of the eligible credit for $80, and have $20 of gross income from the services provided to Customer B.

(iii) *Example 2.* Taxpayer C, an eligible taxpayer, generates $100 of an eligible credit with respect to an eligible credit property in the course of its trade or business. Taxpayer C also sells property to customers. Taxpayer C offers Customer D, a transferee taxpayer that can deduct the purchase of property, the opportunity to receive the $100 of eligible credit for $20 while purchasing Taxpayer C's property for $80. Taxpayer C normally charges $20 for the same property without the transfer of the eligible credit, and an arm's length price of the eligible credit without regard to other commercial relationships is $80 paid in cash for $100 of the eligible credit. Taxpayer C is willing to accept the higher price for the property because Taxpayer C has a net operating loss carryover to offset any taxable income from the transaction. This transaction is subject to recharacterization under the anti-abuse rule under paragraph (e)(4) of this section, and Taxpayer C will be treated as selling the property for $20 and transferring $100 of the eligible credit for $80, and Customer D will have a $20 deduction related to the purchase of the property instead of $80.

(f) *Transferee taxpayer's treatment of eligible credit*—(1) *Taxable year in which credit taken into account*—(i) *In general.* In the case of any specified credit portion transferred to a transferee taxpayer pursuant to a transfer election under this section, the transferee taxpayer takes the specified credit portion into account in the transferee taxpayer's first taxable year ending with or ending after the taxable year of the eligible taxpayer with respect to which the eligible credit was determined. Thus, to the extent the taxable years of an eligible taxpayer and a transferee taxpayer end on the same date, the transferee taxpayer will take the specified credit portion into account in that taxable year. To the extent the taxable years of an eligible taxpayer and a transferee taxpayer end on different dates, the transferee taxpayer will take the specified credit portion into account in the transferee taxpayer's first taxable year that ends after the taxable year of the eligible taxpayer.

(ii) *Rule for 52–53-week taxable years.* For purposes of determining the taxable year in which a credit is taken into account under section 6418(d) and paragraph (f)(1)(i) of this section, a 52–53-week taxable year of an eligible taxpayer and transferee taxpayer is deemed to end on or close on the last day of the calendar month nearest to the last day of the 52–53-week taxable year, as the case may be.

(2) *No gross income for a transferee taxpayer upon claiming a transferred specified credit portion.* A transferee taxpayer does not have gross income upon claiming a transferred specified credit portion even if the amount of cash paid to the eligible taxpayer was less than the amount of the transferred specified credit portion, assuming all other requirements of section 6418 are met. For example, a transferee taxpayer who paid $9X for $10X of a specified credit portion that the transferee taxpayer then claims on its return does not result in the $1X difference being included in the gross income of the transferee taxpayer.

(3) *Transferee treated as the eligible taxpayer*—(i) *In general.* A transferee taxpayer (and not the eligible taxpayer) is treated as the taxpayer for purposes of the Code with respect to the transferred specified credit portion. An eligible taxpayer must apply the rules necessary to determine the amount of an eligible credit prior to making the transfer election for a specified credit portion, and therefore a transferee taxpayer does not re-apply rules that relate to a determination of an eligible credit, such as the rules in sections 49 or 50(b). However, a transferee taxpayer must apply rules that relate to computing the amount of the specified credit portion that is allowed to be claimed in the taxable year by the transferee taxpayer, such as the rules in section 38 or 469, as applicable.

(ii) *Application of section 469.* A specified credit portion transferred to a transferee taxpayer is treated as determined in connection with the conduct of a trade or business and, if applicable, such transferred specified

credit portion is subject to the rules in section 469. In applying section 469, unless a transferee taxpayer owns an interest in the eligible taxpayer's trade or business at the time the work was done, the fact that the specified credit portion is treated as determined in connection with the conduct of a trade or business does not cause the transferee taxpayer to be considered to own an interest in the eligible taxpayer's trade or business at the time the work was done and does not change the characterization of the transferee taxpayer's participation (or lack thereof) in the eligible taxpayer's trade or business by using any of the grouping rules under § 1.469–4(c).

(4) *Transferee taxpayer requirements to take into account a transferred specified credit portion.* In order for a transferee taxpayer to take into account in a taxable year (as described in paragraph (f)(1) of this section) a specified credit portion that was transferred by an eligible taxpayer, as part of filing a return (or short year return), an amended return, or a request for an administrative adjustment under section 6227 of the Code, the transferee taxpayer must include the following—

(i) A properly completed Form 3800, *General Business Credit* (or its successor), to take into account the transferred specified credit portion as a current general business credit, and including all registration number(s) related to the transferred specified credit portion;

(ii) The transfer election statement described in paragraph (b)(5) of this section attached to the return; and

(iii) Any other information related to the transfer election specified in guidance.

(g) *Applicability date.* This section applies to taxable years ending on or after April 30, 2024. For taxable years ending before April 30, 2024, taxpayers, however, may choose to apply the rules of this section and §§ 1.6418–1, –3, and –5, provided the taxpayers apply the rules in their entirety and in a consistent manner.

§ 1.6418–3 Additional rules for partnerships and S corporations.

(a) *Rules applicable to both partnerships and S corporations*—(1) *Partnerships and S corporations as eligible taxpayers and transferee taxpayers.* Under section 6418, a partnership or an S corporation may qualify as a transferor partnership or a transferor S corporation and may elect to make a transfer election to transfer a specified credit portion to a transferee taxpayer. A partnership or an S corporation may also qualify as a transferee partnership or a transferee S corporation. This section provides rules applicable to transferor partnerships and transferor S corporations and transferee partnerships and transferee S corporations. Paragraph (b) of this section provides rules applicable solely to partnerships. Paragraph (c) of this section provides rules applicable solely to S corporations. Paragraph (d) of this section provides guidelines for the manner and due date for which a partnership or an S corporation makes an election under section 6418(a). Paragraph (e) of this section contains examples illustrating the operation of the provisions of this section. Except as provided in this section, the general rules under section 6418 and the section 6418 regulations apply to partnerships and S corporations.

(2) *Treatment of cash received for a specified credit portion.* In the case of any specified credit portion determined with respect to any eligible credit property held directly by a partnership or an S corporation, if such partnership or S corporation makes a transfer election with respect to such specified credit portion—

(i) Any amount of cash payment received as consideration for the transferred specified credit portion will be treated as tax exempt income for purposes of sections 705 and 1366 of the Code; and

(ii) A partner's distributive share of such tax exempt income will be as described in paragraphs (b)(1) and (2) of this section.

(3) *No partner or shareholder level transfers.* In the case of an eligible credit property held directly by a partnership or an S corporation, no transfer election by any partner or S corporation shareholder is allowed under § 1.6418–2 or this section with respect to any specified credit portion determined with respect to such eligible credit property.

(4) *Disregarded entity ownership.* In the case of an eligible credit property held directly by an entity disregarded as separate from a partnership or an S corporation for Federal income tax purposes, such eligible credit property will be treated as held directly by the partnership or S corporation for purposes of making a transfer election.

(5) *Treatment of tax exempt income.* Tax exempt income resulting from the receipt of consideration for the transfer of a specified credit portion by a transferor partnership or transferor S corporation is treated as arising from an investment activity and not from the conduct of a trade or business within the meaning of section 469(c)(1)(A). As such, any tax exempt income is not treated as passive income to any direct or indirect partners or shareholders who do not materially participate within the meaning of section 469(c)(1)(B).

(6) *Certain recapture events not requiring notice*—(i) *Indirect dispositions under section 50*—(A) *Treatment of transferor partnership or transferor S corporation and transferee taxpayer.* For purposes of section 6418(g)(3)(B) only, the disposition of a partner's interest under § 1.47–6(a)(2) or an S corporation shareholder's interest under § 1.47–4(a)(2) in an eligible taxpayer that is treated as a transferor partnership or transferor S corporation is disregarded. As such, provided the investment credit property that is eligible credit property owned by the transferor partnership or transferor S corporation is not disposed of, and continues to be investment credit property with respect to such transferor partnership or transferor S corporation, a transferor partnership or transferor S corporation is not required to provide notice to a transferee taxpayer of an interest disposition by the partner or shareholder because the disposition does not result in recapture under section 6418(g)(3)(B) to which the transferee taxpayer is liable, and thus, the transferee taxpayer does not have to calculate a recapture amount.

(B) *Treatment of partner or shareholder.* A partner or an S corporation shareholder that has disposed of an interest in a transferor partnership or transferor S corporation is subject to the rules relating to such disposition under § 1.47–6(a)(2) or § 1.47–4(a)(2), respectively. Any recapture to a disposing partner is calculated based on the partner's share of the basis (or cost) of the section 38 property to which the specified credit portion was determined in accordance with § 1.46–3(f). Any recapture to a disposing shareholder is calculated based on the shareholder's pro rata share of the basis (or cost) of the section 38 property to which the specified credit portion was determined in accordance with § 1.48–5.

(ii) *Changes in at-risk amounts under section 49*—(A) *Treatment of transferor partnership or transferor S corporation and transferee taxpayer.* For purposes of section 6418 only, a change in the nonqualified nonrecourse financing (as defined in section 49(a)(1)(D)) amount of any partner or shareholder of a transferor partnership or transferor S corporation, respectively, after the close of the taxable year in which the investment credit property is placed in service and the specified credit portion is determined, is disregarded. A transferor partnership or transferor S

corporation is not required to provide notice to a transferee taxpayer of the change because the change does not cause recapture under section 6418(g)(3)(B) to which the transferee taxpayer is liable, and thus, the transferee taxpayer does not have to calculate a recapture amount.

(B) *Treatment of partner or shareholder.* A partner or shareholder in a transferor partnership or transferor S corporation, respectively, must apply the rules under section 49 at the partner or shareholder level if there is a change in nonqualified nonrecourse financing with respect to the partner or shareholder after the close of the taxable year in which the investment credit property is placed in service and the specified credit portion is determined. If there is an increase in nonqualified nonrecourse financing to a partner, any adjustment under the rules of section 49(b) is calculated based on the partner's share of the basis (or cost) of the section 38 property to which the specified credit portion was determined in accordance with § 1.46–3(f). If there is an increase in nonqualified nonrecourse financing to a shareholder, any adjustment under the rules of section 49(b) is calculated based on the shareholder's pro rata share of the basis (or cost) of the section 38 property to which the specified credit portion was determined in accordance with § 1.48–5. If there is a decrease in nonqualified nonrecourse financing, any increase in the credit base is taken into account by the partner or shareholder as provided under section 49, and any resulting credit is not eligible for transfer under section 6418.

(b) *Rules applicable to partnerships*—(1) *Allocations of tax exempt income amounts generally.* A transferor partnership must generally determine a partner's distributive share of any tax exempt income resulting from the receipt of consideration for the transfer based on such partner's proportionate distributive share of the eligible credit that would otherwise have been allocated to such partner absent the transfer of the specified credit portion (otherwise eligible credit). A partner's distributive share of an otherwise eligible credit is determined under §§ 1.46–3(f) and 1.704–1(b)(4)(ii). Tax exempt income resulting from the receipt of consideration for the transfer of a specified credit portion by a transferor partnership is treated as received or accrued, including for purposes of section 705 of the Code, as of the date the specified credit portion is determined with respect to the transferor partnership (such as, for investment credit property, the date the property is placed in service).

(2) *Special rule for allocations of tax exempt income amounts and eligible credits for an election to transfer less than all eligible credits determined with respect to an eligible credit property.* In the event a transferor partnership elects to transfer one or more specified credit portions of less than all eligible credits determined with respect to an eligible credit property held directly by the partnership, the partnership may allocate any tax exempt income resulting from the receipt of consideration for the specified credit portion(s) in accordance with the rules in this paragraph (b)(2).

(i) First, the partnership must determine each partner's distributive share of the otherwise eligible credits with respect to such eligible credit property in accordance with paragraph (b)(1) of this section (partner's eligible credit amount).

(ii) Thereafter, the transferor partnership may determine, in any manner described in the partnership agreement, or as the partners may agree, the portion of each partner's eligible credit amount to be transferred, and the portion of each partner's eligible credit amount to be retained and allocated to such partner. The partnership may allocate to each partner its agreed upon share of eligible credits, tax exempt income resulting from the receipt of consideration for the specified credit portion(s), or both, as the case may be, provided that—

(A) The amount of eligible credits allocated to each partner cannot exceed such partner's eligible credit amount; and

(B) Each partner is allocated its proportionate share of tax exempt income resulting from the transfer(s).

(iii) Each partner's proportionate share of tax exempt income resulting from the transfer(s) is equal to the total amount of tax exempt income resulting from the transfer(s) of the specified credit portion(s) by the partnership multiplied by a fraction—

(A) The numerator of which is such partner's eligible credit amount minus the amount of eligible credits actually allocated to such partner with respect to the eligible credit property for the taxable year; and

(B) The denominator of which is the specified credit portion(s) transferred by the partnership with respect to the eligible credit property for the taxable year.

(3) *Transferor partnerships in tiered structures.* If a partnership (upper-tier partnership) is a direct or indirect partner of a transferor partnership and directly or indirectly receives—

(i) An allocation of an eligible credit, the upper-tier partnership is not an eligible taxpayer under section 6418 with respect to any eligible credit allocated by a transferor partnership; or

(ii) An allocation of tax exempt income resulting from the receipt of consideration for the transfer of a specified credit portion by a transferor partnership, the upper-tier partnership must determine its partners' distributive shares of such tax exempt income in proportion to the partners' distributive shares of the otherwise eligible credit as provided in paragraph (b)(1) of this section.

(4) *Partnership as a transferee taxpayer*—(i) *Eligibility under section 6418.* A partnership may qualify as a transferee partnership to the extent it is not related (within the meaning of section 267(b) or 707(b)(1)) to an eligible taxpayer. A transferee partnership is subject to the no additional transfer rule in § 1.6418–2(c)(2), however, an allocation of a transferred specified credit portion to a direct or indirect partner of a transferee partnership under section 704(b) is not a transfer for purposes of section 6418.

(ii) *Treatment of a cash payment for a transferred specified credit portion.* A cash payment by a transferee partnership as consideration for a transferred specified credit portion is treated as an expenditure described in section 705(a)(2)(B).

(iii) *Allocations of transferred specified credit portions.* A transferee partnership must determine each partner's distributive share of any transferred specified credit portion based on such partner's distributive share of the nondeductible expenses for the taxable year used to fund the purchase of such transferred specified credit portion. Each partner's distributive share of the nondeductible expenses used to fund the purchase of any transferred specified credit portion is determined by the partnership agreement, or, if the partnership agreement does not provide for the allocation of nondeductible expenses paid pursuant to section 6418, then the allocation of the specified credit portion is based on the transferee partnership's general allocation of nondeductible expenses.

(iv) *Transferred specified credit portion treated as an extraordinary item.* A transferred specified credit portion is treated as an extraordinary item and must be allocated among the partners of a transferee partnership as of the time the transfer of the specified credit portion to the transferee

partnership is treated as occurring in accordance with this paragraph (b)(4)(iv) and § 1.706–4(e)(1) and (e)(2)(ix). If the transferee partnership and eligible taxpayer have the same taxable years, the transfer of a specified credit portion to a transferee partnership is treated as occurring on the first date that the transferee partnership makes a cash payment to the eligible taxpayer as consideration for the specified credit portion. If the transferee partnership and eligible taxpayer have different taxable years, the transfer of a specified credit portion to a transferee partnership is treated as occurring on the later of—

(A) The first date of the taxable year that the transferee partnership takes the specified credit portion into account under section 6418(d); or

(B) The first date that the transferee partnership makes a cash payment to the eligible taxpayer for the specified credit portion.

(v) *Transferee partnerships in tiered structures.* If an upper-tier partnership is a direct or indirect partner of a transferee partnership and directly or indirectly receives an allocation of a transferred specified credit portion, the upper-tier partnership is not an eligible taxpayer under section 6418 with respect to the transferred specified credit portion. The upper-tier partnership's distributive share of the transferred specified credit portion is treated as an extraordinary item to the upper-tier partnership and must be allocated among the partners of the upper-tier partnership as of the time the transfer of the specified credit portion to the transferee partnership is treated as occurring in accordance with paragraph (b)(4)(iv) of this section and § 1.706–4(e)(1) and (e)(2)(ix), regardless of whether the transferee partnership and upper-tier partnership have different taxable years under section 706(b). The upper-tier partnership must report the credits to its partners in accordance with guidance.

(c) *Rules applicable to S corporations*—(1) *Pro rata shares of tax exempt income amounts.* Each shareholder of a transferor S corporation must take into account such shareholder's pro rata share (as determined under section 1377(a) of the Code) of any tax exempt income resulting from the receipt of consideration for the transfer. Tax exempt income resulting from the receipt of consideration for the transfer of a specified credit portion by a transferor S corporation is treated as received or accrued, including for purposes of section 1366, as of the date the specified credit portion is determined with respect to the transferor S corporation (such as, for investment credit property, the date the property is placed in service).

(2) *S corporation as a transferee taxpayer*—(i) *Eligibility under section 6418.* An S corporation may qualify as a transferee taxpayer to the extent it is not related (within the meaning of section 267(b) or 707(b)(1)) to an eligible taxpayer (transferee S corporation). A transferee S corporation is subject to the no additional transfer rule in § 1.6418–2(c)(2), however, an allocation of a transferred specified credit portion to a direct or indirect shareholder of a transferee S corporation is not a transfer for purposes of section 6418.

(ii) *Treatment of a cash payment for a transferred specified credit portion.* A cash payment by a transferee S corporation as consideration for a transferred specified credit portion is treated as an expenditure described in section 1367(a)(2)(D) of the Code.

(iii) *Pro rata shares of transferred specified credit portions.* Each shareholder of a transferee S corporation must take into account such shareholder's pro rata share (as determined under section 1377(a)) of any transferred specified credit portion. If the transferee S corporation and eligible taxpayer have the same taxable years, the transfer of a specified credit portion is treated as occurring to a transferee S corporation during the transferee S corporation's permitted year (as defined under sections 444 and 1378(b)) that the transferee S corporation first makes a cash payment as consideration to the eligible taxpayer for the specified credit portion. If the transferee S corporation and eligible taxpayer have different taxable years, then the transfer of a specified credit portion is treated as occurring to a transferee S corporation during the transferee S corporation's first permitted year (as defined under sections 444 and 1378(b)) ending with or after, the taxable year of the eligible taxpayer to which the transferred specified credit portion was determined.

(d) *Transfer election by a partnership or an S corporation*—(1) *In general.* A partnership or an S corporation may make a transfer election to transfer a specified credit portion under section 6418 if it files an election in accordance with the rules set forth in this paragraph (d). A transfer election is made on the basis of an eligible credit property and only applies to the specified credit portion identified in the transfer election by such partnership or S corporation in the taxable year for which the election is made.

(2) *Manner and due date of making a transfer election.* A transfer election for a specified credit portion must be made in the manner provided in § 1.6418–2(b)(1) through (3). All documents required in § 1.6418–2(b)(1) through (3) must be attached to the partnership or S corporation return for the taxable year during which the transferred specific credit portion was determined. For the transfer election to be valid, the return must be filed not later than the time prescribed by §§ 1.6031(a)–1(e) and 1.6037–1(b) (including extensions of time) for filing the return for such taxable year. No transfer election may be made for the first time on an amended return, withdrawn on an amended return, or made or withdrawn by filing an administrative adjustment request under section 6227 of the Code. A numerical error with respect to a properly claimed transfer election may be corrected on an amended return or by filing an administrative adjustment request under section 6227 if necessary; however, the partnership or S corporation's original return, which must be signed under penalties of perjury, must contain all of the information, including a registration number, required by these final regulations. In order to correct an error on an amended return or administrative adjustment request under section 6227, a partnership or an S corporation must have made an error in the information included on the original return such that there is a substantive item to correct; a partnership or an S corporation cannot correct a blank item or an item that is described as being ''available upon request.'' There is no late-election relief available under §§ 301.9100–1 or 301.9100–3 of this chapter for a transfer election that is not timely filed; however, relief under § 301.9100–2(b) may apply if the partnership or S corporation has not received an extension of time to file a return after the original due date, has timely filed a return, takes corrective action under § 301.9100–2(c) within the six-month extension period, and meets the procedural requirements outlined in § 301.9100–2(d).

(3) *Irrevocable election.* A transfer election by a partnership or an S corporation is irrevocable.

(e) *Examples.* The examples in this paragraph (e) illustrate the application of paragraphs (a)(6), (b), and (c) of this section.

(1) *Example 1. Transfer of all eligible credits by a transferor partnership*—(i) *Facts.* A and B each contributed $150X of cash to AB partnership for the purpose of investing in energy property. The partnership agreement provides that A and B share equally in all items of income, gain, loss, deduction, and

credit of AB partnership. AB partnership invests $300X in an energy property in accordance with section 48 and places the energy property in service on date X in year 1. As of the end of year 1, AB partnership has $90X of eligible credits under section 48 with respect to the energy property. Before AB partnership files its tax return for year 1, AB partnership transfers the $90X of eligible credits to an unrelated transferee taxpayer, Transferee Taxpayer X for $80X and executes a transfer election statement with Transferee Taxpayer X.

(ii) *Analysis.* Under § 1.6418–3(b)(1), AB partnership allocates the tax exempt income resulting from the transfer of the specified credit portion proportionately among the partners based on each partner's distributive share of the otherwise eligible section 48 credit as determined under §§ 1.46–3(f) and 1.704–1(b)(4)(ii). Under § 1.46–3(f)(2), each partner's share of the basis of the energy property is determined in accordance with the ratio in which the partners divide the general profits (or taxable income) of the partnership. Under the AB partnership agreement, A and B share partnership profits equally. Thus, each partner's share of the basis of the energy property under § 1.46–3(f) and distributive share of the otherwise eligible credits under § 1.704–1(b)(4)(ii) is 50 percent. The transfer made pursuant to section 6418(a) causes AB partnership's eligible credits under section 48 with respect to the energy property to be reduced to zero, and the consideration of $80X received by AB partnership for the transferred specified credit portion is treated as tax exempt income. Because the tax exempt income is allocated in the same proportion as the otherwise eligible credit would have been allocated, A and B will each be allocated $40X of tax exempt income. Each of partner A's and partner B's basis in its partnership interest and capital account will be increased by $40X. Also in year 1, the basis in the energy property held by AB partnership and with respect to which the credit is calculated is reduced under section 50(c)(3) by 50 percent of the amount of the credit so determined, or $45X. A's and B's basis in their partnership interests and capital accounts will be appropriately adjusted to take into account adjustments made to the energy property under section 50(c)(5) and § 1.704–1(b)(2)(iv)(*j*). The tax exempt income received or accrued by AB partnership as a result of the transferred specified credit portion is treated as received or accrued, including for purposes of section 705, as of date X in year 1, which is the date the transferred specified credit portion was determined with respect to AB partnership.

(2) *Example 2. Recapture to a transferor partnership*—(i) *Facts.* Assume the same facts as in paragraph (e)(1)(i) of this section (*Example 1*), except in year 3, within the recapture period related to the energy property, A reduces its proportionate interest in the general profits of the partnership by 50 percent causing a recapture event to A under § 1.47–6(a)(2). The energy property is not disposed of by AB partnership and continues to be energy property with respect to AB partnership.

(ii) *Analysis.* AB partnership should not provide notice of recapture to Transferee Taxpayer X as a result of the recapture event under § 1.47–6(a)(2) with respect to A. Transferee Taxpayer X is not liable for any recapture amount. A, however, is subject to recapture as provided in § 1.47–6(a)(2) and based on its share of the basis (or cost) of the energy property to which the eligible credits were determined under § 1.46–3(f)(2).

(3) *Example 3. Transfer of a portion of eligible credits by a transferor partnership*—(i) *Facts.* C and D each contributed cash to CD partnership for the purpose of investing in a qualified wind facility. The partnership agreement provides that until a flip point, C is allocated 99 percent of all items of income, gain, loss, deduction and credit of CD partnership and D is allocated the remaining 1 percent of such items. After the flip point, C is allocated 5 percent of all items of income, gain, loss, deduction and credit of CD Partnership and D is allocated 95 percent of such items. CD partnership invests in a qualified wind facility and places the facility in service in year 1. CD partnership generates $100X of credit under section 45(a) for year 1. Before the due date for CD partnership's year 1 tax return (with extension), C and D agree that D's share of the eligible credit will be transferred, and C will be allocated its share of eligible credit. CD partnership transfers $1X of the eligible credit to an unrelated transferee taxpayer for $1X. The flip point has not been reached by the end of year 1.

(ii) *Analysis.* Under paragraph (b)(2) of this section, CD partnership must first determine each partner's eligible credit amount, which is equal to such partner's distributive share of the otherwise eligible section 45(a) credit as determined under § 1.704–1(b)(4)(ii). Under § 1.704–1(b)(4)(ii), for an eligible credit that is not an investment tax credit, allocations of credit are deemed to be in accordance with the partner's interest in the partnership if the credit is allocated in the same proportion as the partners' distributive share of the receipts that give rise to the credit. The CD partnership agreement provides that until the flip point, C is allocated 99 percent of all items of income, gain, loss, deduction and credit of CD partnership and D is allocated the remaining 1 percent of such items. Assuming all requirements of the safe harbor provided for in Revenue Procedure 2007–65, 2007–2 CB 967 are met, CD partnership's allocations of the otherwise eligible credits would be respected as in accordance with section 704(b). Thus, partner C's and partner D's distributive share of the otherwise eligible credit is 99 percent and 1 percent, respectively. C and D have agreed to sell D's eligible credit amount of $1X for full value and to allocate to C its eligible credit amount of $99X. The transfer made pursuant to section 6418(a) causes CD partnership's eligible credits under section 45(a) with respect to the wind facility to be reduced to $99X, and the consideration of $1X received by CD partnership is treated as tax exempt income. D is allocated $1X of tax exempt income from the transfer of the eligible credits, and C is allocated $99X of eligible credits under section 45(a) with respect to the wind facility. Neither C nor D is allocated more eligible credits than its eligible credit amount. Additionally, D is allocated an amount of tax exempt income equal to $\$1X \times (1 - 0)/1$ and C is allocated none of the tax exempt income. The allocations of eligible credits and tax exempt income are permissible allocations under paragraph (b)(2) of this section.

(4) *Example 4. Upper-tier partnership of a transferor partnership*—(i) *Facts.* E, F, and G each contributed $100X of cash to EFG partnership for the purpose of investing in an energy property. E, F, and G are partnerships for Federal income tax purposes. The partnership agreement provides that E, F and G share equally in all items of income, gain, loss, and deduction of EFG partnership. EFG partnership invests $300X in an energy property in accordance with section 48 and places the energy property in service in year 1. As of the end of year 1, EFG partnership has $90X of eligible credits under section 48 with respect to the energy property. Before the due date for EFG partnership's year 1 tax return (with extension), E, F and G agree that E's share of the eligible credits will be transferred, and F and G will each be allocated their shares of eligible credits (or basis). EFG partnership transfers $30X of the eligible credits to an

unrelated transferee taxpayer for $25X. Assuming the allocations to E, F and G of the eligible credits and tax exempt income resulting from the receipt of cash for the transferred specified credit portion are permissible allocations under paragraph (b)(2) of this section, E is allocated $25X of tax exempt income from the transfer of the eligible credits and F and G are each allocated $30X of eligible credits with respect to the energy property.

(ii) *Analysis.* E must allocate the $25X of tax exempt income to its partners as if it had retained its share of the eligible credits. Under § 1.46–3(f)(2), each partner's share of the basis of the section 48 energy property is determined in accordance with the ratio in which the partners divide the general profits (or taxable income) of the partnership. The E partnership agreement provides for equal allocations of income, gain, deduction, and loss to its partners, and thus, E partnership must allocate the otherwise eligible credits in the same manner. Therefore, E partnership must allocate the $25X of tax exempt income equally among its partners. In accordance with paragraph (b)(3)(i) of this section, F and G do not qualify as an eligible taxpayer for purposes of section 6418 and thus, are not permitted to make a transfer election for any portion of the $30X of eligible credit allocated to them by EFG partnership. Under § 1.46–3(f)(2), each partner's share of the basis of the section 48 energy property is determined in accordance with the ratio in which the partners divide the general profits (or taxable income) of the partnership. The F and G partnership agreements provide for equal allocations of income, gain, deduction, and loss to its partners, and F and G must allocate the basis from the energy property to their partners in the same manner.

(5) *Example 5. Transferee partnership*—(i) *Facts.* Y and Z each contributed $50X of cash to YZ partnership for the purpose of purchasing eligible section 45 credits under section 6418. The partnership agreement provides that all items of income, gain, loss, deduction, and credit are shared equally among Y and Z. The partnership agreement also provides that any nondeductible expenses used to fund the purchase of any transferred specified credit portion will be shared equally among Y and Z. On date X in year 1, YZ partnership qualifies as a transferee taxpayer and makes a cash payment of $80X to an eligible taxpayer for $100X of a transferred specified credit portion. The eligible credits will be determined with respect to the eligible taxpayer as of the end of year 1. Both YZ partnership and the eligible taxpayer are calendar year taxpayers.

(ii) *Analysis.* The cash payment of $80X made by YZ partnership for the transferred specified credit portion is treated as a nondeductible expenditure under section 705(a)(2)(B). Under paragraph (b)(4)(iii) of this section, YZ partnership must determine each partner's distributive share of the transferred specified credit portion based on such partner's distributive share of the nondeductible expenses for the taxable year used to fund the purchase of such transferred specified credit portion. The YZ partnership agreement provides that nondeductible expenses used to fund the purchase of any transferred specified credit portion will be shared equally among Y and Z and thus, the transferred specified credit portion is also shared equally among Y and Z. The transferred specified credit portion is treated as an extraordinary item under § 1.706–4(e)(2)(ix) that is deemed to occur on date X in year 1. As of date X in year 1, each of Y and Z are allocated $40X of a section 705(a)(2)(B) expenditure with respect to the cash payment for the transferred specified credit portion and $50X of transferred section 45 credits.

(6) *Example 6. Upper-tier partnership of a transferee partnership*—(i) *Facts.* Assume the same facts as in paragraph (e)(5)(i) of this section (*Example 5*), except Y is a partnership for Federal tax purposes, and Z is a U.S. C corporation for Federal tax purposes (as defined in section 1361(a)(2) of the Code).

(ii) *Analysis.* In accordance with paragraph (b)(4)(v) of this section, Y does not qualify as an eligible taxpayer for purposes of section 6418 for that portion of the transferred specified credit portion allocated to it by YZ partnership. Under paragraph (b)(4)(iii) of this section, Y must determine each partner's distributive share of the transferred specified credit portion based on such partner's distributive share of the nondeductible expenses for the taxable year used to fund the purchase of such transferred specified credit portion. The Y partnership agreement provides that all items of income, gain, loss, deduction, and credit are shared equally. The partnership agreement also provides that any nondeductible expenses used to fund the purchase of any specified credit portion are shared equally. Thus, the transferred specified credit portion must be shared equally among the partners of Y. Y's distributive share of the transferred specified credit portion is treated as an extraordinary item to Y and must be allocated among the partners of Y as of date X in year 1, which is when the item is deemed to occur to YZ partnership, regardless of whether Y and YZ partnership have the same taxable years under section 706(b).

(7) *Example 7. Transferor S corporation*—(i) *Facts.* V and W each contributed $150X of cash to an S corporation for the purpose of investing in energy property. The S corporation invests $300X in an energy property in accordance with section 48 and places the energy property in service on date X in year 1. As of the end of year 1, the S corporation has $90X of eligible credits under section 48 with respect to the energy property. Before the due date for the S corporation's year 1 tax return (with extension), the S corporation transfers the $90X of eligible credits to an unrelated transferee taxpayer for $80X.

(ii) *Analysis.* The transfer made pursuant to section 6418(a) causes the S corporation's eligible credits under section 48 with respect to the energy property to be reduced to zero, and the consideration of $80X received by the S corporation for the transferred specified credit portion is treated as tax exempt income. Under paragraph (c)(1) of this section, each of V and W must take into account its pro rata share (as determined under section 1377(a)) of any tax exempt income resulting from the receipt of consideration for the transfer of the eligible credit, or $40X. Under section 1367(a)(1)(A), each of the shareholder's basis in its stock will be increased by $40X. Also in year 1, the basis in the energy property with respect to which the credit is calculated is reduced under section 50(c)(3) by 50 percent of the amount of the credit so determined, or $45X. The tax exempt income received or accrued by the S corporation as a result of the transfer of the specified credit portion is treated as received or accrued, including for purposes of section 1366, as of date X in year 1, which is the date the transferred specified credit portion was determined with respect to the transferor S corporation.

(8) *Example 8. Transferee S corporation*—(i) *Facts.* J and K each contributed $50X of cash to an S corporation for the purpose of purchasing eligible section 48 credits under section 6418. At the beginning of year 2, the S corporation qualifies as a transferee taxpayer and makes a cash payment of $80X to an eligible taxpayer for $100X of a transferred specified credit portion. The transferred specified credit portion was determined with respect to the eligible taxpayer for energy property placed in service in year 1. Both the S corporation and the

eligible taxpayer are calendar year taxpayers.

(ii) *Analysis.* The cash payment of $80X made by the S corporation for the transferred specified credit portion is treated as an expenditure described in section 1367(a)(2)(D). Each of J and K must take into account its pro rata share (as determined under section 1377(a)) of the transferred specified credit portion. The transferred specified credit portion is deemed to arise for purposes of sections 1366 and 1377 during year 2 of the S corporation. For year 2, each of J and K take into account $40X of a section 1367(a)(2)(D) expenditure with respect to the cash payment for the transferred specified credit portion and $50X of transferred section 48 credits.

(f) *Applicability date.* This section applies to taxable years ending on or after April 30, 2024. For taxable years ending before April 30, 2024, taxpayers, however, may choose to apply the rules of this section and §§ 1.6418–1, –2, and –5, provided the taxpayers apply the rules in their entirety and in a consistent manner.

§ 1.6418–4 Additional information and registration.

(a) *Pre-filing registration and election.* As a condition of, and prior to, any specified credit portion being transferred by an eligible taxpayer to a transferee taxpayer pursuant to an election under § 1.6418–2, or a specified credit portion being transferred by a partnership or an S corporation pursuant to § 1.6418–3, the eligible taxpayer is required to satisfy the pre-filing registration requirements in paragraph (b) of this section. An eligible taxpayer that does not obtain a registration number under paragraph (c)(1) of this section, and report the registration number on its return pursuant to paragraph (c)(5) of this section, is ineligible to make a transfer election for a specified credit portion under § 1.6418–2 or § 1.6418–3, with respect to the eligible credit determined with respect to the specific eligible credit property for which the eligible taxpayer has failed to obtain and report a registration number. However, completion of the pre-filing registration requirements and receipt of a registration number does not, by itself, mean the eligible taxpayer is eligible to transfer any specified credit portion determined with respect to the eligible credit property.

(b) *Pre-filing registration requirements*—(1) *Manner of pre-filing registration.* Unless otherwise provided in guidance, eligible taxpayers must complete the pre-filing registration process electronically through an IRS electronic portal and in accordance with the instructions provided therein.

(2) *Pre-filing registration and election for members of a consolidated group.* A member of a consolidated group (as defined in § 1.1502–1) is required to complete pre-filing registration to transfer any eligible credit determined with respect to the member. *See* § 1.1502–77 (providing rules regarding the status of the common parent as agent for its members).

(3) *Timing of pre-filing registration.* An eligible taxpayer must satisfy the pre-filing registration requirements of this paragraph (b) and receive a registration number under paragraph (c) of this section prior to making a transfer election under § 1.6418–2 or § 1.6418–3 for a specified credit portion on the taxpayer's return for the taxable year at issue.

(4) *Each eligible credit property must have its own registration number.* An eligible taxpayer must obtain a registration number for each eligible credit property with respect to which a transfer election of a specified credit portion is made.

(5) *Information required to complete the pre-filing registration process.* Unless modified in future guidance, an eligible taxpayer is required to provide the following information to the IRS to complete the pre-filing registration process:

(i) The eligible taxpayer's general information, including its name, address, taxpayer identification number, and type of legal entity;

(ii) Any additional information required by the IRS electronic portal, such as information establishing that the entity is an eligible taxpayer;

(iii) The taxpayer's taxable year, as determined under section 441;

(iv) The type of annual tax return(s) normally filed by the eligible taxpayer, or that the eligible taxpayer does not normally file an annual tax return with the IRS;

(v) The type of eligible credit(s) for which the eligible taxpayer intends to make a transfer election;

(vi) Each eligible credit property that the eligible taxpayer intends to use to determine a specified credit portion for which the eligible taxpayer intends to make a transfer election;

(vii) For each eligible credit property listed in paragraph (b)(5)(vi) of this section, any further information required by the IRS electronic portal, such as—

(A) The type of eligible credit property;

(B) Physical location (that is, address and coordinates (longitude and latitude) of the eligible credit property);

(C) Supporting documentation relating to the construction or acquisition of the eligible credit property (such as State, Indian Tribal, or local government permits to operate the eligible credit property, certifications, evidence of ownership that ties to a land deed, lease, or other documented right to use and access any land or facility upon which the eligible credit property is constructed or housed, and U.S. Coast Guard registration numbers for offshore wind vessels);

(D) The beginning of construction date, and the placed in service date of the eligible credit property; and

(E) Any other information that the eligible taxpayer believes will help the IRS evaluate the registration request;

(viii) The name of a contact person for the eligible taxpayer. The contact person is the person whom the IRS may contact if there is an issue with the registration. The contact person must either:

(A) Possess legal authority to bind the eligible taxpayer; or

(B) Must provide a properly executed power of attorney on Form 2848, *Power of Attorney and Declaration of Representative;*

(ix) A penalties of perjury statement, effective for all information submitted as a complete application, and signed by a person with personal knowledge of the relevant facts that is authorized to bind the registrant; and

(x) Any other information the IRS deems necessary for purposes of preventing duplication, fraud, improper payments, or excessive payments under this section that is provided in guidance.

(c) *Registration number*—(1) *In general.* The IRS will review the registration information provided and will issue a separate registration number for each eligible credit property for which the eligible taxpayer provided sufficient verifiable information.

(2) *Registration number is only valid for one taxable year.* A registration number is valid with respect to an eligible taxpayer only for the taxable year in which the credit is determined for the eligible credit property for which the registration is completed, and for a transferee taxpayer's taxable year in which the eligible credit is taken into account under § 1.6418–2(f).

(3) *Renewing registration numbers.* If an election to transfer an eligible credit will be made with respect to an eligible credit property for a taxable year after a registration number under this section has been obtained, the eligible taxpayer must renew the registration for that subsequent taxable year in accordance with applicable guidance, including attesting that all the facts previously

provided are still correct or updating any facts.

(4) *Amendment of previously submitted registration information if a change occurs before the registration number is used.* As provided in instructions to the pre-filing registration portal, if specified changes occur with respect to one or more applicable credit properties for which a registration number has been previously obtained, but not yet used, an eligible taxpayer must amend the registration (or may need to submit a new registration) to reflect these new facts. For example, if the owner of a facility previously registered for a transfer election under § 1.6418–2 or § 1.6418–3 for eligible credits determined with respect to that facility and the facility undergoes a change of ownership (incident to a corporate reorganization or an asset sale) such that the new owner has a different employer identification number (EIN) than the owner who obtained the original registration, the original owner of the facility must amend the original registration to disassociate its EIN from the eligible credit property and the new owner must submit separately an original registration (or if the new owner previously registered other credit properties, must amend its original registration) to associate the new owner's EIN with the previously registered eligible credit property.

(5) *Reporting of registration number by an eligible taxpayer and a transferee taxpayer*—(i) *Eligible taxpayer reporting.* As part of making a valid transfer election under § 1.6418–2 or § 1.6418–3, an eligible taxpayer must include the registration number of the eligible credit property on the eligible taxpayer's return (as provided in § 1.6418–2(b) or § 1.6418–3(d)) for the taxable year the specified credit portion was determined. The IRS will treat a transfer election as ineffective if an eligible taxpayer fails to include the registration number of the eligible credit property on the eligible taxpayer's return.

(ii) *Transferee taxpayer reporting.* A transferee taxpayer must report the registration number received (as part of the transfer election statement as described in § 1.6418–2(b) or otherwise) from a transferor taxpayer on the Form 3800, *General Business Credit,* as part of the return for the taxable year that the transferee taxpayer takes the transferred specified credit portion into account. The specified credit portion will be disallowed to the transferee taxpayer if the transferee taxpayer does not include the registration number on the return.

(d) *Applicability date.* This section applies to taxable years ending on or after April 30, 2024.

§ 1.6418–5 Special rules.

(a) *Excessive credit transfer tax imposed*—(1) *In general.* If any specified credit portion that is transferred to a transferee taxpayer pursuant to an election in § 1.6418–2(a) or § 1.6418–3 is determined to be an excessive credit transfer (as defined in paragraph (b) of this section), the tax imposed on the transferee taxpayer by chapter 1 (regardless of whether such entity would otherwise be subject to chapter 1 tax) for the taxable year in which such determination is made will be increased by an amount equal to the sum of—

(i) The amount of such excessive credit transfer; and

(ii) An amount equal to 20 percent of such excessive credit transfer.

(2) *Taxable year of the determination.* The taxable year of the determination for purposes of paragraph (a)(1) of this section is the taxable year during which the excessive credit transfer determination is made and not the taxable year during which the eligible credit was originally determined by the eligible taxpayer, unless those are the same taxable years.

(3) *Payments related to excessive credit transfer.* Any payments made by a transferee taxpayer to an eligible taxpayer that directly relate to the excessive credit transfer (as defined in paragraph (b) of this section) are not subject to section 6418(b)(2), section 6418(b)(3), or § 1.6418–2(e). The amount of a payment that directly relates to the excessive credit transfer is equal to the total consideration paid in cash by the transferee taxpayer for the specified credit portion multiplied by the ratio of the amount of the excessive credit transferred to the transferee taxpayer to the amount of the transferred specified credit portion claimed by the transferee taxpayer.

(4) *Reasonable cause.* Paragraph (a)(1)(ii) of this section does not apply if the transferee taxpayer demonstrates to the satisfaction of the IRS that the excessive credit transfer resulted from reasonable cause. Determination of reasonable cause is made based on the relevant facts and circumstances. Generally, the most important factor is the extent of the transferee taxpayer's efforts to determine that the amount of specified credit portion transferred by the eligible taxpayer to the transferee taxpayer is not more than the amount of the eligible credit determined with respect to the eligible credit property for the taxable year in which the eligible credit was determined and has not been transferred to any other taxpayer. Circumstances that may indicate reasonable cause can include, but are not limited to, review of the eligible taxpayer's records with respect to the determination of the eligible credit (including documentation evidencing eligibility for bonus credit amounts), reasonable reliance on third party expert reports, reasonable reliance on representations from the eligible taxpayer that the total specified credit portion transferred (including portions transferred to other transferee taxpayers if an eligible taxpayer makes multiple transfer elections with respect to a single credit property) does not exceed the total eligible credit determined with respect to the eligible credit property for the taxable year, and review of audited financial statements provided to the Securities and Exchange Commission (and underlying information), if applicable.

(5) *Recapture events.* A recapture event under section 45Q(f)(4), 49(b), or 50(a) is not an excessive credit transfer.

(b) *Excessive credit transfer defined*—(1) *In general.* The term *excessive credit transfer* means, with respect to an eligible credit property for which a transfer election is made under § 1.6418–2 or § 1.6418–3 for any taxable year, an amount equal to the excess of—

(i) The amount of the transferred specified credit portion claimed by the transferee taxpayer with respect to such eligible credit property for such taxable year; over

(ii) The amount of the eligible credit that, without the application of section 6418, would be otherwise allowable under the Code with respect to such eligible credit property for such taxable year.

(2) *Multiple transferees treated as one.* All transferee taxpayers are considered as one transferee for calculating whether there was an excessive credit transfer and the amount of the excessive credit transfer. If there was an excessive credit transfer, then the amount of excessive credit transferred to a specific transferee taxpayer is equal to the total excessive credit transferred multiplied by the ratio of the transferee taxpayer's portion of the total specified credit to the total specified credit portions transferred to all transferees. The rule in this paragraph (b)(2) is applied on an eligible credit property basis, as applicable.

(3) *Examples.* The following examples illustrate the rules of this paragraph (b):

(i) *Example 1—No excessive credit transfer.* Taxpayer A claims $40x of an eligible credit and transfers $60x of an eligible credit to Transferee Taxpayer B related to a single facility that was expected to generate $100x of such

eligible credit. In a subsequent year it is determined that the facility only generated $60x of such eligible credit. There is no excessive credit transfer in this case because the amount of the eligible credit claimed by Transferee Taxpayer B of $60x is equal to the amount of the credit that would be otherwise allowable with respect to such facility for the taxable year the transfer occurred. Taxpayer A is disallowed the $40x of the eligible credit claimed.

(ii) *Example 2—Excessive credit transfer.* Same facts as in paragraph (b)(3)(i) of this section (*Example 1*) except that Taxpayer A transfers $75x of the $100x of eligible credit to Transferee Taxpayer B in exchange for a cash payment of $67.5x. Taxpayer A claims $25x of the eligible credit and Transferee Taxpayer B claims $75x of the eligible credit. In this situation, a $40x reduction in credit results in a $15x excessive credit transfer to Transferee Taxpayer B because the amount of the credit claimed by Transferee Taxpayer B ($75x) exceeds the amount of credit otherwise allowable with respect to the facility ($60x) by $15x. Therefore, Transferee Taxpayer B's tax is increased for the determination year by $18x, which is equal to the amount of the excessive credit transfer plus 20 percent of the excessive credit transfer as provided in paragraph (a) of this section and section 6418(g)(2)(A). If Transferee Taxpayer B can show reasonable cause as provided in paragraph (a)(4) of this section and section 6418(g)(2)(B), then Transferee Taxpayer B will only have a tax increase of $15x. Taxpayer A is disallowed the $25x of the eligible credit claimed. Under paragraph (a)(3) of this section, the portion of the cash payment of $67.5x made by Transferee Taxpayer B that is attributable to the excessive credit transfer is $13.5x and is equal to Transferee Taxpayer B's cash payment of $67.5x multiplied by the ratio of the excessive credit transfer ($15x) to the transferred specified credit portion claimed by Transferee Taxpayer B ($75x). Pursuant to paragraph (a)(3) of this section, the payments of $13.5x made to Taxpayer A from Transferee Taxpayer B that directly relate to the excessive credit transfer are not subject to section 6418(b)(2), 6418(b)(3), or § 1.6418–2(e).

(iii) *Example 3—Excessive credit with multiple transferees.* Same facts as in paragraph (b)(3)(i) of this section (*Example 1*) except that Taxpayer A transfers $50x of the eligible credit to Transferee Taxpayer B and $30x of the eligible credit to Transferee Taxpayer C. In exchange for transfer of the credit, Transferee Taxpayer B made a cash payment of $45x and Transferee Taxpayer C made a cash payment of $27x. Taxpayer A claims $20x of the eligible credit, Transferee Taxpayer B claims $50x of the eligible credit, and Transferee Taxpayer C claims $30x of the eligible credit. In this situation, because there are multiple transferees, all transferees are treated as one transferee for determining the excessive credit transfer amount under paragraph (b)(2) of this section. There is a total excessive credit transfer of $20x because the amount of the credit claimed by the transferees in total ($80x) exceeds the amount of credit otherwise allowable with respect to the facility ($60x) by $20x. The excessive credit transfer to Taxpayer B is equal to ($50x/$80x * $20x) = $12.5x, and the excessive credit transfer to Taxpayer C is equal to ($30x/$80x * $20x) = $7.5x. Therefore, Transferee Taxpayer B and Transferee Taxpayer C are subject to the provisions in paragraph (a) of this section. Transferee Taxpayer B's and Transferee Taxpayer C's tax is increased for the determination year by the respective excessive credit transfer amount and 20 percent of the excessive credit transfer amount ($15x for Transferee Taxpayer B and $9x for Transferee Taxpayer C) as provided in paragraph (a) of this section and section 6418(g)(2)(A). If Transferee Taxpayer B or Transferee Taxpayer C can show reasonable cause as provided in paragraph (a)(4) of this section and section 6418(g)(2)(B), then the tax increase will only be $12.5x or $7.5x, respectively. Taxpayer A is disallowed the $20x of eligible credit claimed. Under paragraph (a)(3) of this section, the portion of the cash payment of $45x made by Transferee Taxpayer B that is attributable to its portion of the excessive credit transfer is $11.25x and is equal to Transferee Taxpayer B's cash payment of $45x multiplied by the ratio of the excessive credit transfer ($12.5x) to the transferred specified credit portion claimed by Transferee Taxpayer B ($50x). Similarly, the portion of the cash payment of $27x made by Transferee Taxpayer C that is attributable to its portion of the excessive credit transfer is $6.75x and is equal to Transferee Taxpayer C's cash payment of $27x multiplied by the ratio of the excessive credit transfer ($7.5x) to the transferred specified credit portion claimed by Transferee Taxpayer B ($30x). Pursuant to paragraph (a)(3) of this section, the payments made to Taxpayer A by Transferee Taxpayer B ($11.25x) and Transferee Taxpayer C ($6.75x) that directly relate to the excessive credit transfer are not subject to section 6418(b)(2), 6418(b)(3), or § 1.6418–2(e).

(c) *Basis reduction under section 50(c).* In the case of any transfer election under § 1.6418–2 or § 1.6418–3 with respect to any specified credit portion described in § 1.6418–1(c)(2)(ix) through (xi), section 50(c) will apply to the applicable investment credit property (as defined in section 50(a)(6)(A)) as if such credit was allowed to the eligible taxpayer.

(d) *Notification and impact of recapture under section 50(a)*—(1) *In general.* In the case of any election under § 1.6418–2 or § 1.6418–3 with respect to any specified credit portion described in § 1.6418–1(c)(2)(ix) through (xi), if, during any taxable year, the applicable investment credit property (as defined in section 50(a)(6)(A)) is disposed of, or otherwise ceases to be investment credit property with respect to the eligible taxpayer, before the close of the recapture period (as described in section 50(a)(1)(A)), other than as described in § 1.6418–3(a)(6), such eligible taxpayer and the transferee taxpayer must follow the notification process in paragraph (d)(2) of this section, with recapture impacting the transferee taxpayer and eligible taxpayer as described in paragraph (d)(3) of this section. Rules similar to the rules of this paragraph (d) apply in determining the amount of and liability for any section 49(b) recapture as between an eligible taxpayer and the transferee taxpayer.

(2) *Notification requirements*—(i) *Eligible taxpayer.* The eligible taxpayer must provide notice of the occurrence of recapture to the transferee taxpayer. This notice must provide all information necessary for a transferee taxpayer to correctly compute the recapture amount (as defined under section 50(c)(2)), and the notification must occur in sufficient time to allow the transferee taxpayer to compute the recapture amount by the due date of the transferee taxpayer's return (without extensions) for the taxable year in which the recapture event occurs. The eligible taxpayer and transferee taxpayer can contract with respect to the form of the notice and any specific time periods that must be met, so long as the terms of the contractual arrangement do not conflict with the requirements of this paragraph (d)(2)(i). Any additional information that is required or other specific time periods that must be met may be prescribed by the IRS in guidance issued with respect to this notification requirement.

(ii) *Transferee taxpayer.* The transferee taxpayer must provide notice of the recapture amount (as defined in section 50(c)(2)), if any, to the eligible

taxpayer. This must occur in sufficient time to allow the eligible taxpayer to calculate any basis adjustment with respect to the investment credit property by the due date of the eligible taxpayer's return (without extensions) for the taxable year in which the recapture event occurs. The eligible taxpayer and transferee taxpayer can contract with respect to the form of the notice and any specific time periods that must be met, so long as the terms of the contractual arrangement do not conflict with the requirements of this paragraph (d)(2)(ii). Any additional information that is required or other specific time periods that must be met may be provided in guidance prescribed by the IRS issued with respect to this notification requirement.

(3) *Impact of recapture*—(i) *Section 50(a) recapture event.* Except as provided in paragraph (d)(3)(iii) of this section, the transferee taxpayer is responsible for any amount of tax increase under section 50(a) upon the occurrence of a recapture event, provided that if an eligible taxpayer retains any amount of an eligible credit determined with respect to an investment credit property directly held by the eligible taxpayer, the amount of the tax increase under section 50(a) that the eligible taxpayer is responsible for is equal to the recapture amount multiplied by a fraction, the numerator of which is the total credit amount that the eligible taxpayer retained, and the denominator of which is the total credit amount determined for the eligible credit property. The amount of the tax increase under section 50(a) that the eligible transferee is responsible for is equal to the recapture amount multiplied by a fraction, the numerator of which is the specified credit portion transferred to the transferee taxpayer, and the denominator of which is the total credit amount determined for the eligible credit property.

(ii) *Impact of section 50(a) recapture event on basis of investment credit property held by eligible taxpayer.* The eligible taxpayer must increase the basis of the investment credit property (immediately before the event resulting in such recapture) by an amount equal to the recapture amount provided to the eligible taxpayer by the transferee taxpayer under paragraph (d)(2)(ii) of this section and the recapture amount on any credit amounts retained by the eligible taxpayer in accordance with section 50.

(iii) *Impact of partner or shareholder recapture under § 1.6418–3(a)(6).* To the extent that a partner in a transferor partnership or a shareholder in a transferor S corporation recognizes an amount of tax increase under section 50(a) or section 49(b) (that is, a recapture amount) for an investment tax credit determined with respect to investment credit property held directly by the transferor partnership or transferor S corporation that does not result in recapture liability to a transferee taxpayer pursuant to § 1.6418–3(a)(6), that amount reduces the remaining recapture amount under paragraph (d)(3)(i) of this section with respect to the investment credit property, and thus reduces the remaining recapture amounts to which a transferee taxpayer and eligible taxpayer (to the extent of retained credit amounts that have not be previously recaptured) is liable. The amount of the reduction to the transferee taxpayer is proportionate to the amount of the tax increase for the transferred specified credit portion (based on the partner's or shareholder's distributive share or pro rata share of tax exempt income, respectively, resulting from the transfer).

(iv) *Example (1). Impact of transferor partner recapture event to transferee taxpayer*—(A) *Facts.* A, B, C, and D are equal partners in ABCD partnership, a partnership for Federal tax purposes that accounts for tax items on a calendar year basis. The partnership agreement provides that A, B, C and D share equally in all items of income, gain, loss, deduction, and credit of ABCD partnership. ABCD partnership invests $1,000x in an energy property in accordance with section 48 and places the energy property in service on September 30, 2024. As of the end of 2024, ABCD partnership has $300x of eligible credits under section 48 with respect to energy property. Under § 1.6418–3(b)(2)(iv), each of A's, B's, C's, and D's distributive shares of the otherwise eligible section 48 credits is determined under §§ 1.46–3(f) and 1.704–1(b)(4)(ii) and is equal to $75x (based on each of A, B, C and D being allocated $250x of basis). Before the due date for ABCD partnership's 2024 tax return (with extension), A, B, C, and D agree that with respect to A's $75x distributive share of the otherwise eligible section 48 credits, $60x of eligible credits will be transferred and $15x of eligible credits (or $50x basis) will be allocated to A. A, B, C and D also agree that B, C, and D will each be allocated their respective $75x of the $250x of section 48 eligible credits (or basis). On November 15, 2024, ABCD partnership transfers $60x of its eligible section 48 investment credits to Y, an unrelated taxpayer. On January 1, 2025, A sells 50 percent of its interest in ABCD partnership, which results in recapture under § 1.47–6(a)(2).

(B) *Analysis—recapture from partner A's disposition.* Pursuant to § 1.6418–3(a)(6)(i), A is subject to the rules relating to recapture caused by the disposition of its interest under § 1.47–6(a)(2), and A calculates recapture based on half of its share of the basis of the investment credit property ($125x of basis) because A disposed of 50 percent of its interest in ABCD partnership. This results in a recapture amount of $37.5x to A (that is, the amount of the tax increase that A is responsible for due to the recapture event). Of the $37.5x recapture amount, $7.5x relates to $15x of credits retained by A, and $30x relates to the $60x of A's distributive share of the otherwise eligible section 48 credits that were transferred. This recapture event reduces the total potential recapture with respect to the investment credit property from $300x to $262.5x. Y is not subject to recapture because of partner A's disposition, but, if a recapture event with respect to the energy property takes place at a later date, the rules in § 1.6418–5(d)(3)(i) will take partner A's disposition and recapture amount into account when determining Y's recapture amount at that date.

(v) *Example (2). Impact of recapture from ABCD partnership's disposition of the investment credit property*—(A) *Facts.* Same facts as Example (1), except that on October 15, 2025, ABCD partnership sells the investment credit property to an unrelated third party.

(B) *Analysis—recapture event from ABCD partnership's disposition.* As a result of ABCD partnership's disposition of the energy property to a third party after one year, but before two years after placing the energy property into service, under section 50(a)(1)(B), the recapture percentage is 80 percent. This means that 80 percent of the remaining $262.5x of eligible section 48 credits (or $210x) is subject to recapture. Because ABCD partnership retained eligible credits related to the energy property, the $210x recapture amount, which is the amount of the tax increase under section 50(a), must be split between ABCD partnership and Y. Under § 1.6418–5(d)(3)(i), ABCD partnership must recapture $186x of the $210x credit amount, which is determined by multiplying the $210x by a fraction, the numerator of which is $232.5x ($240x of retained eligible credits less $7.5x of retained eligible credits already recaptured by A) and the denominator of which is $262.5x ($300x of total credits determined for the energy property less $37.5x credits recaptured with respect to A's distributive share of

the otherwise eligible section 48 credits transferred by ABCD partnership to Y and A's distributive share of the eligible credits retained by A). Also under § 1.6418–5(d)(3)(i), Y has a $24x recapture amount determined by multiplying the $210x recapture amount by a fraction, the numerator of which is $30x ($60x specified credit portion transferred to Y less the $30x recaptured by A that relates to A's distributive share of the otherwise eligible section 48 credits transferred by ABCD partnership to Y), and the denominator of which is $262.5x ($300x of total credits determined for the energy property less $37.5x credits recaptured with respect to A's distributive share of the otherwise eligible section 48 credits transferred by ABCD partnership to Y and A's distributive share of the eligible credits retained by A).

(e) *Notification and impact of recapture under section 45Q(f)(4)*—(1) *In general.* In the case of any election under § 1.6418–2 or § 1.6418–3 with respect to any specified credit portion described in § 1.6418–1(c)(2)(iii), if, during any taxable year, there is recapture of any section 45Q credit allowable with respect to any qualified carbon oxide that ceases to be captured, disposed of, or used as a tertiary injectant in a manner consistent with section 45Q, before the close of the recapture period (as described in § 1.45Q–5(f)), such eligible taxpayer and the transferee taxpayer must follow the notification process in paragraph (e)(2) of this section with recapture impacting the transferee taxpayer as described in paragraph (e)(3) of this section.

(2) *Notification requirements.* The notification requirements for the eligible taxpayer are the same as for an eligible taxpayer that must report a recapture event as described in paragraph (d)(2)(i) of this section, except that the recapture amount that must be computed is defined in § 1.45Q–5(e).

(3) *Impact of recapture.* The transferee taxpayer is responsible for any amount of tax increase under section 45Q(f)(4) and § 1.45Q–5 upon the occurrence of a recapture event, provided that if an eligible taxpayer retains any amount of an eligible credit determined with respect to a component of carbon capture equipment owned by the eligible taxpayer within a single process train described in § 1.45Q–2(c)(3), the amount of the tax increase under section 45Q(f)(4) that the eligible taxpayer is responsible for is equal to the recapture amount multiplied by a fraction, the numerator of which is the total credit amount that the eligible taxpayer retained, and the denominator of which is the total credit amount determined for the eligible credit property. The amount of the tax increase under section 45Q(f)(4) that the transferee taxpayer is responsible for is equal to the recapture amount multiplied by a fraction, the numerator of which is the specified credit portion transferred to the transferee taxpayer, and the denominator of which is the total credit amount determined for the eligible credit property.

(f) [Reserved].

(g) *Impact of an ineffective transfer election by an eligible taxpayer.* An ineffective transfer election means that no transfer of an eligible credit has occurred for purposes of section 6418, including section 6418(b). Section 6418 does not apply to the transaction and the tax consequences are determined under any other relevant provisions of the Code. For example, an ineffective election results if an eligible taxpayer tries to elect to transfer a specified credit portion, but the eligible taxpayer did not register and receive a registration number with respect to the eligible credit property (or otherwise satisfy the requirements for making a transfer election under the section 6418 regulations) with respect to which the specified credit portion was determined.

(h) *Carryback and carryforward.* A transferee taxpayer can apply the rules in section 39(a)(4) of the Code (regarding the carryback and carryforward period for applicable credits) to a specified credit portion to the extent the specified credit portion is described in section 6417(b) (list of applicable credits, taking into account any placed in service requirements in section 6417(b)(2), (3), and (5)).

(i) *Rules applicable to real estate investment trusts*—(1) *Treatment of eligible credits prior to transfer.* If a real estate investment trust has eligible credits that it may transfer, the value of those credits is not included in either the numerator or denominator in determining the value of the REIT's total assets in section 856(c)(4) of the Code.

(2) *Treatment of eligible credit transfer for purposes of section 857 safe harbor rules.* The transfer of a specified credit portion pursuant to a valid transfer election under section 6418 is not a sale for purposes of section 857(b)(6)(C)(iii) and section 857(b)(6)(D)(iv) of the Code.

(j) *Applicability date.* This section applies to taxable years ending on or after April 30, 2024. For taxable years ending before April 30, 2024, taxpayers, however, may choose to apply the rules of this section and §§ 1.6418–1 through –3 provided the taxpayers apply the rules in their entirety and in a consistent manner.

§ 1.6418–4T [Removed]

■ **Par. 4.** Section 1.6418–4T is removed.

Douglas W. O'Donnell,

Deputy Commissioner.

Approved: April 18, 2024

Aviva Aron-Dine,

Acting Assistant Secretary of the Treasury (Tax Policy).

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Part VIII

Department of Health and Human Services

Administration for Children and Families

45 CFR Part 1355

Designated Placement Requirements Under Titles IV–E and IV–B for LGBTQI+ Children; Final Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Administration for Children and Families

45 CFR Part 1355

RIN 0970–AD03

Designated Placement Requirements Under Titles IV–E and IV–B for LGBTQI+ Children

AGENCY: Children's Bureau (CB); Administration on Children, Youth and Families (ACYF); Administration for Children and Families (ACF); Department of Health and Human Services (HHS).

ACTION: Final rule.

SUMMARY: This rule finalizes requirements under titles IV–E and IV–B for children in foster care who are LGBTQI+ (an umbrella term used in this regulation). The proposed rule was published on September 28, 2023. Federal law requires that state and tribal title IV–E and IV–B agencies (''agencies'') ensure that each child in foster care receives ''safe and proper'' care and has a case plan that addresses the specific needs of the child while in foster care to support their health and wellbeing. To meet these and other related statutory requirements, this final rule requires agencies to ensure that placements for all children are free from harassment, mistreatment, and abuse. The final rule requires that title IV–E and IV–B agencies ensure a Designated Placement is available for all children who identify as LGBTQI+ and specifies the Designated Placement requirements.

DATES: This final rule is effective on July 1, 2024. Title IV–E and IV–B agencies must implement the provisions of this final rule on or before October 1, 2026.

FOR FURTHER INFORMATION CONTACT: Rebecca Jones Gaston, Administration on Children, Youth, and Families, (202) 205–8618, *cbcomments@acf.hhs.gov.*

SUPPLEMENTARY INFORMATION:

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I. Executive Summary

Overview of Notice of Proposed Rulemaking

On September 28, 2023 (88 FR 66752), HHS issued a notice of proposed rulemaking (NPRM) called *Safe and Appropriate Foster Care Placement Requirements for Titles IV–E and IV–B.* ACF proposed the NPRM to support states and tribes in complying with Federal laws that require that all children in foster care receive safe and proper care. In the NPRM, ACF proposed that it would require agencies to implement specific processes and requirements to ensure that children in foster care who identify as LGBTQI+ would be placed with foster care providers who were trained to meet their specific needs related to their sexual orientation and gender identity and who would facilitate access to age-appropriate services to support their health and wellbeing. The NPRM referred to these specially designated placements as ''Safe and Appropriate'' placements for LGBTQI+ youth. Under the proposed rule, agencies would be required to ensure that such placements were available for any child in foster care who identifies as LGBTQI+ and provided to any such child in foster care. However, the NPRM would not have required providers to become designated as such a placement for LGBTQI+ children. The NPRM also proposed agency procedures to ensure a child who identifies as LGBTQI+ would not experience retaliation—regardless of whether the child was in a specially designated ''Safe and Appropriate'' placement, or whether the child was placed with a foster care provider who had chosen not to seek such a designation.

The NPRM proposed that title IV–E/IV–B agencies would be required to notify specified children (including all children at or above the age of 14) about the availability of these placements, the process to request such a placement, and the process to report placement concerns. The NPRM also set forth specific steps for the placement of transgender, intersex, and gender non-conforming children in sex-segregated child care institutions and required specific training for title IV–E/IV–B agency caseworkers and supervisors on how to appropriately serve LGBTQI+ children.

Finally, the proposed rule explained that HHS would monitor a state agency's compliance with the requirement in proposed § 1355.22(a)(1) through the Child and Family Services

Reviews (CFSRs). As explained in the proposed rule, the CFSRs are a formal monitoring protocol in which the state's efforts to comply with title IV–E and IV–B program requirements are assessed at the case and systems level. No tribal title IV–E agency is currently subject to CFSRs because none has a sufficient number of children in foster care and children receiving in-home services for ACF to apply the onsite CFSR case sampling procedures.

Overview of Final Rule

In this final rule, ACF clarifies how title IV–E/IV–B agencies must meet title IV–E and IV–B statutory requirements to appropriately serve LGBTQI+ children in foster care.

ACF received a total of 13,768 comments on the NPRM and has carefully considered each comment. A summary of comments and responses are included in sections III and IV of this preamble. Based on comments received, ACF has made modifications to the final rule.

To address requests from many commenters for further clarity about the meaning of ''safe and appropriate,'' and its applicability to all placements, the final rule distinguishes between the requirement of a safe and appropriate placement, which is applicable to all children in foster care, and a Designated Placement for LGBTQI+ children, which is the term used in the final rule to describe providers who meet specified requirements described in the rule to serve as a designated provider for LGBTQI+ children. Because Federal law requires that every child in foster care receive ''safe and proper'' care and placement in the ''most appropriate setting available,'' ACF reiterates that *all* foster care placements must be safe and appropriate for *all* children—including LGBTQI+ children. This general protection that all foster care placements must be safe and appropriate reiterates existing statutory and regulatory requirements that title IV–E/IV–B agencies must meet to comply with Federal law for all children in foster care. This final rule specifies that as part of meeting the requirement to provide a safe and appropriate placement for all children in foster care, the title IV–E/IV–B agency must ensure that placements, including those for LGBTQI+ children, are free from harassment, mistreatment, and abuse, including related to a child's sexual orientation or gender identity.

As set forth in the NPRM, HHS recognizes that LGBTQI+ youth face significant disparities in the child welfare system. In order for LGBTQI+ youth to receive care that meets Federal statutory guarantees that each child in foster care will receive safe and proper care that is consistent with the best interest and special needs of the child, title IV–E/IV–B agencies must ensure LGBTQI+ children have access to specially designated placements that are prepared to meet their unique needs and create a supportive environment. This final rule refers to those specially designated placements as ''Designated Placements.'' The requirements of a Designated Placement are consistent with the requirements proposed in the NPRM for specially designated placements for LGBTQI+ children (which the NPRM referred to as ''Safe and Appropriate'' placements), with some clarifying text added. Recognizing that safe and proper treatment for LGBTQI+ children requires attention to certain particular harms and risks that this population faces, this final rule specifies that Designated Placement providers must have particular training and provide particular protections for LGBTQI+ children that may not be relevant or necessary for non-LGBTQI+ children.

The final rule does not require any provider to become a Designated Placement. Further, the rule specifies that nothing in the rule should be construed as requiring or authorizing a state to penalize a provider that does not seek or is determined not to qualify as a Designated Placement provider. It also says that nothing in this rule shall limit any State, tribe, or local government from imposing or enforcing, as a matter of law or policy, requirements that provide greater protection to LGBTQI+ children than this rule provides.

The rule requires that the title IV–E/IV–B agency ensure a Designated Placement is available for, and may be requested by, any child in foster care who identifies as LGBTQI+. In order to be considered a Designated Placement for an LGBTQI+ child, the placement must satisfy three conditions, each of which goes beyond the general requirements that apply to all placements. First, the provider must commit to establishing an environment that supports the child's LGBTQI+ status or identity. Second, the provider must be trained with the appropriate knowledge and skills to provide for the needs of the child related to the child's self-identified sexual orientation, gender identity, and gender expression. Third, the provider must facilitate the child's access to age- or developmentally appropriate resources, services, and activities that support their health and well-being. HHS has concluded that these conditions are generally necessary to effectuate the statutory promise of a safe and appropriate placement for children who are LGBTQI+ because of the extensive evidence of the specific needs LGBTQI+ children have which require more specialized support. This rule requires title IV–E/IV–B agencies to ensure that the totality of their child welfare system includes sufficient placements for LGBTQI+ children that meet each of these standards.

As explained further below, when making placement and services decisions related to an LGBTQI+ child, the title IV–E/IV–B agency must give substantial weight to the child's concerns or request for a Designated Placement in determining the child's best interests.

The final rule requires agencies to notify certain children about the availability of Designated Placements, the process to request one, and the process to report concerns about their current placement or about retaliation against them. Notification requirements apply to all children age 14 and over, as well as those under age 14 removed from their home due, in whole or part, to familial conflict about their sexual orientation, gender identity, gender expression, or sex characteristics; or if they have disclosed their LGBTQI+ status or identity; or whose LGBTQI+ status or identity is otherwise known to the agency. The final rule also requires that the title IV–E/IV–B agency ensure that LGBTQI+ children have access to age and developmentally appropriate services that support their needs related to their sexual orientation and gender identity or expression. This includes clinically appropriate mental and behavioral health care supportive of their sexual orientation and gender identity and expression, as needed.

A number of commenters emphasized that, in many cases, if a child requests services and a current placement chooses to accept them, that could make a current placement more appropriate for an LGBTQI+ child and prevent any need for a placement change. Other commenters raised concerns about the potential for disruptive placement changes as a result of the proposed rule. In response, the final rule recognizes that, in addition to requesting a change in placement to a Designated Placement, a child could also request that services be offered to stabilize their current placement. Moreover, if a child requests a Designated Placement, the final rule clarifies that to promote placement stability, the title IV–E/IV–B agency must first consider whether, if the current provider wishes to accept additional services, it would allow the current provider to voluntarily meet the conditions for a Designated Placement.

Promoting such stability is particularly important in cases where children are placed with kin, siblings, close to families of origin, and in family-like settings. In making the determination about the child's best interests, the agency is required to give substantial weight to the child's request. If the child's current provider elects to become a Designated Placement, in accordance with the case review system and protocols, the title IV–E/IV–B agency must regularly review the status of the placement to ensure it progresses towards meeting the relevant conditions. ACF expects this process will in some cases enable title IV–E/IV–B agencies to provide Designated Placements while preserving placement stability, particularly in settings where children are placed with kin, with siblings, in close proximity to families of origin, or in family-like settings as recommended by commenters.

The final rule also requires that the title IV–E/IV–B agency have a procedure to protect LGBTQI+ children in foster care from retaliation for disclosure of their LGBTQI+ status and/or identity, if they are reported or perceived to have LGBTQI+ status and/or identity, or for requesting a Designated Placement. It also requires training for title IV–E/IV–B agency caseworkers and supervisors on how to appropriately serve LGBTQI+ children and on how to implement the procedural requirements of the rule. The final rule requires title IV–E/IV–B agencies to ensure that agency contractors and subrecipients who have responsibility for placing children in foster care, making placement decisions, or providing services, as well as all placement providers, are informed of the procedural requirements of the rule.

The statute at 42 U.S.C. 671(a)(8) enumerates safeguards which restrict the use or disclosure of information concerning children in foster care. These critical safeguards ensure the privacy and confidentiality of children with very limited exceptions. Consistent with title IV–E and IV–B confidentiality requirements at 42 U.S.C. 671(a)(8) and 45 CFR 1355.21(a), 1355.30(p)(3), and 205.50, the final rule provides that agencies are prohibited from disclosing information about a child's LGBTQI+ status or identity except as provided by statute and that any such disclosure must be the minimum necessary to accomplish the legally-permitted purposes. In response to comments, the final rule clarifies the privacy and confidentiality protections for information related to an LGBTQI+ child's status or identity. The Children's Bureau will monitor a state agency's compliance through the CFSRs, a formal monitoring protocol in which the state's efforts to comply with title IV–E and IV–B program requirements are assessed at the case and systems level. No tribal title IV–E agency is currently subject to CFSRs because none has a sufficient number of children in foster care and children receiving in-home services for ACF to apply the onsite CFSR case sampling procedures. All requirements of the rule will be subject to the partial review process.

The final rule expressly provides that insofar as the application of any requirement under the rule would violate applicable Federal protections for religious freedom, conscience, and free speech, such application shall not be required. The rule does not require any provider to become a Designated Placement, and specifies that nothing in the rule should be construed as requiring or authorizing a state to penalize a provider that does not seek or is determined not to qualify as a Designated Placement from participation in the state's program under titles IV–E and IV–B. The final rule also clarifies that the rule does not limit any State, Tribal or local government or agency from imposing or enforcing as a matter of state, tribal or local law or policy, requirements that provide greater protection to LGBTQI+ children than this rule provides.

Legal Authority for the Final Rule

Titles IV–E and IV–B of the Social Security Act (the Act) require title IV–E/IV–B agencies to provide case plans for all children in foster care. Under section 475(1)(B) of the Social Security Act, 42 U.S.C. 675(1)(B), case plans must include a plan for assuring that the child receives safe and proper care and that services are provided to improve the conditions in the parents' home, facilitate return of the child to his own safe home or the permanent placement of the child, and address the needs of the child while in foster care. The plan must also discuss the appropriateness of the services provided to the child under the plan. Agencies must also have case review systems through which they ensure that each foster child's case plan is ''designed to achieve placement in a safe setting that is the least restrictive (most family like) and most appropriate setting available and in close proximity to the parents' home, consistent with the best interest and special needs of the child[.]'' (Section 475(5) of the Social Security Act, 42 U.S.C. 675(5)(A)) In order to receive title IV–E and IV–B funds, agencies must have plans approved by ACF that provide for case plans and case review systems that meet these statutory requirements (sections 471(a)(16) and 422(b) of the Social Security Act, 42 U.S.C. 671(a)(16) and 622(b)).

Additionally, in order to receive title IV–E funds, states and tribes must certify in their title IV–E plans that they will ensure that before a child in foster care is placed with prospective foster parents, the prospective foster parents ''will be prepared adequately with the appropriate knowledge and skills to provide for the needs of the child [and] that the preparation will be continued, as necessary, after the placement of the child'' (section 471(a)(24) of the Social Security Act, 42 U.S.C. 671(a)(24)). The Act also requires that agencies ensure that foster parents, as well as at least one official at any child care institution providing foster care, receive training on how to use and apply the ''reasonable and prudent parent standard,'' a ''standard characterized by careful and sensible parental decisions that maintain the health, safety, and best interests of a child while at the same time encouraging the emotional and developmental growth of the child, that a caregiver shall use when determining whether to allow a child in foster care under the responsibility of the State to participate in extracurricular, enrichment, cultural, and social activities'' (Social Security Act 471(a)(24) and (a)(10) and 475(10)(A), 42 U.S.C. 671(a)(24) and (a)(10) and 675(10)(A)).

The Act requires agencies to develop and implement standards to ensure that children in foster care placements are provided quality services that protect their safety and health (Social Security Act section 471(a)(22), 42 U.S.C. 671(a)(22)).

The Act authorizes the Secretary of Health and Human Services (the Secretary) to review state compliance with the title IV–E and IV–B program requirements. Specifically, the Act requires the Secretary to determine whether state programs are in substantial conformity with state plan requirements under titles IV–E and IV–B, implementing regulations promulgated by the Secretary and the states' approved state plans (section 1123A of the Social Security Act, 42 U.S.C. 1320a–2a).

Finally, the Act authorizes the Secretary to ''make and publish such rules and regulations . . . as may be necessary to the efficient administration of the functions with which [the Secretary] is charged under [the Social Security Act].'' (Section 1102 of the Social Security Act, 42 U.S.C. 1302)

II. Background

LGBTQI+ Children in the Child Welfare System

As the NPRM explained, a significant body of evidence demonstrates that LGBTQI+ children are overrepresented in the child welfare system and face poor outcomes in foster care.[1]

Overrepresentation of LGBTQI+ Children in Foster Care

LGBTQI+ children are overrepresented in the foster care population. One recent confidential survey revealed that 32 percent of foster youth ages 12–21 surveyed report that they identify as having a diverse sexual orientation or gender identity.[2] Another large confidential survey found that 30.4 percent of foster children aged 10–18 identify as LGBTQ+.[3] A recent study using nationally representative survey data found that youth with a minority sexual orientation, such as lesbian, gay, and bisexual youth, are nearly two and a half times as likely as heterosexual youth to experience a foster care placement.[4]

A study published in 2016 of the population of youth who have been involved in both the foster care and juvenile justice systems found that LGBTQ+ juvenile-justice involved youth were three times more likely to have been removed from their home and twice as likely to have experienced being physically abused in their homes prior to removal than their non-LGBTQ+ juvenile-justice involved counterparts.[5]

LGBTQI+ children are overrepresented in the child welfare system because of a confluence of factors. Studies suggest that LGBTQ+ children face higher rates of parental physical abuse and are more likely to run away from home or be kicked out than their non-LGBTQ+ counterparts, often because of conflict over their sexual orientation or gender identity.[6] These experiences place LGBTQI+ children at greater risk of entering foster care and mean that many LGBTQI+ children enter foster care with complex needs and trauma related to the discrimination and stigma they have experienced because of their sexual orientation or gender identity. As a result of reviewing this research, and hearing from LGBTQI+ individuals with lived experience in foster care, we have developed this regulation to improve how title IV–E/IV–B agencies address the needs of this population.[7]

Impact of Family and Caregiver Behavior on LGBTQI+ Child Wellbeing

Research shows that the support LGBTQI+ children receive from their families and caregivers related to their sexual orientation or gender identity is highly predictive of their mental health and wellbeing. For example, a 2022 survey found the five most common ways that LGBTQ youth reported feeling supported by their parents or caregivers included having been welcoming to their LGBTQ friends or partners, talking with them respectfully about their LGBTQ identity, using their name and pronouns correctly, supporting their gender expression, and educating themselves about LGBTQ people and issues. That survey found that LGBTQ youth who felt high social support from their family in these ways reported less than half the number of suicide attempts than LGBTQ youth who experienced low or moderate social support from their family.[8] Another study quantified the negative impacts of family rejection of LGBTQ children, which can lead to greater representation in foster care.[9] The study found that family behaviors, including excluding LGBTQ children from family events and activities because of their identity, not letting their child learn about their LGBTQ identity, or trying to change their child's LGBTQ identity increased the risk of depression, suicide, illegal drug use, and other serious health risks. The study also found that family behaviors that support LGBTQ children, including standing up for their child when others mistreat them because of their LGBTQ identity, had positive outcomes, helped promote self-esteem, overall health, and protected against suicidal behavior, depression, and substance abuse. The study found that lesbian, gay, and bisexual young adults who reported high levels of family rejection during adolescence were more than eight times more likely to report having attempted suicide, nearly six times more likely to report high levels of depression, and more than three times more likely to use illegal drugs compared with their lesbian, gay, and bisexual counterparts from families that reported no or low levels of family rejection.[10] Studies found improved health outcomes in youth whose caregivers demonstrated supportive behavior towards the child's LGBTQ+ identity, including connecting the child to an LGBTQ+ adult role model.[11] Moreover, caregiver behavior

[1] Some studies cited below defined their scope as LGBTQ, LGBT, or Lesbian, Gay, and Bisexual (LGB) children or youth specifically. Where one of those studies is cited, this regulation uses the same acronym as the study itself.

[2] Institute for Innovation and Implementation at University of Maryland's School of Social Work and the National Quality Improvement Center on Tailored Services, Placement Stability, and Permanency for LBTQ2S Children and Youth in Foster Care (2021). Cuyahoga Youth Count: A Report on LBTQ+ Youth Experience in Foster Care, *https://theinstitute.umaryland.edu/media/ssw/institute/Cuyahoga-Youth-Count.6.8.1.pdf.*

[3] Baams, L., Russell, S.T., and Wilson, B.D.M. LGBTQ Youth in Unstable Housing and Foster Care, American Academy of Pediatrics, Volume 143, Issue 3, March 2019. *https://doi.org/10.1542/peds.2017-4211.*

[4] Fish, J., Baams, L., Wojciak, A.S., & Russell, S.T. (2019), Are Sexual Minority Youth Overrepresented in Foster Care, Child Welfare, and Out-of-Home Placement? Findings from Nationally Representative Data. Child Abuse and Neglect, *https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7306404/.*

[5] Irvine, Angela, and Canfield, Aisha. *The Overrepresentation of Lesbian, Gay, Bisexual, Questioning, Gender Nonconforming and Transgender Youth within the Child Welfare to Juvenile Justice Crossover Population,* 24.2 A.m. U. J. Gender Soc. Pol'y & L., 243–261 (2016), *https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1679&context=jgspl.*

[6] Friedman, M., Marshal, M., Guadamuz, T., Wei, C., Wong, C., Saewyc, C., and Stall, R., 2011: A Meta-Analysis of Disparities in Childhood Sexual Abuse, Parental Physical Abuse, and Peer Victimization Among Sexual Minority and Sexual Nonminority Individuals American Journal of Public Health 101, 1481_1494, *https://ajph.aphapublications.org/doi/full/10.2105/AJPH.2009.190009.* Pearson, J., Thrane, L., & Wilkinson, L. (2017). Consequences of runaway and thrown away experiences for sexual minority health during the transition to adulthood. Journal of LGBT Youth, 14(2), 145–171, *https://www.tandfonline.com/doi/full/10.1080/19361653.2016.1264909.* For a review of risk factors impacting children in foster care see Matarese, M., Greeno, E. and Betsinger, A. (2017). Youth with Diverse Sexual Orientation, Gender Identity and Expression in Child Welfare: A Review of Best Practices. Baltimore, MD: Institute for Innovation & Implementation, University of Maryland School of Social Work, *https://qiclgbtq2s.org/wp-content/uploads/sites/6/2018/05/LGBTQ2S-Lit-Review_-5-14-18.pdf.*

[7] ACF held two listening sessions with LGBTQI+ youth with lived experience in foster care on February 9, 2023, and December 18, 2023.

[8] The Trevor Project, 2022 National Survey on LGBTQ Youth Mental Health, *https://www.thetrevorproject.org/survey-2022/assets/static/trevor01_2022survey_final.pdf.*

[9] See Innovations Institute, University of Connecticut School of Social Work, Family Acceptance Project, and National SOGIE Center (n.d.). *Parents & Families Have a Critical Impact on Their LGBTQ Children's Health Risks & Well-Being* [Fact Sheet]. Data for the fact sheet is drawn from Ryan, C (2021) *Helping Diverse Families Learn to Support Their LGBTQ Children to Prevent Health and Mental Health Risks and Promote Well-Being,* San Francisco, Family Acceptance Project, San Francisco State University. Ryan, C., Huebner, D., Diaz, R.M., & Sanchez, J. (2009). *Family rejection as a predictor of negative health outcomes in white and latino lesbian, gay, and bisexual young adults.* Pediatrics, 123(1), *https://publications.aap.org/pediatrics/article-abstract/123/1/346/71912/Family-Rejection-as-a-Predictor-of-Negative-Health?redirectedFrom=fulltext.*

[10] Ryan, C., Huebner, D., Diaz, R.M., & Sanchez, J. (2009). *Family rejection as a predictor of negative health outcomes in white and latino lesbian, gay, and bisexual young adults.* Pediatrics, 123(1), *https://publications.aap.org/pediatrics/article-abstract/123/1/346/71912/Family-Rejection-as-a-Predictor-of-Negative-Health?redirectedFrom=fulltext.*

[11] Ryan, C (2021) *Helping Diverse Famiies Learn to Support Their LGBTQ Children to Prevent Health*

Continued

that is not affirming, including refusing to use a child's chosen name and pronouns, or ridiculing or name-calling because of the child's LGBTQ+ identity, contributes to increased risks for serious health concerns for the child, such as depression, suicidal thoughts, suicidal attempts, and illegal drug use.[12]

Experience of LGBTQI+ Children in Foster Care

A meaningful body of research demonstrates that LGBTQI+ children in foster care face disproportionately worse outcomes and experiences than other children in foster care due to their specific mental health and well-being needs often being unmet. Further, evidence from qualitative studies, listening sessions, and Congressional testimony makes clear that many LGBTQI+ foster youth do not currently receive placements or services that are safe and proper, as required by statute.[13]

LGBTQI+ children in foster care report experiencing mistreatment related to their sexual orientation or gender identity. One study found that ''one of the most consistent themes that LGBTQ youth in foster care have conveyed in focus groups and qualitative interviews is a tendency to be harassed, teased, and bullied by staff, peers, and [foster] care providers . . . LGBTQ youth are often excluded and rejected by their peers and caretakers . . . It is common for LGBTQ youth in group home and foster home settings to be isolated to their own bedroom or to their own wing of the house due to fears of placing them with youth of the same sex.'' [14]

Children in foster care who identify as LGBTQI+ are more likely to be placed in congregate care settings (group homes and residential care rather than family like settings), experience multiple placements, and have adverse experiences in their placement than non-LGBTQI+-identifying youth.[15] One study found that LGBTQI+ youth in foster care are more likely to experience at least 10 foster care placements, with youth of color who are LGBTQ reporting the highest rates.[16]

A 2021 study showed that children in foster care who identify as LGBTQ+ report a perception of poor treatment by the foster care system more frequently than their non-LGBTQ peers and feel less frequently that they can be themselves.[17] Children in foster care who identify as LGBTQI+ are less likely to report at least ''good'' physical and mental health and are less likely to have at least one supportive adult on whom they can rely for advice or guidance than their non-LGBTQI+ counterparts in foster care.[18]

In one study that looked at LGBTQ+ status-related discrimination, 37.7 percent of children in foster care ages 12 through 21 who identify as LGBTQ+ reported poor treatment connected to their gender expression, sexual minority status, or transgender status. The study also showed that LGBTQ+ foster youth were more likely than their non-LGBTQ+ foster youth counterparts to have been hospitalized for emotional reasons or been homeless at some point in their life.[19]

Research has also demonstrated strong correlations between LGBTQI+ children who spent time in foster care and who later experienced housing instability, homelessness, and food insecurity. LGBTQI+ youth who reported past housing instability or a current homeless episode were six times more likely to have been in foster care than LGBTQI+ youth who did not report any housing instability.[20]

These many findings illustrate the need for child welfare personnel and foster parents to be trained on their critical role in the lives of LGBTQI+ children to avoid re-traumatization and further victimization of children.[21] Implementing strategic training and recruitment to meet the well-being needs of children who are LGBTQI+ is critical.

Mental Health Needs of LGBTQI+ Children

Research consistently shows that when LGBTQI+ youth experience supportive environments and services, they experience the same positive mental health outcomes as other youth.[22] However, research demonstrates that LGBTQI+ youth in foster care face significant mental health disparities that result from experiences of stigma and discrimination. A 2020 survey found that LGBTQ youth in foster care were more than two and a half times more likely to report a past year suicide attempt than LGBTQ youth who were not in foster care, with 35 percent of LGBTQ foster youth reporting

and Mental Health Risks and Promote Well-Being, San Francisco, Family Acceptance Project, San Francisco State University, *https://lgbtqfamilyacceptance.org/wp-content/uploads/2021/11/FAP-Overview_Helping-Diverse-Families6.pdf.*

[12] *Ibid.*

[13] For examples, see Weston Charles-Gallo testimony before the Ways and Means Committee Worker and Family Support Subcommittee Hearing on ''Making a Difference for Families and Foster Youth,'' May 12, 2021, *https://www.congress.gov/117/meeting/house/112622/witnesses/HHRG-117-WM03-Wstate-Charles-GalloW-20210512.pdf.* Creating Safer Spaces for Youth who are LGBTQ in Broward County, Florida: Collecting SOGIE Data for Life-Coaching Services. Vol. 96, No. 1, Special Issue: Sexual Orientation, Gender Identity/Expression, and Child Welfare (First of two issues) (2018), pp. 27–52 (26 pages), *https://www.jstor.org/stable/48628034.* Mountz, S., Capous-Desyllas, M., & Pourciau, E. (2018). 'Because we're fighting to be ourselves:' voices from former foster youth who are transgender and gender expansive. Child Welfare, Suppl.Special Issue: Sexual Orientation, Gender Identity/Expression, and Child Welfare, 96(1), 103–125, *https://www.proquest.com/scholarly-journals/because-were-fighting-be-ourselves-voices-former/docview/2056448509/se-2.* ACF held two listening sessions with LGBTQI+ youth with lived experience in foster care on February 9, 2023, and December 18, 2023.

[14] McCormick, A., Schmidt, K., and Terrazas, S. (2017) LGBTQ Youth in the Child Welfare System: An Overview of Research, Practice, and Policy, Journal of Public Child Welfare, 11:1, 27–39, DOI: 10.1080/15548732.2016.1221368, *https://doi.org/10.1080/15548732.2016.1221368.*

[15] Wilson, B.D.M., & Kastanis, A.A. (2015). Sexual and gender minority disproportionality and disparities in child welfare: A population-based study. Children and Youth Services Review, 58, 11–17, and Bianca D.M. Wilson, Angeliki A. Kastanis, Sexual and gender minority disproportionality and disparities in child welfare: A population-based study, Children and Youth Services Review, Volume 58, 2015, Pages 11–17, ISSN 0190–7409, *https://doi.org/10.1016/j.childyouth.2015.08.016.*

[16] Poirier, J., Wilkie, S., Sepulveda, K. & Uruchima, T., *Jim Casey Youth Opportunities Initiative: Experiences and Outcomes of Youth Who Are LGBTQ,* 96.1 Child Welfare, 1–26 (2018), *https://www.proquest.com/docview/2056448464.*

[17] Matarese, M., Greeno, E., Weeks, A., Hammond, P. (2021). The Cuyahoga youth count: A report on LGBTQ+ youth's experience in foster care. Baltimore, MD: The Institute for Innovation & Implementation, University of Maryland School of Social Work, *https://theinstitute.umaryland.edu/media/ssw/institute/Cuyahoga-Youth-Count.6.8.1.pdf.*

[18] Poirier, J., Wilkie, S., Sepulveda, K. & Uruchima, T., *Jim Casey Youth Opportunities Initiative: Experiences and Outcomes of Youth Who Are LGBTQ,* 96.1 Child Welfare, 1–26 (2018), *https://www.proquest.com/docview/2056448464.*

[19] Wilson, B.D.M., Cooper, K., Kastanis, A., & Nezhad, S. (2014), Sexual and Gender Minority Youth in Foster care: Assessing Disproportionality and Disparities in Los Angeles, The Williams Institute, UCLA School of Law, *https://williamsinstitute.law.ucla.edu/wp-content/uploads/SGM-Youth-in-Foster-Care-Aug-2014.pdf.*

[20] DeChants, J.P., Green, A.E., Price, M.N., & Davis, C.K. (2021), Homelessness and Housing Instability Among LGBTQ Youth, West Hollywood, CA, The Trevor Project, *https://www.thetrevorproject.org/wp-content/uploads/2022/02/Trevor-Project-Homelessness-Report.pdf.*

[21] For a review of best practices for child welfare practitioners, see Matarese, M., Greeno, E. and Betsinger, A. (2017). Youth with Diverse Sexual Orientation, Gender Identity and Expression in Child Welfare: A Review of Best Practices. Baltimore, MD: Institute for Innovation & Implementation, University of Maryland School of Social Work, *https://qiclgbtq2s.org/wp-content/uploads/sites/6/2018/05/LGBTQ2S-Lit-Review_-5-14-18.pdf.*

[22] Substance Abuse and Mental Health Services Administration (SAMHSA): Moving Beyond Change Efforts: Evidence and Action to Support and Affirm LGBTQI+ Youth. SAMHSA Publication No. PEP22–03–12–001. Rockville, MD: Center for Substance Abuse Prevention. Substance Abuse and Mental Health Services Administration, 2023, *https://store.samhsa.gov/sites/default/files/pep22-03-12-001.pdf.*

such an attempt. Reports of past year suicide attempt rates were even higher among LGBTQ+ foster youth of color (38 percent) and non-binary and transgender foster youth (45 percent).[23]

One area of particular concern for the mental health of LGBTQI+ youth in foster care is possible exposure to sexual orientation or gender identity or expression change efforts (so-called ''conversion therapy''), as well as other actions to change, suppress or undermine a child's sexual orientation, gender identity, or gender expression. Such efforts are not supported by credible evidence and have been rejected as harmful by the American Academy of Child and Adolescent Psychiatry, the American Academy of Pediatrics, the American Psychiatric Association, the American Psychological Association, and the National Association of Social Workers, among others.[24] The American Psychological Association (APA) has concluded that any behavioral health or other effort that attempts to change an individual's gender identity or expression is inappropriate and, further, can cause harm and/or suffering. After reviewing scientific evidence on gender identity change efforts, harm, affirmative treatments, and professional practice guidelines, the APA has affirmed gender identity change efforts are associated with reported harm, and the APA opposes these practices because of their association with harm.[25] Likewise, according to the APA, sexual orientation change efforts are ''coercive, can be harmful, and should not be part of behavioral health treatment.[26] A literature review by Substance Abuse and Mental Health Services Administration (SAMHSA) discussed in its 2023 report, ''Moving Beyond Change Efforts: Evidence and Action to Support and Affirm LGBTQI+ Youth'' concluded that [sexual orientation change efforts] were not effective and may cause harm.'' It found that no research has ''demonstrated that gender identity change efforts are effective in altering gender identity.'' In fact, the review found that ''exposure to gender identity change efforts . . . is associated with harm, including suicidality, suicide attempt, and other negative mental health outcomes such as severe psychological distress.'' [27]

Current Approaches To Meet the Needs of LGBTQI+ Children in Foster Care

Current approaches for meeting the needs of LGBTQI+ children in foster care vary across states and tribes. Some agencies use, or are working towards implementing, child welfare practice models that address the specific needs of LGBTQI+ children, in line with existing Federal statutory requirements applicable to all children in foster care. In 2023, the Child Welfare Information Gateway issued a report on ''Protecting the Rights and Providing Appropriate Services to LGBTQI+ Youth in Out-of-Home Care'' (''Report'').[28] The Report provides a review of state laws, regulations, and policies related to reducing the negative experiences of any child who identifies as LGBTQI+, including laws and policies that support a child's ability to be safe and free from discrimination; have access to needed care and services; and be placed in ''safe and supportive'' placement settings with caregivers who have received appropriate training. The Report found that 22 states and the District of Columbia require agencies to provide youth who identify as LGBTQI+ with services and supports that are tailored to meet the specific needs of an LGBTQI+ child, such as providing clothing and hygiene products and referring to the child by the name and pronouns that align with their gender identity. The Report found that eight states and the District of Columbia offer developmentally appropriate case management that helps child welfare workers support LGBTQI+ youth. The Report found that fifteen states and the District of Columbia require training on LGBTQI+ issues for foster caregivers and related staff, including on how to communicate effectively and professionally with youth who identify as LGBTQI+, and education on current social science research and common risk factors for LGBTQI+ youth experiencing various negative outcomes.

However, the Report also demonstrates that a majority of title IV–E/IV–B agencies do not have laws, regulations, or policies to make appropriate services and supports or Designated Placements available to an LGBTQI+ child in foster care. Without such laws or policies, agencies may not adequately meet statutory requirements that guarantee that LGBTQI+ children in foster care, like all foster children, receive a safe and proper placement. In March 2022, ACF published Information Memorandum (IM) ACYF–CB–IM–22–01, which included suggestions on how agencies could best provide services and supports to each LGBTQI+ child who is at risk of entering or is in foster care.[29] ACF believes this final rule will help address the extensively documented risk factors and adverse outcomes for LGBTQI+ children in foster care.

III. Regulatory Provisions and Responses to Comments

Summary of Commenters

The comment period for the NPRM was open for 60 days and closed on November 27, 2023. We received a total of 13,768 comments consisting of:

- Comments from 15 state or local child welfare agencies and governmental entities, such as state attorneys generals (AG) and a state civil legal aid office;
- Two letters representing 26 congressional members;
- Comments from 65 advocacy organizations, providers, and university institutes; and
- 13,536 comments from individuals, more than 12,000 of which consisted of two form letters, one in support and one in opposition.

We also received comments that were submitted on a different NPRM, were out of scope, or were duplicate submissions, and will therefore not be addressed. No comments were received by the deadline from Indian Tribes, Tribal organizations or consortiums, or organizations that represent Tribal interests. The comments are available in the docket for this action on *https://www.regulations.gov/docket/ACF-2023-0007/comments.* We reviewed and analyzed all of the NPRM comments and considered them in finalizing this rule.

Below is a summary of comments received. We include a detailed

[23] The Trevor Project, 2022 National Survey on LGBTQ Youth Mental Health, *https://www.thetrevorproject.org/survey-2022/assets/static/trevor01_2022survey_final.pdf.*

[24] Substance Abuse and Mental Health Services Administration, FAQs About Finding LGBTQI+ Inclusive Providers, *https://www.samhsa.gov/behavioral-health-equity/lgbtqi/faqs.*

[25] American Psychological Association, APA Resolution of Gender Identity Change Efforts, February 2021, *https://www.apa.org/about/policy/resolution-gender-identity-change-efforts.pdf.*

[26] American Psychological Association, APA Resolution on Sexual Orientation Change Efforts, February 2021, *https://www.apa.org/about/policy/resolution-sexual-orientation-change-efforts.pdf.*

[27] Substance Abuse and Mental Health Services Administration (SAMHSA): Moving Beyond Change Efforts: Evidence and Action to Support and Affirm LGBTQI+ Youth. SAMHSA Publication No. PEP2203–12–001. Rockville, MD: Center for Substance Abuse Prevention. Substance Abuse and Mental Health Services Administration, 2023, *https://store.samhsa.gov/product/moving-beyond-change-efforts-evidence-and-action-support-and-affirm-lgbtqi-youth/pep22-03-12-001.*

[28] Child Welfare Information Gateway, Protecting the Rights and Providing Appropriate Services to LGBTQIA2S+ Youth in Out-of-Home Care, 2023, *https://www.childwelfare.gov/topics/systemwide/laws-policies/statutes/LGBTyouth/.*

[29] Children's Bureau, Guidance for Title IV–B and IV–E Agencies When Serving LGBTQI+ Children and Youth, March 2, 2022, *https://www.acf.hhs.gov/cb/policy-guidance/im-22-01.*

response to comments in section IV of this preamble.

Summary of Comments by Commenter Type

Summary of Comments From State and Local Child Welfare Agencies

Four states or government entities expressed support: three were supportive of ACF's goal to improve care for LGBTQI+ children but also expressed concerns and recommended substantive changes to the proposal, and one expressed a neutral position. The supporters expressed that they are currently undertaking efforts to meet the needs of LGBTQI+ children in foster care, such as state-level non-discrimination laws, a foster children's bill of rights, resource groups for LGBTQI+ community outreach, requiring providers to demonstrate an ability to support LGBTQI+ children, and training for their workforce on cultural competency and sensitivity related to sexual orientation and gender identity. State agencies and governments who supported the rule expressed appreciation for the efforts of HHS to establish protections for LGBTQI+ children in foster care. They also supported some of the NPRM's requirements around assessing that placements meet the unique needs of LGBTQI+ children, reporting concerns with such placements, and placing children in sex-segregated child care institutions according to their gender identity.

Four states or government entities and the three letters representing 20 state attorneys general opposed the proposal. The state agencies and governments who opposed the rule stated a general belief that the NPRM creates a separate and distinct process for LGBTQI+ children that violates privacy and raised concerns related to the religious beliefs of providers. Additional concerns raised included that the NPRM would require an ''upfront'' conversation about a child's sexual orientation and gender identity instead of allowing a child to decide when to share this information with their case worker. Those states or entities who opposed the NPRM also argued that it creates a ''cumbersome fix'' for a problem that lacks clear definition while states are currently having issues finding enough providers for all children in foster care. They also argued that the NPRM's provisions would disincentivize families who may object to providing specially designated care for LGBTQI+ children from serving as foster parent providers and would ''drive individuals and organizations of faith away.'' They also expressed concerns that most congregate care providers are not currently equipped to meet the provisions around placing children according to their gender identity. Finally, there were objections to what they saw as unfunded burdens on the agencies to develop new trainings, modify licensing and placement rules, and revise case management systems to track placements, notifications, and other requirements in the NPRM.

Letters from State attorneys general raised legal concerns that the NPRM violates various statutory and constitutional requirements; these concerns are addressed in section IV.

Suggestions for revisions from state and local child welfare agencies and Government entities included:

- Expanding the approach proposed in the NPRM to apply the process to report placement concerns and provide notice to all children in foster care and not only to those specified in the NPRM, such as those over age 14;
- Providing clear guidance related to all of the rule's requirements and specifically the treatment of kin placements;
- Providing more funding to establish or enhance services for LGBTQI+ children within the states; in rural areas; and for recruitment, retention, and training of child welfare workers and foster care providers; and
- Replacing specific terms or phrases to broaden or provide flexibility to certain requirements, such as replacing ''retaliation'' with ''discrimination'' and replacing ''age-appropriate'' with ''developmentally appropriate.''

Summary of Comments From Congressional Members

Two sign-on letters from a total of 26 congressional members expressed opposition to the NPRM. They generally expressed a belief that the NPRM imposes mandates on a subset of children based exclusively on the child's gender identity and sexual orientation while there are no Federal policies that define ''safe and proper care'' for other children with unique characteristics, such as those living with a disability. They argued that the proposed rule would dissuade families of faith from being foster parents, thus impacting availability of foster care placements and that the training requirements would impact availability of caseworkers. They also expressed concern that the proposed rule will impose ''significant financial and administrative burdens'' on title IV–E agencies. They expressed concerns about the NPRM's requirements for transgender children and that placing children according to their gender identity could result in children being placed in settings ''they find uncomfortable and invasive or, at worst, unsafe.''

Summary of Comments From Advocacy Organizations, Providers, and Universities

Of the 65 advocacy organizations, providers, and university institutions that commented, 34 were supportive of the Department's goal to improve care for LGBTQI+ children but also recommended substantive changes to the proposal. Seven expressed support without recommending changes to the proposal, and 24 opposed.

Those organizations, providers, and university institutions who supported the rule without making changes concurred with the research summarized in the NPRM that demonstrates the complex challenges faced by LGBTQI+ children in foster care and agreed that the NPRM would help prevent discrimination and retaliation against LGBTQI+ children by allowing them to express their identities without fear of discrimination. They argued that the NPRM balances the exercise of religion with the need to ensure child wellbeing and represents an essential step towards creating an inclusive and supportive child welfare community. Some of the providers who commented expressed support for the NPRM and outlined the programs, policies, and procedures that they currently undertake to assist LGBTQI+ children in foster care. These practices included training kin caregivers and families of origin on affirming care, helping youth identify lasting affirming connections, having a mix of residential facilities for children, and training for facilities staff.

The 34 advocacy organizations, providers, and university institutes that expressed general support but also concerns with the NPRM's requirements appreciated ACF's commitment to ensuring that LGBTQI+ children in foster care are protected from harm. They agreed that LGBTQI+ children are overrepresented in the child welfare system and appreciated that ACF's summary of research documents the discrimination and challenges LGBTQI+ children in foster care face.

However, some of the advocacy organization and providers that commented expressing overall support also raised concerns about the approach of the NPRM and some stated that it was vague, lacking clarification at various decision-making points, and would negatively impact the availability of providers, specifically kin and religious

providers. Commenters raised concerns over freedom of religion and the legality of the NPRM's proposed requirements. Several organizations argued the NPRM as drafted could harm, instead of help, LGBTQI+ children in foster care. Specific concerns about the NPRM raised by these commenters include that the proposed rule added a layer of bureaucracy on child welfare agencies; may present a burden for kin caregiver providers to meet; creates a ''two-tiered system'' where non-LGBTQI+ children have an expectation of safety anywhere, but for LGBTQI+ children only certain placements are ''safe and appropriate''; places the onus on children to request a placement change, requiring them to disclose their identity when they may not feel comfortable doing so; did not explicitly contain anti-discrimination policies; lacked additional funding to implement the rule's requirements; and questioned whether CFSR would be the best mechanism for monitoring. As with all comments noted in these summaries, these concerns are addressed in the comment and response section that follows.

A number of the commenters who opposed the NPRM said that, while they agreed that every child in foster care should feel safe and be in a hostility-free environment, they were concerned that the NPRM only applied to LGBTQI+ children. Those that opposed generally argued the NPRM infringes upon religious liberties, questioned whether it was legal in its approach, and stated it minimized the contributions of faith-based providers. Some providers who submitted comments said the NPRM would have ''unintended consequences'' such as exacerbating the placement shortage. They also argued the NPRM was overly broad and vague, for example stating that not defining ''hostility, mistreatment, and abuse'' was ''deliberate'' to enable labeling providers as unsafe for ''simply disagreeing with the state's so-called 'appropriate' method for caring for LGBT children.'' They expressed concern that the NPRM would preclude ''reasonable efforts'' to help children think through their ''current feelings and assumptions'' arguing that foster parents should be free to offer their views. They also expressed concerns that ''age-appropriate services and supports'' could require gender-affirming care for transgender minors, which they argued creates various risks for children and should not be provided. Some commenters said that the NPRM's provision to place children according to their gender identity would ''threaten girls' privacy'' and that requiring use of a youth's chosen pronouns is a violation of free speech. A few commenters suggested instead creating a certification process for providers who have undergone training to be particularly supportive and affirming for LGBTQI+ children in foster care, such as something similar to having training to be a therapeutic foster care placement.

Summary of Comments From Individual Commenters

As noted earlier, we received approximately 13,536 comments from individuals, more than 12,000 of which consisted of two form letters. Of those, over 1,700 form letters expressed support, and over 10,000 form letters expressed opposition. Additionally, over 100 non-form letters expressed support, over 1,300 non-form letters expressed opposition, and 25 non-form letters expressed a neutral position. In general, the supportive commenters agreed that LGBTQI+ children are overrepresented in foster care, applauded HHS for requiring agencies to maintain enough safe and appropriate placements for LGBTQI+ children, and expressed their belief that this rule would be a ''huge step forward'' in keeping children safe. They also agreed that LGBTQI+ foster children should not be subjected to abuse or discrimination, including by placements that practice ''conversion therapy.'' Some commenters stated that agencies have no policies that protect LGBTQI+ children in foster care and that the proposals in the NPRM will create important mandates for agencies and providers. Others expressed that ensuring that providers are trained and equipped with skills to provide for a child's needs regarding sexual orientation and gender identity is the ''next step in improving the well-being of the LGBTQI+ youth in foster care.'' Supportive commenters asked who will define ''safe and proper care.''

Commenters who expressed opposition expressed a belief that the approach taken in the NPRM would harm, rather than help, children in foster care. They argued that it would disqualify most faith-based providers and label people of faith and religious organizations as ''unsafe'' and ''inappropriate.'' The individuals and anonymous commenters who opposed the NPRM expressed concerns that the proposal would reduce the number of available providers, exacerbate the placement shortage, and discourage religious families and individuals from becoming foster parents or seeking employment in the child welfare profession. There were also a substantial number of commenters who appeared to misunderstand or misinterpret the NPRM's provisions, including a substantial number of comments discussing the appropriateness or lack thereof of gender-affirming care for children. These comments are outside the scope of the rule because this rule does not establish any particular standard of medical care or require that anyone receive any particular medical services.

The 25 commenters who expressed neutral positions shared personal stories of their experience with LGBTQI+ children or foster care, views on child rearing, or generally that placements should be free from hostility and mistreatment.

Section by Section Discussion of Regulatory Provisions

We respond to the relevant comments we received in response to the NPRM in this section-by-section discussion.

Title and Definition of LGBTQI+

In the proposed rule we proposed the title of § 1355.22 to be ''Placement requirements under titles IV–E and IV–B for children who identify as lesbian, gay, bisexual, transgender, queer or questioning, intersex, as well as children who are non-binary or have non-conforming gender identity or expression.'' The proposed rule used the terms ''LGBTQI+ status'' and ''LGBTQI+ identity'' in various locations to refer to LGBTQI+ children.

Comments: Some commenters encouraged ACF to amend the rule to explicitly include other identities—such as children who are Two Spirit—to be as inclusive as possible and provide clarity for providers. Some commenters encouraged ACF to explicitly include children with a variation in sex characteristics in addition to intersex children, as not all such children identify as intersex. Other commenters encouraged ACF to include protections based on ''LGBTQI+ identity'' in addition to ''LGBTQI+ status'' to provide maximum clarity about which children are entitled to Designated Placements.

Response: ACF agrees that addressing the needs of Two Spirit youth in the child welfare system is an important part of this regulation. ACF also agrees with the importance of providing clarity to title IV–E/IV–B agencies and providers about the meaning of the term ''LGBTQI+.'' For the purposes of this rule, the term refers to children who identify as lesbian, gay, bisexual, transgender, queer or questioning, intersex, as well as children who are non-binary, Two-Spirit, or have non-

conforming gender identity or expression, all of whom are referred to under the umbrella term of LGBTQI+ for this regulation.

For streamlining purposes, ACF updated the final rule's regulatory text to read ''LGBTQI+ children (including children who are lesbian, gay, bisexual, transgender, queer or questioning, and intersex).'' The word ''including'' clarifies that the umbrella term LGBTQI+ includes children who are non-binary, Two-Spirit, or have non-conforming gender identity or expression as well.

We also agree with commenters that the use of both ''LGBTQI+ status'' and ''LGBTQI+ identity'' offers greater clarity. The term ''LGBTQI+ status'' is frequently used in reference to protecting LGBTQI+ individuals from discrimination, harm, and mistreatment based on their ''LGBTQI+ status.'' Protecting a child from mistreatment based on their ''LGBTQI+ status'' would include protections should the child disclose their LGBTQI+ identity, should a third party identify a child as LGBTQI+, or should the child be perceived as having an LGBTQI+ identity. Other sections of the NPRM provided protections to children based on their ''LGBTQI+ identity.'' The term ''LGBTQI+ identity'' is frequently used when a person self-identifies as LGBTQI+. For this final rule, ACF uses the term ''LGBTQI+ status or identity,'' and any reference to LGBTQI+ children is intended to include both children with LGBTQI+ status and LGBTQI+ identity. For brevity, ACF has revised the title of this final regulation to be ''Designated Placement requirements under titles IV–E and IV–B for LGBTQI+ children.''

In regard to questions about children with variations in sex characteristics, ACF acknowledges that not all children with variations in sex characteristics self-identify with the term intersex but believes that the term LGBTQI+ provides sufficient clarity that the rule's protections apply to such children.

Final Rule Change: ACF updated the title of the regulation to ''Designated Placement requirements under titles IV–E and IV–B for LGBTQI+ children'' and updated the rule text to read ''LGBTQI+ children (including children with lesbian, gay, bisexual, transgender, queer or questioning, and intersex status or identity).''

Section 1355.22(a) Protections Generally Applicable

In § 1355.22(a)(1) of the proposed rule, ACF proposed to require that title IV–E/IV–B agencies ensure that a safe and appropriate placement is available for and provided to all children in foster care, including each LGBTQI+ child in foster care. The proposed rule referred to specially designated placements for LGBTQI+ children in foster care as ''Safe and Appropriate'' placements. The NPRM proposed that a ''Safe and Appropriate'' placement for an LGBTQI+ child would be a placement in which (1) the provider will establish an environment free of hostility, mistreatment, and abuse based on the child's LGBTQI+ status; (2) the provider is required to be trained on the appropriate knowledge and skills to provide for the needs of the child related to the child's self-identified sexual orientation, gender identity, and gender expression; and (3) the provider will facilitate the child's access to age-appropriate resources, services, and activities that support their health and well-being. The NPRM further clarified that providers would not be required to be ''Safe and Appropriate'' as the rule does not compel any particular provider to seek a special designation to provide supportive care to LGBTQI+ children.

Comments: Numerous commentors, including those who supported and opposed the requirements of the proposed regulation, provided recommendations for using clearer terminology in the final rule.

Some commenters suggested that every child is already entitled to a safe and appropriate placement under Federal child welfare law, and that the final rule should clarify that this requirement applies to all children in foster care, not just to children in specially designated placements for LGBTQI+ children.

A number of commenters were opposed to applying the protections in paragraph (a) of the NPRM only to LGBTQI+ children for various reasons, including that it could appear that LGBTQI+ children are provided protections not guaranteed to others. Another commenter stated that there are no other Federal policies that define how a state must provide ''safe and proper care'' to children of other unique circumstances.

Many commenters expressed concern with the terminology ''safe and appropriate'' placements, interpreting that such a placement was only available to LGBTQI+ children. One commenter expressed the belief that using the term ''safe and appropriate'' permits the state to place the child with caregivers who are merely tolerant of the child's sexual orientation or gender identity rather than in a home that is fully supportive. Commenters stated the rule does not go far enough to affirm children, and that the ''free from hostility, mistreatment, and abuse'' threshold was insufficient.

A number of commenters recommended that the final rule should require all placement providers to meet the requirements to be a safe and appropriate placement, unless they obtain a waiver based on a religious objection. Other commenters argued that unless all placement providers are required to be supportive, some LGBTQI+ foster children will not receive the benefit of such placements because they are not comfortable disclosing their identity to their caseworker.

Conversely, many commenters wrote that the proposed rule relies on a false assumption that only placements that support a child's LGBTQI+ identity are safe and proper. A commenter explained that the proposed rule would create a two-tiered system for both foster families and child-placing agencies in which consideration is given to homes that promote a liberal view of sexuality and gender. Commenters stated that this could particularly impact providers with religious beliefs and viewpoints that oppose same-sex marriage and believe that there are only two genders, for example. One commenter stated that, absent clear definitions and parameters for a safe home, foster families who hold certain religious convictions are at risk of being inappropriately deemed unsafe. One commenter stated that a foster family should not have to agree with a child's beliefs and that the foster parent's belief regarding sexuality and gender identity does not compromise their ability to provide safe and appropriate care for non-LGBTQI+ children.

Response: ACF appreciates commenters' views and suggestions. ACF agrees that the terminology used in the NPRM, which referred to placements that are specially designated for LGBTQI+ children as ''Safe and Appropriate,'' needed clarification.

First, consistent with comments received, ACF confirms that Federal law requires all foster care placements to be safe and appropriate. ACF did not intend to suggest otherwise with the terminology it used in the NPRM. The agency sought to clarify how these Federal statutory requirements should be met in the context of LGBTQI+ children who, as the preamble to this rule demonstrates, have specific needs related to placements and services. One important aspect of a safe and appropriate placement for all children is that the placement be free of harassment, mistreatment, and abuse, and at 45 CFR 1355.22(a), we have incorporated regulatory language

making clear that this requirement applies to all children in all placements, including LGBTQI+ children. We discuss the change to using the term ''harassment'' rather than the term ''hostility''—the term we had employed in the NPRM—below.

Second, ACF acknowledges the concerns of commenters that families who do not meet or seek to meet specified requirements to serve as a designated provider for LGBTQI+ children could be mislabeled as ''unsafe'' under the terminology of the proposed rule. ACF acknowledges the particular concerns of faith-based providers and families of faith who serve as foster families. We appreciate the vital role that many families and providers of faith play in the child welfare system, and ACF is committed to upholding Federal legal protections for religious exercise, free speech, or conscience as further discussed in the ''Response to Comments Raising Statutory and Constitutional Concerns'' section of this preamble.

In response to these concerns, HHS has revised the terminology used in the final rule. The rule now uses the phrase ''Designated Placements'' as shorthand to refer to providers that are specially designated to serve LGBTQI+ children because they have made a set of commitments and undergone training to better meet the needs of LGBTQI+ children. State and Tribal agencies must have available a sufficient number of these placements as part of their responsibilities to satisfy the statutory requirement that all children in foster care have access to a safe and appropriate placement.

ACF disagrees with commenters who asserted that placements that affirm the identity of LGBTQI+ children are not beneficial for the child. As described in the introductory section of this preamble addressing Mental Health Needs of LGBTQI+ Youth, an extensive body of research consistently shows that when LGBTQI+ youth experience supportive environments and services, they experience the same positive mental health outcomes as other youth. Further, evidence from studies, listening sessions, and Congressional testimony makes clear that many LGBTQI+ foster youth do not currently receive placements or services that are safe and appropriate, as required by statute. In view of the data, ACF disagrees with the commenter's view that supportive placements are not necessarily desirable for safe and appropriate placement of children.

Comments: Multiple commenters asked for clarification of what specific requirements would apply to placement providers (*i.e.,* foster family homes, child care institutions) that do not choose to become Designated Placements for LGBTQI+ children. Commenters asked that ACF provide examples of what such providers would and would not be required to do. For example, some commenters vocalized the importance of allowing placement providers to talk with children about their own feelings, and to have the ability to offer alternative viewpoints to LGBTQI+ children. Conversely, many commenters also suggested that the rule be expanded to require that all foster parents should be able to meet the needs of any child who enters their home to ensure that all children, including those who identify as LGBTQI+, are able to thrive in care.

Response: As noted above, ACF appreciates the opportunity to clarify that all children in foster care are entitled to safe and appropriate care under Federal law, regardless of whether they are LGBTQI+ or not, and if they are LGBTQI+, regardless of whether they are in a Designated Placement. Titles IV–E and IV–B of the Act provide protections that are designed to ensure that while in foster care, all children receive ''safe and proper care'' (Social Security Act section 475(1)(B), 42 U.S.C. 675(1)(B)). Specifically, as part of its title IV–E and IV–B plans, an agency must develop a case plan for each child in foster care that, among other things, assures that the child receives ''safe and proper'' care and ''address(es) the needs of the child while in foster care'' (*Id.*). This statutory process includes a ''discussion of the appropriateness of the services that have been provided to the child under the plan'' (*Id.*). Similarly, the title IV–E/IV–B case review system requires that the agency have procedures for assuring that each child has a case plan designed to achieve placements in the most appropriate setting available, consistent with the best interests and special needs of the child (Social Security Act sections 422(b), 471(a)(16), 475(1)(B), and 475(5), 42 U.S.C. 622(b), 671(a)16), and 675(5)). The responsibility to develop and implement foster children's case plans lies with the child welfare agency. Child welfare agencies assign foster children to placement providers in accordance with their case plans. These decisions are individualized and take many aspects of a child's circumstances into account. These general protections for safe and appropriate foster care placements apply to all placements and all children.

ACF appreciates the opportunity to further clarify what these general statutory provisions require. These statutory terms, which apply to all placements, at a minimum mean that the placement must be free from harassment, mistreatment, and abuse—including related to a child's sexual orientation, gender identity, or LGBTQI+ status. In this final rule, we use the term ''harassment'' in place of the term ''hostility'' used in the proposed rule. We agree with the concern, articulated by commenters, that the term ''hostility'' is insufficiently clear to provide guidance to providers. By using the term ''harassment,'' we seek to clarify that the general protections focus on the provider's conduct; a provider will not violate this rule simply because of the view or beliefs the provider may have or by good-faith and respectful efforts to communicate with LGBTQI+ children about their status or identities. Under its settled meaning in the law, the concept of harassment requires conduct that is sufficiently severe or pervasive to create an unsafe or hostile environment based on the child's characteristics. *See, e.g., Oncale* v. *Sundowner Offshore Servs.,* Inc., 523 U.S. 75, 78 (''When the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment, Title VII is violated.'') (citation omitted).

Of course, children in foster care are especially vulnerable and rely on their providers to provide a supportive and protective environment. Protecting LGBTQI+ children from harassment, mistreatment, or abuse in all foster care placements is of particular importance given the vulnerability of these children. For example, as described in the preamble to this rule, a significant body of evidence demonstrates a connection between the risk that a LGBTQI+ child will consider or attempt suicide and the conduct and treatment of their caregivers towards the child's sexual orientation or gender identity. A 2009 study cited above showed that ''LGB young adults who reported higher levels of family rejection during adolescence were 8.4 times more likely to report having attempted suicide [and] 5.9 times more likely to report high levels of depression'' compared with children of families of low or no such behaviors.[30] Application of the legal

[30] Ryan, C., Huebner, D., Diaz, R.M., & Sanchez, J. (2009). *Family rejection as a predictor of negative health outcomes in white and latino lesbian, gay, and bisexual young adults.* Pediatrics, 123(1), *https://publications.aap.org/pediatrics/article-abstract/123/1/346/71912/Family-Rejection-as-a-*

Continued

definition of harassment must necessarily attend to this context. *See Oncale,* 523 U.S. at 81(1998) (determination of harassment ''requires careful consideration of the social context in which particular behavior occurs and is experienced by its target'').

Harassment does not include an isolated hurtful remark or action. But it can include deprivation of key resources. *See id.* at 650–651 (actionable harassment exists when it keeps ''female students from using a particular school resource—an athletic field or a computer lab, for instance''). Conduct need not physically deprive an individual of such a resource to constitute harassment; harassment includes conduct that so undermines and detracts from the victims' . . . experience [with the program], that the victim[s] are effectively denied equal access to [the program's] resources and opportunities.'' *Id.* at 651.

Harassment, mistreatment, or abuse of any child in foster care is impermissible in any placement. A provider that harasses a child about that child's religious beliefs or practices violates the general guarantee that all foster placements must be safe and appropriate. Similarly, a provider that harasses a child about that child's LGBTQI+ status or identity violates the same guarantee.

In response to commenters who sought clarity about what conduct would or would not be permissible in placements that had not sought designation as a Designated Placement, ACF appreciates that some providers, like some caregivers, parents, and kin, may struggle to understand an LGBTQI+ child's identity, or have questions or concerns about a child's wellbeing upon learning that a child in their care is LGBTQI+. Good-faith and respectful efforts to engage children appropriately do not constitute harassment, mistreatment, or abuse. However, though the inquiry must be fact specific, providers can cross the line into harassment, mistreatment, or abuse if they are found to have engaged in behaviors such as punishing the child, subjecting the child to harsher rules, or excluding the child from community activities because they are LGBTQI+; or disparaging the child, calling them shameful, or using slurs or derogatory language because they are LGBTQI+. Such conduct can also constitute prohibited retaliation as outlined in paragraph (d) of this rule.

ACF understands that many providers will be learning over time how to best engage LGBTQI+ children. As discussed below at *Section 1355.22(b)(3) Placement and Services Decisions and Changes,* ACF recognizes that some providers may be willing to accept and benefit from additional resources and training in order establish a supportive environment for an LGBTQI+ child. ACF will provide technical assistance and guidance to agencies to support training and resources for providers who desire such training. ACF again notes that good-faith and respectful efforts to communicate with LGBTQI+ children about their status or identity do not constitute harassment, mistreatment, or abuse.

Additionally, consistent with the proposed regulation, this final rule requires that the title IV–E/IV–B agency ensure that no LGBTQI+ child experience retaliation in any placement, including those that are not Designated Placements. Revisions to the rule's nonretaliation provisions are described below. Accordingly, if a placement provider were to engage in (or attempt to engage in) retaliation against an LGBTQI+ child, the title IV–E/IV–B agency must take steps to protect the child from such retaliation. Depending on the circumstances and child's wishes, those steps could include moving the child to a new Designated Placement.

ACF reiterates that the final rule does not directly regulate the actions of individual foster care providers, as title IV–E/IV–B agencies are responsible for ensuring that each placement the agency makes meets requirements that it is safe and appropriate. As with all provisions of this rule, caseworkers who make individualized placement decisions about each child in foster care will make case-by-case determinations about which placement is in the best interest of the child to implement the requirements of Federal statutory protections as well as this rule.

ACF reiterates that this rule does not prohibit individuals and organizations from continuing to participate as foster care providers if they do not wish to serve as Designated Placements. Although states and tribes must have sufficient Designated Placements for LGBTQI+ children, the final rule does not require any placement to meet the requirements of a Designated Placement. The fact that a given provider has not sought to become a Designated Placement is not evidence that the provider has engaged in harassment, mistreatment, or abuse. We have added a new provision at § 1355.22(j), which states that nothing in this rule requires or authorizes a State to penalize a provider in the state's titles IV–E and IV–B program because the provider does not seek or is determined not to qualify for the status of a Designated Placement under this rule.

Consistent with the NPRM, this rule also requires that placement providers who have not chosen to become Designated Placements for LGBTQI+ children are informed of the procedural requirements to comply with the rule, including the non-retaliation provision, described below.

Comment: Many commenters said the proposed rule did not define the terms ''hostility,'' ''mistreatment,'' and ''abuse'' and sought clarity on their meaning. One commenter suggested the final regulations provide greater specificity about what actions by providers/social workers cannot be permitted because they undermine, rather than create safe and appropriate spaces for, LGBTQI+ and other children.

Response: As described elsewhere in this preamble, we are clarifying that as part of meeting the requirement to provide a safe and appropriate placement for all children in foster care, the title IV–E/IV–B agency must ensure that placements, including those for LGBTQI+ children, are free from harassment, mistreatment, or abuse. As we explain above, we now use the term ''harassment'' in place of the term ''hostility'' used in the NPRM in response to requests from commenters for greater clarity. Applying the ''harassment, mistreatment, or abuse'' test advances the goal of providing a safe environment to children while ensuring that agency staff and foster care providers will not violate those general protections simply for holding any view or belief or for good-faith and respectful efforts to communicate with LGBTQI+ children about their status or identity. Since those requirements and all of the rule's retaliation requirements apply to all foster care placements, they also necessarily apply to all placement providers, including Designated Placements. We note, as well, that the final rule's non-retaliation provision is not limited to providers. Thus, similar actions by caseworkers would also be prohibited by this rule. And because the general protections apply to all children, this final rule prohibits harassment, mistreatment, or abuse even when not directed against a child based on LGBTQI+ status or identity. For example, harassment of a child because of their religious beliefs or cultural practices would violate those general statutory protections. For further discussion of these issues, we refer the reader to the beginning of this section.

Predictor-of-Negative-Health?redirectedFrom=full text.

Final Rule Changes: We have revised the final rule so that 45 CFR 1355.22(a) now provides that as part of meeting the requirement to provide a safe and appropriate placement for all children in foster care, the title IV–E/IV–B agency must ensure that placements, including those for LGBTQI+ children, are free from harassment, mistreatment, or abuse.

Section 1355.22(b)(1) Designated Placements and Services for LGBTQI+ Children

The NPRM preamble explained that title IV–E/IV–B agencies should have a sufficient number of placements specially designated to serve LGBTQI+ children throughout their foster care system to meet the requirement of the proposed rule to ensure that a safe and appropriate placement is available for and provided to each LGBTQI+ child in foster care.

Comments: Several commenters asked for clarification on preamble language regarding ''sufficient placements.'' For the determination of ''sufficient'' placements, they expressed concern that, in their view, the NPRM preamble failed to clearly articulate how agencies must determine whether their networks would include enough providers. Commenters cautioned that depending on how sufficient numbers are calculated, educational continuity and keeping children in their communities could be undermined. Commenters also stated the proposed rule failed to clarify how different placement types would be factored into determinations of sufficient numbers of providers. One commenter emphasized the need for geographic representation of placements.

Response: As noted above, the final rule clarifies that all providers must be safe and appropriate for all children. Title IV–E/IV–B agencies need to have sufficient Designated Placements to be responsive to the needs of LGBTQI+ children. Consistent with the proposed rule, this final regulation does not prescribe a specific number of Designated Placements that will be needed in a given child welfare program. Title IV–E/IV–B agencies are in the best position to determine the number of such placements that will be required to meet their local needs and comply with this regulation. Accordingly, the regulation does not mandate a specified number of placements, but rather mandates what the title IV–E/IV–B agency must do to provide access to Designated Placements. The title IV–E/IV–B agency will need to determine the number of placements needed to meet these requirements. In recognition of the diversity of programs and local contexts across the Nation, we are not seeking to establish a uniform, standard requirement that applies to all jurisdictions and populations. Each state and tribe is unique and best suited to identify their placement needs and how to meet the provision in the final rule based on considerations such as variation in population; geographical disbursement including rural, remote, and urban populations; and the number of children in need of foster care placements, among other consideration. ACF encourages agencies to use data, modeling, and case work to estimate how many Designated Placements may be needed. ACF will provide further technical assistance to states and tribes to help them achieve this requirement. As we discuss below, this final rule clarifies that nothing in this rule shall be construed to require or authorize a state or tribe to penalize a provider in the title IV–E and IV–B program because the provider does not seek or is determined not to qualify as a Designated Placement under this rule.

The final rule also clarifies the requirements for a placement to be considered a Designated Placement for LGBTQI+ children. First, in addition to the protections generally applicable, the provider must commit to establish an environment that supports the child's LGBTQI+ status or identity. We have added the term ''commit'' to reflect that assent to this designation will be documented by title IV–E/IV–B agencies and in recognition that current placements, working toward designation as part of a placement stabilization plan, may express their commitment while working to establish the environment as described in the rule. The criteria for Designated Placements include provider training as discussed below. Finally, a Designated Placement must facilitate the child's access to age- or developmentally appropriate resources, services, and activities that support their health and well-being.

Provider Training for Designated Placements

The proposed rule clarified that for a placement to be considered specially designated for an LGBTQI+ child, the provider must be ''trained to be prepared with the appropriate knowledge and skills to provide for the needs of the child related to the child's self-identified sexual orientation, gender identity, and gender expression.'' In the NPRM, we requested comments on how ACF can ensure training curriculums for foster care providers are of high quality.

Comment: Many commenters responded with recommendations on how ACF can ensure training curricula for foster care providers are of high quality. Many commenters recommended ACF work with LGBTQI+ youth with lived experience and other experts in the community to develop core elements that should be presented in high quality trainings. One commenter recommended that trainings and measures of success should be reviewed and evaluated by LGBTQI+ youth with lived experience. Several commenters recommended ACF ensure trainings are certified by organizations with experience serving LGBTQI+ children. One commenter recommended ACF develop a set of guidelines for placement providers' trainings to ensure the trainings address a robust set of topics. One commenter recommended ACF create a few standards for key concepts that must be included in trainings, at minimum, and discuss how to create supportive and inclusive environments for all sexual orientations and gender identities. The commenter also recommended trainings provide strategies on how to ask and respond to questions around these topics in a respectful way and that therapists who work with LGBTQI+ youth in care should provide evidence-based services and care. One commenter recommended all training include information about the critically important role of faith for the mental health of LGBTQI+ youth and that ACF should urge states to approve diverse training options, including at least one approved training sequence designed by and for theologically conservative faith-based providers. Several commenters recommended provider training should be offered annually for new resource families or as an opportunity for a training ''refresher'' and ideally should be coupled with coaching opportunities to reinforce training content. One commenter recommended training modules be updated and provide for recurring trainings as the agency best sees fit and that ACF should put in place a system to implement a data check to understand the effectiveness of these training programs. Several commenters recommended ACF highlight programs that have been developed to work with existing resource families and recommend that States provide similar programs to placement providers who are assessed as not yet supportive to LGBTQI+ children. One commenter recommended ACF should provide specific funding and grant opportunities to assist states and tribes to provide appropriate

training pertaining to LGBTQI+ children in foster care.

Many commenters had suggestions about foster care provider training, such as requiring that providers receive relevant trainings and resources that enable and empower them to care for LGBTQI+ children; agencies offer the same provider training requirements for kinship caregivers, and offer expanded provider training to ensure that all kinship and foster caregivers are equipped to be safe and appropriate, regardless of the child's sexual orientation or gender identity; and incentives are offered to agencies using evidence-based trainings. Another commenter said that being designated to provide care for LGBTQI+ children should not be solely defined by the receipt of specific provider training and instead be determined by an ability and willingness of the caregiver to meet the child's needs. Commenters also requested clarity on what constitutes ''appropriate knowledge'' and ''skills,'' recommending ACF work with faith-based groups on provider training development, while others suggested not to be overly specific. Other commenters disagreed saying that there is no ''official federal training available'' for providers and that since foster care training curriculum are administered by state and county authorities, enforcing specific provider training requirements would violate individual state statues. Other commenters suggested adding information about professional standards as part of the provider training requirement.

One commenter suggested expanding the rule to include training for all service providers, including attorneys and guardians ad litem.

Response: We considered all of the recommendations and comments. We have revised the final rule in paragraph (b)(1)(ii) to add additional specificity to the training for foster care providers. In addition to requiring the training to reflect evidence, studies, and research about the impacts of rejection, discrimination, and stigma on the safety and wellbeing of LGBTQI+ children, the final rule also requires the training to provide information for providers about professional standards and recommended practices that promote the safety and wellbeing of LGBTQI+ children. Those recommended practices should reflect evidence-based supportive behaviors shown to improve health and other outcomes for LGBTQI+ children and exclude behaviors shown to lead to poor health outcomes for LGBTQI+ children. ACF acknowledges that training materials could be improved through engagement with people with lived experience, and strongly encourages title IV–E/IV–B agencies to do so, though we have not chosen to make it a requirement. So long as the requirements in this final rule are satisfied, ACF will defer to states and tribes on how to best incorporate these additional requirements into their training. ACF will provide technical assistance to help agencies implement this requirement.

The final rule does not extend these training requirements in paragraph (b)(1)(ii) beyond the foster care provider, as the training is focused on becoming a Designated Placement for a child. ACF acknowledges title IV–E/IV–B agencies should offer training and services to kinship caregivers and foster families that opt to become Designated Placements for LGBTQI+ children, particularly those currently placed with them. The final rule in § 1355.22(b)(2) states that services and training can be offered to current providers, including kin, to help them become a Designated Placement if they wish and thus promote sibling unification, and retaining sibling, kinship, family, and community ties. ACF acknowledges that training on supportive services for LGBTQI+ children could be beneficial for guardians ad litem and attorneys. However, requirements for training attorneys are beyond the scope of this rule.

Other Comments on Designated Placement Requirements

Comment: One commenter wanted the rule to more clearly specify who is included in the term placement provider.

Response: Placement providers are foster family homes, child care institutions, or other facilities that provide foster care to children, consistent with the definition of foster care at 45 CFR 1355.20.

Comment: One commenter requested clarification on whether short-term, emergency placements are exempt from the Designated Placement requirements for an LGBTQI+ child if a designated provider is unavailable. One commenter expressed the need to afford flexibility for states to offer exceptions or alternatives for LGBTQI+ children placed with kin caregivers when it is in the best interest and desire of an LGBTQI+ child.

Response: The issues raised by the commenters regarding short-term or emergency placements are related to agency decision making and provider licensing which are determined at the local level. State and Tribal title IV–E/IV–B agencies that have placement and care responsibility of children who are in foster care have the authority to make placement decisions for the child. In doing so, they must consider the Federal statutory and regulatory requirements for foster care placements and must balance all of these factors in making a placement decision on a case-by-case basis. This requirement includes relative placement preferences, jointly placed sibling placement requirements, least restrictive placement requirements, and requirements for placements in close proximity to the parent's home and the child's school of origin. However, we are not revising the final rule to provide specific exemptions. ACF encourages title IV–E/IV–B agencies to work with foster care placement providers who wish to become Designated Placements, including relative placements to build their capacity to provide such placements through coaching, training, and education. As noted above, ACF encourages agencies to use case work, data, and modeling to ensure that there are enough placements as needed in specific geographic areas, which will help ensure that children are placed in proximity to the parent's home and child's school of origin. Ensuring adequate numbers of Designated Placements will also help increase the likelihood that LGBTQI+ children will be placed with siblings.

Comment: Several commenters had suggestions or requested clarification regarding the terms used in this provision of the NPRM. Several organizations suggested using the term ''developmentally appropriate'' instead of ''age-appropriate.''

Response: We agree with commenters that in addition to age-appropriate resources, services and activities, a child should have access to developmentally appropriate resources, services, and activities. Therefore, we are revising the final rule to read ''age- or developmentally- appropriate.'' This is to be consistent with the definition in section 475(11)(A) of the Act (Social Security Act Section 475(11)(A), 42 U.S.C. 675(11)(A)).

Final Rule Changes: The final rule provides requirements for a placement to be considered a Designated Placement, which goes beyond the general protection of an environment free of harassment, mistreatment, and abuse, which is now described as safe and appropriate. To be considered Designated, a placement must meet the criteria described in § 1355.22(b)(1).

Section 1355.22(b)(2) Process for Notification of and Request for Designated Placements

Section 1355.22(b)(2) describes the process the title IV–E/IV–B agency must implement to notify an LGBTQI+ child that they may request a Designated Placement or request that services be offered to their current placement to become a Designated Placement. In the NPRM, where the provision to request a placement for an LGBTQI+ child was located at § 1355.22(a)(2), ACF proposed that title IV–E/IV–B agencies must implement a process by which a child identifying as LGBTQI+ may request a placement specially designated as meeting specified requirements for LGBTQI+ children, and that the title IV–E/IV–B agency must consult with such child to provide an opportunity to provide input into that placement. The NPRM proposed that this process must safeguard the privacy and confidentiality of the child. It also proposed to require that title IV–E/IV–B agencies notify all children over the age of 14 that specially designated placements for LGBTQI+ children are available, as well as providing such notification to children under the age of 14 who have been removed from their home due to familial conflict about their LGBTQI+ status, and children who have disclosed their LGBTQI+ identity or whose LGBTQI+ identity or status is known to the agency. The NPRM further proposed that the notice should be provided in an age-appropriate manner both verbally and in writing, and that the notice must inform the child about how they request a safe and appropriate placement.

Notification Requirements—Frequency, Age, and Developmental-Appropriateness

Comment: Many commenters provided recommendations on how often the agency must provide the child notification and recommended providing multiple notifications to children. Suggestions included providing notice at least two times a year; continuously; at regular intervals; and no less than twice per year. One commenter stated that children should be notified within 72 hours of entering foster care that having a safe and appropriate foster placement is a right. They also recommended that youth should acknowledge receipt of rights at case hearings and placement changes and that rights be publicly posted in congregate care facilities, and accessible to youth in foster homes.

Response: There are existing mandated requirements for agencies to provide care and services to children in foster care. This includes conducting an initial case plan within 60 days of a child's removal and conducting monthly home visits with the child. These are opportunities that agencies already have in their ongoing work that will allow them to provide proper notifications in accordance with the rule; while the rule specifies information that must be included in the notice, agencies are not required to establish a new process to notify children that Designated Placements are available. ACF intends to clarify opportunities to ensure children are informed through technical assistance. We encourage agencies to use all opportunities available to ensure children are well informed. Therefore, we have determined not to make these changes in the final rule. However, ACF takes this opportunity to clarify that in response to comments about enforcement of the rule's provisions, the final rule provides for the notification requirement to be monitored through the CFSRs, a formal monitoring protocol in which the state's efforts to comply with title IV–E and IV–B program requirements are assessed at the case and systems level. This change is discussed below under *Section 1355.34(c) Criteria for Determining Substantial Conformity.*

Comment: Numerous commenters recommended that the notice of availability of safe and appropriate placements should be provided to all children regardless of age, rather than the age of 14 as specified in the NPRM. One organization commented that notice at age 14 is too late and should be provided at an earlier age. Another suggested varying ages at which to begin offering notifications.

Response: ACF appreciates the comments about the importance of providing notification to children. In the final rule, ACF has kept the age requirement for notification to all children 14 and over, in alignment with the existing case plan requirement in section 475(1)(B) of the Social Security Act.

Moreover, in addition to requiring agencies to notify all children age 14 and over, the final rule also requires agencies provide notice about Designated Placements to those under age 14 who are removed from their home due, in whole or part, to familial conflict about their sexual orientation, gender identity, gender expression or sex characteristics; have disclosed their LGBTQI+ status or identity; or whose LGBTQI+ status or identity is otherwise known to the agency. It also requires that the title IV–E/IV–B agency ensure that LGBTQI+ children have access to age- or developmentally appropriate services that support their needs related to their sexual orientation and gender identity or expression. This includes clinically appropriate mental and behavioral health care supportive of their sexual orientation and gender identity and expression as needed.

Comment: Many commenters recommended that the NPRM requirement for the written and verbal notice to be provided in an ''age-appropriate'' manner be revised. They recommended that age appropriate be changed to ''developmentally appropriate.''

Response: We agree with commenters that in addition to providing written and verbal notice in an age-appropriate manner, the notice should also be provided in a developmentally appropriate manner. Therefore, we are revising the final rule to read ''age- or developmentally appropriate.'' This is to be consistent with the definition in section 475(11)(A) of the Social Security Act, 42 U.S.C. 675(11)(A).

Requested Placements

Comment: A number of commenters stated that while the NPRM proposed that the agency must notify the child specified in the NPRM that a safe and appropriate placement was available, they understood it as written that a safe and appropriate placement is only available if the child requested the placement. Some commenters indicated that this would be too heavy a burden on the child to self-identify and to initiate the request, which would exacerbate negative health outcomes for these children. One commenter recommended removing all of paragraph (a)(2) in the NPRM because if all placements are safe and appropriate as required, there would be no need to request one, and others commented that they support this section as proposed.

Response: As we have previously discussed, the final rule expressly provides that all placements, including placements for LGBTQI+ children, must be safe and appropriate. However, we have clarified that because not all placements will be Designated Placements, the rule provides for a process by which a Designated Placement may be offered or requested. HHS intends that there are multiple processes through which Designated Placements may be provided to an LGBTQI+ child, including when initiated by a child's request.

Final Rule Changes: The final rule provides for a process by which an LGBTQI+ child may request a Designated Placement or request that

their current placement be offered services. The final rule maintains the proposed rule's minimum age of notification of 14 and over, and continues to require agencies to provide notice about Designated Placements to those under age 14 who are removed from their home due, in whole or part, to familial conflict about their sexual orientation, gender identity, gender expression, or sex characteristics; have disclosed their LGBTQI+ status or identity; or whose LGBTQI+ status or identity is otherwise known to the agency. In addition, the final rule adds a requirement that the notice given to children must also inform the child of non-retaliation protections and the process whereby a child may report concerns about retaliation.

Section 1355.22(b)(3) Placement and Services Decisions and Changes

Comments: A number of commenters raised concerns about the impact that they believed the proposed regulations would have on the placement stability of LGBTQI+ youth. One commenter raised a concern that if only some foster care providers are designated safe and appropriate for LGBTQI+ children, it may result in decreased placement stability for LGBTQI+ children. Other commenters stated that the result of an LGBTQI+ child requesting a placement that affirms their identity will be to move to another provider, and that such placement changes cause upheaval and trauma for children. Some commenters said that LGBTQI+ youth, especially those who are in placements with their siblings, would avoid requesting Designated Placements for fear of being separated from their siblings, community, or school.

Response: ACF agrees that placement stability is a vitally important component of a youth's experiences and outcomes in foster care, and that placement stability is impacted by a foster care provider being able to meet a child's individual needs. ACF further acknowledges that research shows that LGBTQI+ youth in the child welfare system have lower levels of placement stability compared with other youth.[31]

In response to concerns about placement stability, we note first that the placement stability of LGBTQI+ youth will be positively impacted by a title IV–E/IV–B agency's success in ensuring there are sufficient Designated Placements to meet the needs of LGBTQI+ youth. As clarified in the NPRM, IV–E agencies may claim Federal funds under title IV–E for certain activities to comply with this rule, including recruiting and training providers to be Designated Placements.

ACF further acknowledges that one consequence of an LGBTQI+ child requesting a Designated Placement may be a move to a new placement and that in certain instances, the child's first preference may not be a change in placement but rather that steps be taken to make the current placement more supportive of the child's LGBTQI+ status or identity. Accordingly, we revised the final rule in several important ways.

First, we have made clarifications at § 1355.22(b)(2) related to notification requirements. In addition to the requirement that title IV–E/IV–B agencies implement a process under which a child may request a Designated Placement, this final rule further requires that this process also enables a child to request services for a *current* placement to receive services to become supportive. Agencies must provide notice that the child can request a placement change or services for a current placement, and the process the agency will use for responding to the request. The final rule also clarifies that the title IV–E/IV–B agency's process for considering such a request must provide the child with an opportunity to express their needs and concerns.

Second, we have added a new section at § 1355.22(b)(3) which provides further clarity on how the title IV–E/IV–B agency should reach placement and services decisions. The final rule clarifies that when making placement and service decisions related to an LGBTQI+ child, the title IV–E/IV–B agency shall give substantial weight to the child's expressed concerns or requests when determining the child's best interests. As noted in the final regulatory text, placement decisions should give substantial weight to the child's requests; determining a child's best interests will require that the title IV–E/IV–B agency engage directly with the child to understand their needs and concerns.

The final rule further provides that, to support placement stability, when a request for a placement change or services is made, the title IV–E/IV–B agency must first determine whether actions could be taken to support the current provider in voluntarily meeting the conditions of a Designated Placement, and if the provider is willing to meet the conditions of a Designated Placement, requires that the title IV–E/IV–B agency use the case review process to regularly review the provider's compliance in providing a supportive environment. We believe this clarification in the final rule will allow more LGBTQI+ children to be safely served in their current placement.

Under these revised provisions, if an LGBTQI+ child expressed their preference to receive a Designated Placement, but their current provider had not sought to become a Designated Placement provider, the title IV–E/IV–B agency would be required to consider whether actions could be taken to support the current provider in meeting the conditions of a Designated Placement to maintain the child's placement stability, if the provider wishes to become such a placement. For example, the current placement provider could be offered the opportunity to receive the training needed to become a Designated Placement to better meet the needs of the LGBTQI+ child. Other steps to promote placement stability could include—consistent with child's best interests and the willingness of the provider—more regular visits by the caseworker, or counseling for the child alone or in conjunction with the placement provider to address any challenges.

As noted throughout this rule, we reiterate that nothing in this rule compels any provider to seek to become a Designated Provider. In the case of a provider who is not interested in becoming a Designated Placement for an LGBTQI+ child currently in their care, the title IV–E/IV–B agency could meet the child's needs by placing the child with a Designated Placement provider or, consistent with the child's preference for placement stability and the agreement of the current provider, by providing training and services necessary to make the current placement more supportive. To further support the placement stability of LGBTQI+ children, we reiterate that this rule's prohibition on retaliation encompasses unwarranted placement changes for a child because of their LGBTQI+ status or identity.

Compliance with some requirements of this rule will be assessed through the CFSRs and all requirements are subject to the partial review process. In pertinent part, the CFSRs assess the degree to which States have the necessary array of placement options available to serve the needs of all children who come into their care. The

[31] Wilson, B.D.M., & Kastanis, A.A. (2015). Sexual and gender minority disproportionality and disparities in child welfare: A population-based study. Children and Youth Services Review, 58, Pages 11–17, ISSN 0190–7409, *https://doi.org/10.1016/j.childyouth.2015.08.016.* Poirier, J., Wilkie, S., Sepulveda, K & Uruchima, T., *Jim Casey Youth Opportunities Initiative: Experiences and Outcomes of Youth Who Are LGBTQ,* 96.1 Child Welfare, 1–26 (2018), *https://www.proquest.com/docview/2056448464.*

reviews also assess state performance in ensuring placement stability.

Section 1355.22(c) Process for Reporting Concerns About Placements and Concerns About Retaliation

Section 1355.22(3) of the proposed rule described the process the agency must implement for LGBTQI+ children to report concerns about a placement that does not meet the requirements of this rule and concerns about retaliation. The NPRM proposed to require that title IV–E/IV–B agencies implement a process for LGBTQI+ children to report concerns about any placement that fails to meet the requirements of a placement that is specially designated for LGBTQI+ children. The NPRM proposed that this process must safeguard the privacy and confidentiality of the child. Like the requirement that certain children be notified that specially designated placements for LGBTQI+ children are available, the NPRM proposed that the same children be notified verbally and in writing about the process to raise concerns about a placement. Finally, the NPRM proposed to require that IV–E agencies ''respond promptly'' to a child's reported concern, consistent with the agency's timeframes for investigating child abuse and neglect reports, depending on the nature of the child's report.

Comment: Several commenters expressed their views on how an agency should respond to the child's placement concerns, when to make a placement change, and foster family home licensing considerations, such as placing the license on a hold while the family engages in training and is reassessed.

Response: State and Tribal title IV–E/IV–B agencies have placement and care responsibility for children who are in foster care, and this allows such agencies to make placement decisions for each child on a case-by-case basis. In reference to whether there should always be a placement change when a child expresses a concern, we want to clarify that, absent a safety concern or the specific desires of the child, placement changes should not necessarily be the first course of action. As noted above, the final rule requires that before initiating any placement changes, the title IV–E/IV–B agency must consider whether additional services and training would allow the current provider to meet the conditions for a Designated Placement, and whether the current provider is willing to meet the conditions of a Designated Placement. Thus, with the child's consent and subsequent agreement by the provider, we encourage the agency to offer the foster care provider supports including training, coaching, and information to enable the provider to provide an affirming home for the child. This approach should be prioritized when a child wishes to remain in their placement for reasons of sibling unification, proximity to family and community of origin and schools, wish to remain in a family-like setting, or generally to avoid placement disruption. Where caregivers agree to accept such services and training, we encourage agencies to work in an ongoing way to build caregivers' capacity to provide this kind of care for LGBTQI+ children.

Prompt Response to Concerns

In the NPRM, we requested public comment on whether and how best to define ''promptly'' as applied to the requirement at proposed paragraph (a)(3)(iii) that an agency respond promptly to a child's reported concerns.

Comment: Many commenters offered suggestions on how to define ''promptly'' as it applies to this paragraph. Many commenters responded with several suggestions recommending ''promptly'' be defined as immediate and that these instances should be investigated sooner than current agency timelines for investigating reports of abuse or neglect. Many included a timeframe for response in their recommendation to occur within two hours to 24 hours. Several expressed that any reported concerns should be handled with urgency as the LGBTQI+ population is already identified in the rule as having significant risk. Other commenters recommended ACF not define the term, leave flexibility to states to define it, and suggested that these requests be handled by an independent entity, such as an ombudsman.

Response: ACF has reviewed all of the suggestions, and, while we appreciate the comments, we are not defining ''promptly'' in the final rule. ACF is not mandating a uniform timeframe for agencies to respond to a placement concern as that would be unnecessary when agencies already have established protocols to respond to reports of child abuse and neglect investigations. As such, the title IV–E/IV–B agency will determine the timeframe for responding promptly to a child's report consistent with their existing timelines for agency child abuse and neglect reporting and investigating procedures commensurate with the seriousness of the child's concern. When there is reasonable cause to believe that a child is in imminent danger, most agencies require investigations to be initiated immediately, in as little as two hours and not longer than 24 hours, after the report is made. As part of its existing monitoring process, ACF may evaluate whether a title IV–E/IV–B agency is responding to all concerns promptly, including that those raised by LGBTQI+ children are responded with the same level of promptness as it responds to other comparable concerns. While this final rule does not dictate a timeline for response, a title IV–E/IV–B agency that treated concerns raised by LGBTQI+ children about the safety of their placements with lesser priority than concerns raised by other youth may be subject to the partial review process to determine compliance with this requirement.

Other Comments on Reporting Concerns About a Placement

Comment: Several commenters suggested that ACF monitor and enforce these provisions for responding to placement concerns to the maximum extent possible.

Response: These provisions in the final rule are monitored as part of the partial review process. This means that if ACF becomes aware of a potential non-compliance issue with the provisions in § 1355.22, it will initiate a ''partial'' review, which is a review of state and tribal title IV–E/IV–B plan requirements (45 CFR 1355.33(e)). If there is evidence of non-conformity identified through the partial review process, the state/tribal title IV–E/IV–B agency will be required to enter into a program improvement plan and make necessary changes to come into compliance. Therefore, since there is already an established protocol for monitoring, no changes to the final rule are warranted.

Comment: Several commenters recommended adding a requirement to engage LGBTQI+ youth with lived experience in process development. One commenter recommended that it should be required for agencies to have an independent forum for reporting, investigating, and resolution of reported concerns, such as a Foster Care Ombudsman. One commenter recommended that agencies provide updates about the ''investigation'' to youth and allow options for ongoing communication to keep youth updated such as phone call or email.

Response: We considered these comments and determined to retain the provision as proposed in the NPRM to allow agencies to design their notification processes. Instead, technical assistance is available to states and tribes as warranted in implementing in a manner consistent with best practices, including by engaging youth with lived

experience. Therefore, we are not making changes to the final rule.

Comment: Many organizations recommended adding that the written and verbal communication needed to be developmentally appropriate, rather than age appropriate.

Response: We agree with commenters that in addition to developmentally-appropriate services, a child should have access to developmentally-appropriate communications. Therefore, we are revising the final rule to read that ''notice must be provided in an age- or developmentally appropriate manner, both verbally and in writing.'' This is to be consistent with the definition in section 475(11)(A) of the Social Security Act, 42 U.S.C. 675(11)(A).

Final Rule Changes: As part of the final rule, ACF clarifies that, absent a safety concern or the specific desires of the child, placement changes should not necessarily be the first course of action. The final rule requires the process for reporting concerns about a child's placement also include reports about retaliation. In addition, it adds that a child should receive developmentally-appropriate notice both verbally and in writing of the process for reporting concerns about a placement or retaliation.

Section 1355.22(d) Retaliation Prohibited

In the proposed rule, ACF proposed to require that title IV–E/IV–B agencies must have a procedure to ensure that no LGBTQI+ child in foster care experiences retaliation for disclosing their LGBTQI+ identity, for requesting a specially designated placement for LGBTQI+ children, or for reporting concerns that their current placement does not meet their needs related to being LGBTQI+. The proposed rule described examples of what would be considered retaliatory under the rule.

Comment: Many commenters strongly supported the NPRM's prohibition on retaliation and said that such protections were important for the safety, health, and wellbeing of LGBTQI+ children who face heightened risks when they disclose their sexual orientation or gender identity.

Other commenters raised concerns about the retaliation prohibition and said that religious providers could be accused of retaliation for merely disagreeing with a child's sexual orientation or gender identity. As discussed in Section IV, a couple of commenters asserted that concepts included in the proposed rule that relate to a child's identity place individuals and organizations of faith at risk of being accused of retaliation that would unconstitutionally infringe on their free exercise of religion.

Response: ACF appreciates commenters' views on the rule's prohibition on retaliation. We agree with commenters who observed that LGBTQI+ children are particularly vulnerable to retaliation when their sexual orientation or gender identity is disclosed. We also acknowledge the concerns of some providers who worried about being accused of retaliation when engaged in conduct related to their faith or beliefs. As we address more fully below in our response to the First Amendment and Religious Freedom comments, ACF is committed to upholding Federal protections for free speech, religious exercise, and conscience for all providers and children in the child welfare system. In particular, we have developed this rule in a manner that respects these guarantees. The Department will apply Federal protections for religious exercise, free speech, and conscience, including by applying the Department's regulatory protections for seeking religious accommodations.

In response to requests for clarification, we are first more clearly specifying the actions for which retaliation is impermissible. The proposed rule had referred to retaliation for the child disclosing their LGBTQI+ identity; requesting a placement specially designated for LGBTQI+ children (which the final rule now refers to as Designated Placement); or for reporting concerns about the safety and appropriateness of their current placement. To this list, the final rule makes clear that the intended reference is to both LGBTQI+ status and identity, and further specifies that retaliation is impermissible for having a child's LGBTQI+ status or identity disclosed by a third party; for the child being perceived to have an LGBTQI+ status or identity; or for the child's request or report related to requirements for placements or services.

The proposed rule had specified that retaliation includes unwarranted placement changes including unwarranted placements in congregate care facilities; restriction of access to LGBTQI+ peers; or attempts to undermine, suppress, or change the sexual orientation or gender identity of a child; or other activities that stigmatize a child's LGBTQI+ identity. In response to commenters' requests for greater clarity on what actions would constitute retaliation, the final rule provides additional detail about such actions and how they interact with other provisions of the rule, such as the prohibition on harassment, mistreatment, or abuse in all foster placements.

Comment: Some commenters expressed concern that, in their opinion, the proposed rule did not provide sufficient reassurance that LGBTQI+ children would be protected from retaliation, whether for disclosure of their status or identity, requesting a new placement, or reporting a placement that is not safe and appropriate. One commenter expressed concern that absent Federal protections ''caseworkers could further harm children by engaging in discriminatory behavior,'' and shared the example of a caseworker blaming a child for mistreatment they experienced as a result of their status or identity. This commenter was also concerned that the rule ''fails to protect all families, including kin, and current and prospective foster and adoptive parents'' from discrimination in their interactions with the child welfare system. Finally, this commenter noted that absent Federal protections, officials might use retaliatory child protection investigations, such as a state investigating a parent because of bias toward the child's or the parent's disclosed or perceived identity or status.

Response: We agree with commenters that it is important that children have strong protections against retaliation for having disclosed their LGBTQI+ identity or status and having requested a new placement or reporting a placement that is not safe and appropriate. As a result, we have made several adjustments in the final rule.

First, we specify in paragraph (d)(2)(v) that the title IV–E/IV–B agency will be considered to have retaliated against a child if it uses information about the child's LGBTQI+ identity or status to initiate or sustain a child protection investigation or discloses information about the child's LGBTQI+ identity or status to law enforcement in any manner not permitted by law. While both of these actions already fall under the definition of retaliation in paragraph (d)(2)(iv), which includes ''disclosing the child's LGBTQI+ status and/or identity in ways that cause harm or risk the privacy of the child,'' we believe it is appropriate to name these actions directly in order to give assurance to LGBTQI+ children that such actions are not allowable.

Second, in paragraph (d)(2)(vi), we clarify that the prohibition on retaliation includes retaliation against current or potential caregivers (including foster parents, pre-adoptive parents, adoptive parents, kin caregivers, and birth families) for supporting a child's LGBTQI+ status or identity. We believe

this is necessary to ensure that children can benefit from the protections of this rule, as we are concerned that retaliation against a supportive adult could be used in an effort to prevent or discourage an LGBTQI+ child from requesting or receiving a Designated Placement or necessary services. While we do not define all of the actions that could constitute ''retaliation'' in this context, as it may vary significantly depending on circumstances, we understand it to mean any harmful action taken against a current or potential caregiver for an LGBTQI+ child because of their support of that child's LGBTQI+ identity or status.

Third, § 1355.22(b)(3)(iii) of the final rule includes a requirement that children receiving notice of the availability of Designated Placements also be provided notice of the retaliation protections in this final rule and describe the process by which a child may report a concern about retaliation. The title IV–E/IV–B agency must provide this information in an age- and developmentally appropriate manner, verbally and in writing, and must safeguard the confidentiality of the child. At a minimum, the agency must provide the notice about this process to: (1) all children age 14 and over, and (2) children under age 14 who have been removed from their home due to familial conflict about their sexual orientation, gender identity, gender expression or sex characteristics or have disclosed their LGBTQI+ status and/or identity, or it is otherwise known to the agency. In addition, the agency must respond promptly to the child's concerns, consistent with the agency's timeframes for investigating child abuse and neglect reports.

Finally, in response to comments raising concerns about enforcement of these provisions and safeguards on keeping a child free from retaliation, ACF welcomes the opportunity to clarify that state agencies' compliance with the final rule's requirements will be monitored by CB through the CFSRs, a formal monitoring protocol in which the state's efforts to comply with title IV–E and IV–B program requirements are assessed at the case and systems level.

Comment: Several commenters recommended that the provision be expanded to all children in foster care to ensure no child experiences retaliation. One commenter recommended modifying the final rule to include a prohibition on retaliation of the disclosure of the child's LGBTQI+ ''status'' in addition to the child's identity.

Response: We agree with commenters that retaliation against any child because of their characteristics or identity is harmful and impermissible. For example, title VI of the Civil Rights Act of 1964, which prohibits all recipients of Federal financial assistance from discriminating on the basis of race, color, or national origin, specifically prohibits retaliation against anyone seeking to vindicate a right under that law. This prohibition includes discrimination and retaliation against children based on their shared ancestry or ethnic characteristics, including children who are perceived to be Jewish, Christian, Muslim, Sikh, Hindu, or Buddhist, or of another religious group, if the discrimination is based on their ancestry or ethnic characteristics. The purpose of this rule is to clarify the specific protections necessary for LGBTQI+ youth to receive safe and proper care in an appropriate placement. In particular, safe and proper care for LGBTQI+ youth requires that no child in foster care experiences retaliation as a result of their LGBTQI+ status or identity or for being perceived to have an LGBTQI+ status or identity. This intent is reflected in the current text of the final rule.

Comment: One commenter recommended modifying the final rule to include that a child should not experience retaliation if an LGBTQI+ child's identity is disclosed by a ''third party.''

Response: We agree with the commenter and modified the final rule to ensure a child does not experience retaliation as a result of disclosure of an LGBTQI+ child's identity or status by a third party. As such, the provision now includes a prohibition on retaliation whether the child or a third party discloses the LGBTQI+ child's status or identity. This is to ensure that the provision is applied as broadly as needed and provides protection for a child whose identity or status is shared with another party resulting in the possibility of retaliation as discussed in the preamble of the proposed rule.

Comment: Several commenters recommended that retaliation include restricting normalcy activities (*e.g.,* attempts to restrict access to activities that allow youth to make and maintain friends, and develop problem solving skills) due to their sexual orientation or gender identity. One commenter recommended modifying the final rule to reflect that retaliation is not limited to items listed and can include restriction of access to supportive community resources.

Response: ACF agrees that restricting an LGBTQI+ child's access to age- and developmentally appropriate supportive resources or activities, or access to supportive peers or family members, based on their LGBTQI+ status or identity, would constitute retaliation under this rule. We also agree that disclosing the child's LGBTQI+ status and/or identity in ways that cause harm or risk the privacy of the child are impermissible forms of retaliation. The final rule clarifies the conduct that will be considered retaliation includes the examples listed at § 1355.22(d)(2)(i) through (vi).

Comment: One commenter voiced concern about a ''lack of an enforcement policy related to retaliation'' and stated without significant enforcement policy, the provision is hollow.

Response: We considered the commenters concern and, to provide further clarity, modified the regulatory provisions for monitoring in the final rule. The final rule now includes monitoring a state agency's compliance with the requirements of § 1355.22(d) through the CFSR.

Final Rule Changes: Consistent with the Protections Generally Applicable for all placements, discussed above, the final rule clarifies that harassment, mistreatment, or abuse would also be considered retaliation. In response to comments on other possible retaliatory actions against LGBTQI+ children or their caregivers, the final rule also specifies that a title IV–E/IV–B agency, provider, or any entity acting on behalf of an agency or provider will be considered to have retaliated against a child if it restricts access to developmentally appropriate materials or community resources; discloses private information in a way that causes harm or violates the rights of a child; or uses information about the child's LGBTQI+ status or identity to initiate or sustain an investigatory action. The final rule extends the prohibition on retaliation to include retaliation against current or potential caregivers. It clarifies a requirement that children receiving notice of the availability of Designated Placements also be provided notice of the retaliation protections, and it provides for monitoring state agency compliance through the CFSR.

Section 1355.22(e) Access to Supportive and Age- or Developmentally Appropriate Services

Section 1355.22(a)(5) of the proposed rule described the requirements for the agency to provide access to services that support the child's LGBTQI+ status and/or identity and includes clinically appropriate mental and behavioral health care that is supportive of their

sexual orientation and gender identity and expression.

Comment: Many organizations suggested adding medical care (some referred to this as health care) and clarifying what this entails. Several commenters said it was unclear whether the rule allows or requires gender-affirming medical care, with some commenters opposing access to gender-affirming care and others supporting such access. Many organizations suggested the rule should state that gender-affirming medical care is among the potential age-appropriate resources and services that may support transgender children's health and well-being. Other commenters said that gender-affirming care should never be considered ''appropriate'' services.

Response: This rule does not establish any standard of medical care. Title IV–E agencies determine what services to provide to an individual child, on a case-by-case basis, in accordance with statutory requirements. Specifically, the case plan must assure ''that services are provided to the parents, child, and foster parents in order to improve the conditions in the parents' home, facilitate return of the child to his own safe home or the permanent placement of the child, and address the needs of the child while in foster care, including a discussion of the appropriateness of the services that have been provided to the child under the plan''. See section 475(1)(B) of the Social Security Act, 42 U.S.C. 675(1)(B). What services are appropriate for an individual child would depend on many individual factors, including physicians' recommendations, the input and consent of the child's authorized legal representative or parent, the child's input, and the best available medical guidance at the time. Nothing in this rule preempts state laws regulating the practice of medicine or prohibiting particular treatments.

Comment: Many commenters recommended explicitly defining mental and behavioral health care as broad and inclusive of wellness practices and alternative supports.

Response: Mental and behavioral health supports are examples of required supports for which the agency must provide access to all children in foster care, including LGBTQI+ children. As such, ACF has determined it is not necessary to provide a definition for these examples. Title IV–E/IV–B agencies will determine what mental and behavioral health care services are needed on a case-by-case basis in accordance with a child's case plan to, among other things, facilitate the child's safe return home or the permanent placement of the child.

Comment: Several commenters suggested explicitly prohibiting the use of so-called ''conversion therapy'' and other harmful interventions that undermine and conflict with a youth's identity. Other commenters asked about the definition and ability to use ''talk therapy.'' Others provided information that addressed out of scope issues regarding this topic.

Response: As we stated in the NPRM, efforts to change or suppress a child's sexual orientation, gender identity, or gender expression—also known as so-called ''conversion therapy''—are not supported by credible evidence and have been rejected as harmful by the American Academy of Child and Adolescent Psychiatry, the American Academy of Pediatrics, the American Psychiatric Association, the American Psychological Association, and the National Association of Social Workers, among others. The final rule, at § 1355.22(d)(2)(ii), includes ''Attempts to undermine, suppress, change, or stigmatize a child's sexual orientation or gender identity or expression through so-called ''conversion therapy'' as a form of prohibited retaliation against any child known or perceived to have an LGBTQI+ status or identity.

Section 1355.22(e) requires that the title IV–E/IV–B agency must ensure that LGBTQI+ children have access to age- or developmentally appropriate services that are supportive of their sexual orientation and gender identity or expression, including clinically appropriate mental and behavioral health supports, which can include forms of talk therapy.

Comment: Several commenters had suggestions or requested clarification regarding the terms used in this provision. Several organizations suggested using the term ''developmentally appropriate'' instead of ''age-appropriate.''

Response: We agree with commenters that in addition to age-appropriate services, a child should have access to developmentally appropriate services. Therefore, we are revising the final rule to read ''age- or developmentally appropriate''. This is to be consistent with the definition in section 475(11)(A) of the Social Security Act, 42 U.S.C. 675(11)(A).

Comment: A few commenters recommended ACF provide technical assistance, consultants, or funding to support recruitment of providers in rural areas to support LGBTQI+ children in foster care. Several organizations expressed their views on working with local and national agencies and individuals with lived experience to maintain a list of national resources to assist agencies in identifying supportive and age-appropriate services and to add standards of care for what constitutes clinically appropriate care and services.

Response: ACF has a current solicitation for a training and technical assistance contractor to assist states and tribes by providing training to increase Designated Placements for LGBTQI+ children and youth in foster care. ACF intends to issue implementation guidance for the final rule incorporating many of these recommendations for recruiting Designated Placement providers including in rural areas, including partnering with local and national agencies serving LGBTQI+ youth, and approaches which are informed by the lived experiences of LGBTQI+ children and youth in foster care.

Final Rule Changes: The final rule states that attempts to undermine, suppress, change, or stigmatize a child's sexual orientation or gender identity or expression through so-called ''conversion therapy'' is a form of prohibited retaliation against any child known or perceived to have an LGBTQI+ status and/or identity. The final rule also adds that, in addition to age-appropriate services, a child should have access to developmentally appropriate services.

Section 1355.22(f) Placement of Transgender and Gender Non-Conforming Children in Foster Care

In the NPRM, ACF proposed that when considering placing a transgender, gender non-conforming or intersex child in sex segregated child care institutions, the title IV–E/IV–B agency must place the child consistent with their gender identity. The NPRM further proposed to require that IV–E/IV–B agency also consult with the transgender, gender non-conforming, or intersex child to provide an opportunity to voice any concerns related to the placement when the agency is considering a placement in such a facility.

Comment: A commenter asked that the final rule clarify placement procedures for non-binary and Two-Spirit children living in sex-segregated child care institutions.

Response: As explained in the preamble to the final rule for § 1355.22, non-binary and Two-Spirit children are included throughout this regulation under the term LGBTQI+. Thus, this provision for the agency to place the child consistent with their gender identity also applies to non-binary and Two-Spirit children and we have added the language to reflect this in the

preamble for clarity. When making placement decisions for children whose gender identity doesn't meet the sex-segregated options at the child care institution, the title IV–E/IV–B agency should engage with the child to determine the safest living arrangement that is in the child's best interest among the options that are available, giving substantial weight to the child's request.

Comment: Some commenters expressed concern about the NPRM requirement for children to be placed in sex segregated child care institutions consistent with their self-identified gender identity, not their ''biological sex.'' They stated it is a danger and ''disregards the child's safety and privacy interests to be placed in a mixed-sex setting'' that a child ''may find uncomfortable and invasive or, at worst, unsafe.'' One state recommended that the final rule allow for discussions that incorporate the child's preference as well as safety and risk concerns.

Response: ACF agrees that it is important to incorporate a child's preference for all placements. While ACF believes the requirement to offer a transgender or gender non-conforming child a placement consistent with their gender identity is most applicable to placements in child care institutions and sex segregated facilities, we have determined that it is necessary to extend that requirement to apply to all placements for transgender and gender non-conforming children. ACF accordingly updated the final rule text to apply to all placements for transgender and gender non-conforming children. The final rule text states that, when considering placing a child, the title IV–E/IV–B agency must offer the child a placement consistent with their gender identity. The updated regulatory text is consistent with the statutory requirement to place children in the ''most appropriate setting available'' (section 475(5) of the Social Security Act, 42 U.S.C. 675(5)(A)) and the rule's requirement that title IV–E/IV–B agencies must give substantial weight to the child's expressed concerns or requests when determining the LGBTQI+ child's best interest when making placement and service decisions.

ACF disagrees with the assertion that allowing transgender and other youth to access sex-segregated facilities consistent with their gender identity will diminish safety or privacy. Courts have held that all individuals' safety and privacy can be protected without also excluding transgender individuals from accessing sex-separate facilities and activities consistent with their gender identity.[32] Title IV–E/IV–B agencies have a range of tools at their disposal to accommodate any individuals' privacy concerns in a nondiscriminatory manner. However, a title IV/IV–B agency will be in violation of this rule if it refuses to offer a child a placement consistent with their gender identity. We also note that no application of this rule shall be required insofar as it would violate Federal religious freedom, conscience, or free speech law and that providers may request an accommodation from any rule provision as described in Section IV of the preamble, below.

In addition, the NPRM proposed to require consultation with the child and the final rule maintains this requirement. The final rule requires that the title IV–E/IV–B agency consult with the child to provide an opportunity for the child to voice any concerns related to their placement when the agency is considering placing the child in such a facility.

Comment: One commenter was concerned that the NPRM did not account for the preferences of parents whose rights are intact in these agency placement decisions.

Response: Title IV–B/IV–E agencies have an established responsibility to engage with parents. For example, under 45 CFR 1356.21, title IV–E agencies ''must make reasonable efforts to maintain the family unit and prevent unnecessary removal of a child from [their] home, as long as and the child's safety is assured; [and] to effect the safe reunification of the child and family if temporary out-of-home placement is necessary to ensure the immediate safety of the child.'' Under state and tribal law, parents often also retain certain rights even after their children have been removed from their physical and/or legal custody. We expect that agencies will act with appropriate awareness of parental rights under the law of the applicable state or tribe.

Comment: A few commenters expressed concerns that the provision may conflict with state laws and policies that govern sex-segregated childcare institutions and that many sex-segregated childcare institutions are not equipped to meet these placement requirements.

Response: The requirement to offer children a placement consistent with their gender identity is based on ACF's careful consideration of current research on best practices to promote children's health and wellbeing, as described in Section II of the preamble. This regulatory requirement does not preempt state or tribal laws regarding sex-segregated institutions. It simply requires that a child be offered a placement that is consistent with their gender identity. It thus clarifies, for children in foster care, the IV–E statutory requirement to place foster children in ''a safe setting . . . consistent with the best interest and special needs of the child.'' Section 475(5) of the Social Security Act, 42 U.S.C. 675(5)(A). If a state law prohibits placement in sex-segregated institutions based on gender identity, then the title IV–E/IV–B agency should explore all other placement options in order to offer a foster child a placement consistent with their gender identity, while also meeting the child's other particular needs. ACF further notes that pursuant to § 1355.22(d)(2)(iii), agencies may not place children in child care institutions solely due to their sexual orientation or gender identity or expression or allow child care institutions or other providers to segregate or isolate children on the basis of their sexual orientation or gender identity or expression.

Comment: Some commenters suggested having single or private rooms for youth who are non-binary and Two-Spirit who are placed in sex-segregated childcare institutions to ensure their comfort.

Response: ACF appreciates the commenter's concern for the privacy of such children and notes nothing in this rule would preclude those entities from accommodating the privacy needs of any child in their care. Appropriate placements should be determined based on the child's individual needs and their expressed preferences. We understand the commenters' concern that such children might feel especially uncomfortable in sex-segregated childcare institutions and encourage agencies to work with such children to ensure they receive appropriate placements.

Comment: Commenters made recommendations throughout about how Federal funding should be used and that it should be prohibited in specified circumstances, such as if a childcare institution does not allow children to be placed according to their gender identity.

Response: The final rule does not regulate how Federal funding under title IVE is reimbursed to states and tribes. Eligibility for title IV–E reimbursement of the placement of a particular child is based on many factors, including that the child is placed in a child care institution or foster family home as defined in section 472 of the Social Security Act. The final rule implements

[32] *See, e.g., Grimm* v. *Gloucester City*, 972. F.3d 586 (2020).

title IV–E and IV–B plan requirements, and not the particulars of title IV–E foster care funding. Therefore, the recommendations are not within the purview of this final rule and no changes were made to the final rule.

Final Rule Change: The final rule clarifies that the requirement for title IV–E/IV–B agencies to offer placements for transgender and gender non-conforming children consistent with a child's gender identity applies to all placements, not exclusively to sex-segregated child care institutions.

Section 1355.22(g) Compliance With Privacy Laws

As explained in the NPRM, title IV–E/IV–B agencies are prohibited from disclosing information concerning foster children for any purpose except for those specifically authorized by statute section 471(a)(8) of the Social Security Act. Information about a foster child's LGBTQI+ identity or status, as well as any other information in their foster care case file, is protected by these confidentiality requirements. Foster children's personal information may only be disclosed for specific authorized purposes, which are, in paraphrase: the administration of the title IV–E plan and that of other Federal assistance programs; any investigation, prosecution, or audit conducted in connection with any of those programs; and reporting child abuse and neglect to appropriate authorities. Under ACF regulations and policy, information that the IV–E/IV–B agency discloses for those allowable purposes may not be redisclosed by recipients unless the redisclosure is also for one of the enumerated allowable purposes. 45 CFR 205.50; Child Welfare Policy Manual 8.4E.

Comments: Commenters provided input on the impact of the regulations on the privacy and confidentiality of LGBTQI+ youth. In addition, in the NPRM we requested public comment on what further guidance states may need on producing administrative records to monitor and track requests for safe and appropriate placements for LGBTQI+ children, while protecting the privacy and confidentiality of all children.

Several commenters expressed concerns that children may feel unsafe disclosing their LGBTQI+ identity or reporting mistreatment in their current out-of-home placement due to their sexual orientation or gender identity. LGBTQI+ youth with lived experience in foster care have shared in comment letters, surveys, and testimony that they do not disclose their sexual orientation, gender identity or expression to foster parents and caseworkers for fear of lack of acceptance, unwarranted placement changes, fear of separation from siblings and/or unwarranted placements in congregate care facilities, feeling a ''taboo'' against sharing their LGBTQI+ identity, fearing prejudice, and lacking privacy. Commenters additionally stated that state laws restricting discussion of LGBTQI+ identities in school may have a chilling effect on whether children feel safe disclosing their sexual orientation or gender identity.

A few commenters made suggestions related to enhanced confidentiality provisions for data collection on a child's sexual orientation, gender identity, or sex characteristics. These included a recommendation to include a provision to require the agency to disclose information only when necessary for the wellbeing of the child or required by court, to regulate permissible uses of data, data sharing, and data security/storage protocols, to require consistency with confidentiality requirements for health data, and to require the child's consent to any disclosure under section 471(a)(8) of the Social Security Act (42 U.S.C. 671(a)(8)) about a specific child's sexual orientation, gender identity, or sex characteristics. Two commenters recommended provisions on how to store, seal and maintain a child's record. Specifically, they stated that the final rule should require agencies to seal physical records related to a child's sexual orientation, gender identity or expression and separately maintain the information from the case record and that electronic records should be maintained under separate, heightened data security levels.

Response: These experiences and concerns illustrate the need for data confidentiality, and protections from retaliation for disclosure or presumption of a child's LGBTQI+ identity and status. Such requirements are essential to help ensure that children will feel safe to disclose their identity and request Designated Placements.

Some states have existing privacy and data confidentiality requirements related to foster children's sexual orientation, or gender identity or expression. For example, California law provides that all children in foster care have the right ''to maintain privacy regarding sexual orientation and gender identity and expression, unless the child permits the information to be disclosed, or disclosure is required to protect their health and safety, or disclosure is compelled by law or a court order.'' Cal. Welf. & Inst. Code sec. 16001.9(a)(19). In response to comments, and to address risks related to the disclosure of a child's LGBTQI+ status or identity and to help ensure children feel safe in making such disclosures and requesting Designated Placements, the final rule includes a number of important protections. First, § 1355.22(b)(2) provides that the process for requesting a Designated Placement or services to make a current placement a supportive one must safeguard the privacy and confidentiality of the child, consistent with section 471(a)(8) of the Social Security Act (42 U.S.C. 671(a)(8)) and 45 CFR 205.50. Second, § 1355.22(c) provides that the process for reporting concerns about a current placement must safeguard the privacy and confidentiality of the child, consistent with section 471(a)(8) of the Act (42 U.S.C. 671(a)(8)) and 45 CFR 205.50. Third, § 1355.22(d)(2)(v) provides that prohibited retaliation includes disclosing the child's LGBTQI+ status or identity in ways that cause harm or risk the privacy of the child or that infringe on any privacy rights of the child. Fourth, § 1355.22(g) specifies that the title IV–E/IV–B agency must comply with all applicable privacy laws, including section 471(a)(8) of the Act (42 U.S.C. 671(a)(8)) and 45 CFR 205.50, in all aspects of its implementation of this section, and that information that reveals a child's LGBTQI+ status or identity may only be disclosed in accordance with law and any such disclosure must be the minimum necessary to accomplish the legally-permitted purposes. The amount of information necessary to achieve the purpose of the disclosure would be determined on a case-by-case basis and in consideration of the best interest of the child. For example, the information needed to make a referral for a child to receive services related to the child's identity or status could be greater than another type of referral for services. In addition, states that allow open courts would want to be mindful about the information shared in reports to the court as that information could be later shared openly.

The incorporation of these provisions is consistent with existing legal requirements relating to privacy and confidentiality. As discussed earlier in the preamble, title IV–E/IV–B agencies are required to maintain a child's information confidentially and may disclose it only for purposes specifically authorized by law. Under ACF regulations and policy, information that the IV–E/IV–B agency discloses for those allowable purposes may not be redisclosed by recipients unless the redisclosure is also for one of the enumerated allowable purposes. 45 CFR 205.50; Child Welfare Policy Manual

8.4E. Regarding the statutory provision that allows title IV–E/IV–B agencies to disclose a child's information for investigations, prosecutions, criminal or civil proceedings, or audits ''conducted in connection with the administration of any [Federal assistance] programs,'' the requirement that the proceeding or audit be ''conducted in connection with the administration'' of title IV–E or another Federal assistance program strictly limits the disclosures allowed. Title IV–E/IV–B agencies may not disclose information for purposes such as investigating whether children or families are in compliance with generally-applicable state or local laws, as such investigations would not be conducted in connection with the administration of a Federal assistance program.

Final Rule Changes: The final rule includes several revisions to address privacy protections. Paragraph (g) was added to make explicit that title IV–E/IV–B agencies must comply with all applicable privacy laws, including section 471(a)(8) of the Act and 45 CFR 205.50. Information revealing a child's LGBTQI+ status or identity may only be disclosed in accordance with law. Such disclosure should be the minimum necessary to accomplish the legally-permitted purposes. The final rule also includes disclosing the child's LGBTQI+ status or identity in ways that cause harm as conduct that constitutes prohibited retaliation. It also specifies that the title IV–E/IV–B agency must comply with all applicable privacy laws.

Section 1355.22(h) Training and Notification Requirements

In the NPRM, ACF proposed to require that in order to meet the requirements of the rule, title IV–E agencies must ensure that its employees who have responsibility for placing children in foster care, making placement decisions, or providing services are trained to implement the procedural requirements of this section, and are adequately prepared with the appropriate knowledge and skills to serve an LGBTQI+ child related to their sexual orientation, gender identity, and gender expression. The NPRM further proposed that the IV–E agency must ensure that all of its contractors and subrecipients who have responsibility for placing children in foster care, making placement decisions, or providing services are informed of the procedural requirements to comply with this section, including the required non-retaliation provisions. Finally, the NPRM proposed that the IV–E agency must ensure that any placement providers who have not chosen to become designated as safe and appropriate placements for LGBTQI+ children are informed of the procedural requirements to comply with this section, including the required non-retaliation provision.

Comment: Several organizations recommended engaging LGBTQI+ youth with lived experience in development and implementation, providing guidance or resources on minimum number of hours, frequency of trainings, curricula, topics, developing a list of curricula, or core elements for training requirements for employees. Many of the commenters provided specific topics and/or core elements and suggested curricula. A few commentors also recommended that the trainings be certified by certain non-profit agencies.

Response: We have reviewed all the recommendations and appreciate recommendations for high-quality training. ACF has determined not to make any changes to the final rule in order to provide appropriate flexibility to agencies to determine the breadth of training consistent with the statute and rule and not prescribe specific requirements on hours, frequency, development, implementation, topics, or core elements. ACF intends to issue implementation guidance for the final rule which incorporates many of these recommendations for high-quality initial and ongoing training for providing supportive care for LGBTQI+ children. We expect the guidance will be informed by the lived experiences of LGBTQI+ children and youth in foster care, and we encourage title IV–E/IV–B agencies to engage LGBTQI+ youth with lived experience in foster care in developing employee trainings. Further, ACF is committed to providing ongoing training and technical assistance to assist states, tribes, and agencies to provide training to increase Designated Placements for LGBTQI+ children in foster care.

Comment: Several commenters recommended that training should be mandatory for all staff, including all contractors and subrecipients of the child welfare agency.

Response: ACF has determined not to make any changes to the final rule for the following reasons: it would be overly burdensome to title IV–E/IV–B agencies to have specific training requirements for those employees who do not have responsibility for placing children in foster care, for making placement decisions, or for providing services. The rule is designed to effectuate Designated Placements in the least burdensome manner possible. Thus, the final rule retains the provision as proposed.

Comment. Some commenters recommended that all agency contractors must be informed of the procedural requirements.

Response: The requirement to be informed of the requirements in the final rule is essential only for those contractors that are fulfilling foster care placements and services. We are not expanding the requirement to include contractors and subrecipients who are not going to be involved with placements because it is unnecessary and overly burdensome for the agency to notify such contractors and subrecipients about the requirements of the rule. Thus, no changes to the final rule are warranted.

Comment: Some commenters recommended that all providers, including those that are seeking to serve as a designated placement for LGBTQI+ children must be informed of the procedural requirements.

Response: We agree with the commenters and have revised the final rule to ensure that all foster care providers are informed about the provisions in the final rule. Providers who are Designated Placements will receive additional training to meet the needs of the LGBTQI+ child, as knowing the full protections required for these children is necessary for fulfilling their role as a Designated Placement.

Final Rule Changes: The final rule clarifies agencies must ensure that all placement providers are informed of the procedural requirements to comply with this rule, including the required non-retaliation provisions.

Section 1355.22(i) Protections for Religious Freedom, Conscience, and Free Speech

Comment: Many commenters raised concerns that religious families and organizations will have sincerely held religious beliefs that conflict with the rule and as a result, those families and organizations will be deemed to not be ''safe and appropriate'' by the Federal Government. These commenters asserted that both individuals and organizations of faith will be discouraged from applying or continuing to provide foster care services because they will be penalized for their beliefs. Another commenter said that if adhering to a certain view of sexuality equates to a hostile environment, faith-based institutions and religious foster parents will not fit the standard. Similarly, a commenter wrote that a ''safe and appropriate'' placement designation implies that a home that espouses certain ethics of

marriage, sexuality, and gender identity is harmful to LGBTQI+ children. Several commenters also stated that in order to be considered a safe and appropriate placement, a provider would be expected to utilize the child's identified pronouns, chosen name, and allow the child to dress in an age-appropriate manner that the child believes reflects their self-identified gender identity and expression.

Response: ACF appreciates the vital role that faith-based providers and families of faith play in the child welfare system. Indeed, many families of faith are compelled by their religious beliefs to provide loving care to children in foster care, including LGBTQI+ children. ACF further anticipates that some faith-based providers and families of faith will seek to become Designated Placements for LGBTQI+ children, while others will choose not to do so.

ACF remains fully committed to complying with all religious freedom, free speech, and conscience laws and regulations, including the First Amendment and the Religious Freedom Restoration Act (RFRA), 42 U.S.C. 2000bb *et seq.,* as well as all other applicable Federal civil rights laws and HHS regulations including 45 CFR part 87 (''Equal Treatment for Faith-Based Organizations''). A provider requesting any accommodation would submit the request to their state's or tribe's title IV–E/IV–B agency. If the title IV–E/IV–B agency determines that the request concerns an objection based on religious freedom, conscience, or free speech to an obligation that is required or necessitated by this rule, the title IV–E/IV–B agency must promptly forward the request to ACF, which will consider the request in collaboration with the HHS Office of the General Counsel. ACF will carefully consider any organization's assertion that any obligations imposed upon them that are necessitated by this final rule conflicts with their rights under the Constitution and Federal laws that support and protect religious exercise, free speech, and freedom of conscience. Under ACF's established practice, a state or tribe may not disqualify from participation in the program a provider that has requested the accommodation unless and until the provider has made clear that the accommodation is necessary to its participation in the program and HHS has determined that it would deny the accommodation. See 45 CFR 87.3(c) and (q) (2014).

We reiterate that this rule does not diminish each state's and tribe's obligation to ensure that faith-based organizations are eligible on the same basis as any other organization to participate in child welfare programs administered with title IV–E and IV–B funds. *See* 45 CFR 87.3(a) (2014). Further, states and tribes are prohibited from discriminating for or against an organization on the basis of the organization's religious character, motives, or affiliation, or lack thereof, or on the basis of conduct that would not be considered grounds to favor or disfavor a similarly situated secular organization. *Id.*

Finally, to address some of the concerns that religious providers who decline to become designated as a placement provider for LGBTQI+ children could be deemed unsafe, the final rule uses different and clearer terminology, as outlined earlier in this preamble. The preamble notes that all placements must be safe and appropriate for all children, regardless of their sexual orientation or gender identity. And the final rule clarifies that all placements of LGBTQI+ children, like all other children, must be safe and appropriate, whereas placements that are offered by providers who decide to become specially designated to provide care for LGBTQI+ children will be referred to as Designated Placements. As we have explained elsewhere in this preamble, the general requirement to avoid harassment, mistreatment, and abuse—which applies to all children in all placements—does not turn on a provider's religious or nonreligious motivation for engaging in conduct that rises to the level of harassment, mistreatment, or abuse. Nor would a provider's merely holding particular views about sex and gender, whether for religious or nonreligious reasons, nor would respectful efforts to communicate with LGBTQ+ children about their status or identities violate that general requirement.

Comment: Some commenters discussed the impact of the rule on kinship caregivers who are people of faith, and who may have religious concerns or objections to provisions within this rule. For example, one commenter said that the proposed rule would require training for relatives of children who are LGBTQI+ in some circumstances. The commenter wrote that such a rule would violate the religious beliefs of kinship caregivers. Another commenter said that although the rule provides an exemption framework for religious providers, that framework does not appear to apply to individual foster parents. Similarly, the commenters expressed concern about how the proposed rule would impact individual foster care providers with deeply held religious beliefs that are not affiliated with a faith-based organization—which could include kinship caregivers.

Response: ACF appreciates that kinship caregivers often provide the best possible placement for a child in foster care. That includes kinship caregivers who are people of faith. Title IV–E agencies should seek to comply with the requirements of this rule while continuing to prioritize placements with kinship caregivers whenever a caseworker has determined that doing so is in the best interest of a child.

To be clear as to the training requirement, this final rule only requires that providers, including kinship caregivers, be informed of the procedural requirements of this rule, including the non-retaliation provision. The separate training requirement in paragraph (b)(1)(ii) applies only to those providers who voluntarily choose to offer Designated Placements. ACF understands that there could be instances in which a kinship caregiver has a religious objection to a requirement in this rule. But that does not mean the rule violates the religious beliefs of all kinship caregivers, or any other providers, irrespective of whether they have requested an accommodation. As with any provider that requests a religious accommodation, a kinship caregiver with a religious objection to a requirement of the rule could seek an accommodation by submitting the request to their state's or tribe's title IV–E/IV–B agency, which should then follow the same process that applies to other providers. As discussed more fully above, under that process, if the title IV–E/IV–B agency determines that the request concerns an objection based on Federal legal protections for religious exercise, free speech, or conscience an obligation that is required or necessitated by this rule, the title IV–E/IV–B agency must promptly forward the request to ACF, which will consider the request in collaboration with the HHS Office of the General Counsel.

As ACF acknowledged in the proposed rule preamble, in *Fulton* v. *City of Philadelphia,* 593 U.S. 522 (2021), the Court held that Philadelphia's decision to apply a non-discrimination requirement to a specific faith-based foster care provider, having made clear that the city had ''no intention'' of granting an exception to that organization, violated the Free Exercise Clause of the First Amendment. *Id.* at 535. In contrast, in the preambles to both the proposed rule and this final rule, ACF has made clear that the agency is fully committed to carefully considering any provider's assertion that any obligations imposed upon them that are necessitated by this

final rule conflict with their rights under the Constitution and Federal laws and regulations supporting and protecting religious exercise and freedom of conscience. ACF will enforce these Federal protections by granting religious accommodations that are consistent with them where appropriate. RFRA protects the religious liberty rights of individuals as well as ''corporations, companies, associations, firms, partnerships, societies, and joint stock companies.'' 42 U.S.C. 2000bb–1; 1 U.S.C. 1. This practice of considering such requests on a case-by-case basis is consistent with applicable department-wide regulations at 45 CFR 87.3(b) and (c). This individualized approach to any religious accommodation requests is also practical because ACF expects that many other care providers of varying religious or nonreligious backgrounds will be willing to be Designated Placements. ACF also recognizes that the facts that are relevant to any potential objection may vary considerably because the involvement of the child welfare system in kinship care varies from jurisdiction to jurisdiction as each state or tribe has its own laws and practices. For example, while some potential kinship care providers may have a pre-existing relationship with a child in foster care, others may not.

Through the religious accommodation process to which ACF refers above, this rule recognizes that, insofar as the application of any requirement under this section would violate applicable Federal protections for religious freedom, conscience, and free speech, such application shall not be required. It also states that nothing in this rule shall be construed to require or authorize a state to penalize a provider in the state's titles IV–E and IV–B program because the provider does not seek or is determined not to qualify as a Designated Placement.

Final Rule Change: The final rule clarifies that insofar as the application of any requirement under the rule would violate applicable Federal protections for religious freedom, conscience, and free speech, such application shall not be required. The proposed rule did not include this provision in the proposed regulation text.

Section 1355.22(j) No Penalties for Providers That Do Not Seek To Qualify as Designated Placements

Comment: Several commenters suggested that any agency contractors or subcontractors and their licensed foster care providers who do not seek a special designation to serve LGBTQI+ children should not have a contract with the state or at a minimum should not be able to utilize or claim any Federal funds. Other commenters asserted that the rule will penalize those providers who do not seek that designation and will thus discourage them from applying or continuing to provide foster care services.

Response: ACF does not intend for this final rule to require any provider to seek the status of a Designated Placement. To make that point clear, we have added a new § 1355.22(j). This provision states that nothing in this rule requires or authorizes a State to penalize a provider in the state's titles IV–E and IV–B program because the provider does not seek or is determined not to qualify for the status of a Designated Placement under this rule. It therefore underscores our intent that, as far as Federal law is concerned, the choice to become a Designated Placement is a voluntary one to be made by each foster care provider. By adopting this structure, ACF ensures that LGBTQI+ children in the foster care system will have Designated Placements available to them without requiring states or tribes to override the choices of providers who do not wish to be Designated Placements.

Final Rule Change: The final rule clarifies that nothing in the rule shall be construed to require or authorize a state or tribe to penalize a provider in the state's titles IV–E and IV–B program because the provider does not seek or is determined not to qualify as a Designated Placement under this rule. The proposed rule did not include this provision.

Section 1355.22(k) Severability

Section 1355.22(e) of the Proposed Rule described the severability provision in the event that a portion of the rule, if final, is determined by be invalid or unenforceable.

We received no comments about this section and made no changes to the final rule, as it appears at § 1355.22(k).

Section 1355.22(l) Implementation

Comment: We received comments expressing concerns that the provisions in the rule added burden on child welfare agencies. One commenter indicated that its state would require two to three years to implement these new provisions.

Response: We acknowledge that agencies will need time to come into compliance with these provisions, and this final regulation provides approximately two Federal fiscal years for implementation. The implementation date is on or before October 1, 2026.

Section 1355.22(m) No Effect on More Protective Laws or Policies

Comment: Commenters sought clarity about whether this regulation would preempt conflicting state laws.

Response: As noted throughout this preamble, this rule does not preempt state laws that regulate health care or other matters that extend beyond the federally funded title IV–E/IV–B system. Rather, it interprets key terms that delineate the care title IV–E/IV–B agencies must provide to foster children in the programs carried out with Federal title IV–B and IV–E financial assistance. It is within HHS' authority to implement the requirements applicable to the receipt of Federal matching funds under the Social Security Act for the administration of the title IV–B and IV–E programs, and nothing in this regulation requires state agencies or other persons to fail to comply with general state laws that regulate matters like health care that go beyond the foster care system.

This rule sets a Federal floor for safe and appropriate care of LGBTQI+ children in the title IV–B/IV–E program. But it does not limit states from providing additional protections to those children. To clarify that point, in this final rule, ACF has added a new § 1355.22(m), entitled ''No effect on more protective laws or policies.'' This provision applies to the entirety of the final rule and makes clear that nothing in the rule shall limit any State, Tribal, or local government from imposing or enforcing, as a matter of state law, requirements that provide greater protection to LGBTQI+ children than this rule provides. This provision makes clear that, in the context of LGBTQI+ children, the final rule creates a Federal floor to enforce Congress's mandate that children in title IV–E/IV–B programs receive safe and appropriate care. The rule requires that states ensure that they have a sufficient number of Designated Placements to serve all children in foster care who identify as LGBTQI+ and request or would benefit from such a placement. It imposes certain specific requirements on providers who have voluntarily agreed to serve as Designated Placements. It reaffirms that all children in title IV–E/IV–B programs, including LGBTQI+ children, are entitled to protections against harassment, abuse, and mistreatment, regardless of their placement. And it creates specific nonretaliation protections for LGBTQI+ children, also regardless of their placement.

ACF believes that these provisions, taken together, advance the statutory guarantee that children in title IV–E/IV–

B programs receive safe and appropriate care. But those provisions set a floor only. States and tribes may legitimately decide that the welfare and interests of LGBTQI+ children require greater protection. Nothing in titles IV–E and IV–B authorizes ACF to stand in the way of those state decisions, and ACF makes clear in this provision it has no intention to do so.

ACF understands that a number of States have adopted statutes or policies that provide protections for LGBTQI+ children that go beyond those in this rule. Some of these States require training on how to support LGBTQI+ youth for all providers. See, *e.g.,* N.M. Admin. Code 8.26.5.18.A.(3) (requiring policies to ''educate prospective and current foster or adoptive families on how to create a safe and supportive home environment for youth in foster care regardless of their sexual orientation, gender identity or gender expression''). Others have adopted their own detailed requirements governing placements for LGBTQI+ children. See, *e.g.,* MD Policy SSA–CW #23–05 (Dec. 15, 2023). In a recent review of state laws and policies, ACF found that ''[l]aws and policies in 22 States and the District of Columbia require that agencies provide youth who identify as LGBTQIA2S+ with services and supports that are affirming of the youth's LGBTQIA2S+ identity and are tailored to meet their specific needs.'' Children's Bureau, *Protecting the Rights and Providing Appropriate Services to LGBTQIA2S+ Youth in Out-of-Home Care* at 2 (2023) (footnote omitted). In particular, ''[p]olicies in 21 States and the District of Columbia address the needed qualifications for persons who provide out-of-home care for children or youth who identify as LGBTQIA2S+.'' *Id.* at 4 (footnote omitted). And ''[f]ifteen States and the District of Columbia require training on LGBTQIA2S+ issues for foster caregivers and related staff.'' *Id.* (footnote omitted). These state laws and policies rest on the State's authority to provide protections for children in its foster care system, not on this final rule. The State's authority to provide those protections preexisted this final rule, and nothing in this final rule limits a State's, tribes, or local government's power to impose or enforce laws and policies like these.

Final Rule Change: The final rule clarifies that nothing in the rule shall limit any State, tribe, or local government from imposing or enforcing, as a matter of law or policy, requirements that provide greater protection to LGBTQI+ children than the rule provides. The proposed rule did not include this provision.

Section 1355.34(c) Criteria for Determining Substantial Conformity

Section 1355.34(c)(2)(i) describes an amendment to the Child and Family Services Review (CFSR) to monitor compliance with requirements in § 1355.22(b)(1).

Comment: Several commenters expressed support of this provision; however, one state expressed concern with monitoring the proposed placement provisions through the CFSR, stating it is already a cumbersome review process. In addition, a few commenters provided recommendations that are not within the purview of this final rule, such as changing the overall CFSR process and others suggested expanded monitoring processes in addition to the CFSR. Several commenters raised the concern that the proposed rule's prohibition on retaliation would not be enforced.

Response: We are modifying the final rule to expand the requirements in the rule to be monitored through the CFSR to include the retaliation provisions in paragraph (d) and Designated Placements and services requirements in paragraph (b), as applicable. Under the current CFSR regulations, the Children's Bureau reviews how state title IV–E agencies ensure the appropriateness of foster care placements as required by the title IVE/IVB case review system. Monitoring through the CFSR is the appropriate vehicle because the final rule implements these statutory case review system requirements that agencies must meet for LGBTQI+ children in foster care.

Comment: One state questioned how ACF intends to monitor compliance with these regulations and whether ACF anticipates making changes to reporting requirements for LGBTQI+ children and youth.

Response: As stated in the NPRM preamble, ACF will monitor both state and tribal title IV–E/IV–B agency plan compliance with the requirements of § 1355.22 using the partial review process outlined in § 1355.34(c)(2)(i). If ACF becomes aware of a potential non-compliance issue with § 1355.22, it will initiate the partial review process. In addition, the final rule now includes monitoring a state agency's compliance with § 1355.22(b) and (d) through the CFSR. Related to changes in reporting, the requirements in the final rule must be included in the state or tribe's title IV–E plan that ACF must review and approve.

Comment: One commenter recommended HHS clarify how, if at all, this proposed rule will impact state laws and questioned whether it was HHS's position that this rule will preempt state law? Would such state laws disqualify states from receiving funding for foster care or lead to an enforcement action by HHS? One commenter expressed concern that enforcing the requirements for safe and appropriate placements for LGBTQI+ children would constitute Federal overreach. The commenter also stated that the final rule would ''enforce a narrow definition of this requirement that usurps a state's constitutional authority to determine what is in the best interests of a child in its foster care system.''

Response: ACF refers commenters to our responses in section IV of the preamble to comments regarding federalism, nondelegation and Spending Clause concerns. As noted there, this rule does not preempt generally-applicable state laws. Rather, it interprets key terms regarding the care title IV–E/IV–B agencies must provide to foster children in order to qualify for the Federal title IV–B and IV–E Federal financial assistance programs. ACF also refers commenters to the new § 1355.22(m), entitled ''No effect on more protective laws or policies,'' which is discussed above.

Comment: A few commenters recommended to expand agency accountability beyond monitoring through the CFSR or to modify the CFSR process. Suggestions included to engage with impacted youth and families, youth advisory boards, and other experts, develop qualitative data collection and reporting processes, and provide annual reports to ACF.

Response: ACF reviewed the suggestions provided but we are not making any changes to add other monitoring requirements. Several of the recommendations are outside the authority of this final rule because they are suggestions for changing ACF's monitoring process or adding new monitoring processes for the provisions in the rule. However, ACF would like to note that the CFSR process includes reviewing qualitative data and consultation with youth and others as required under those regulations. For example, as part of the Round 4 CFSRs, through a series of focus groups, 18 young people with self-identified lived child welfare experience were asked about the best methods of recruiting, engaging, supporting, and retaining young people in all aspects of the CFSRs.

Final Rule Changes: ACF is retaining the provision in the final rule as proposed to review § 1355.22(b)(1) (which was numbered as § 1355.22(a)(1)

in the NPRM) and adding provisions to also review § 1355.22(b) and (d) through the CFSR, which is the authority that governs reviews of title IV–B and IV–E programs.

Comments on Cross-Cutting Issues

In the proposed rule, ACF requested public comment on various topics and provisions in the NPRM. Responses to these questions are described below.

Kinship Caregivers

In the NPRM, we requested public comment on how agencies can best comply with the requirements of the proposed rule and prioritize placements with kinship caregivers. In particular, we invited public comment on what resources agencies might need from HHS to support kinship caregivers in caring for an LGBTQI+ child.

Comments: Many commenters suggested that kinship caregivers should have access to specific training and support to ensure that they can provide a caring and nurturing environment for their LGBTQI+ child in foster care. Several commenters emphasized that the training should be culturally responsive and developed, delivered, and evaluated in partnership with youth with lived experience in foster care, kinship caregivers, and foster parents. They identified specific programs such as Family Builders' Youth Acceptance Project, Affirm for Caregivers, and Trans-Generations. A few commenters suggested specific faith-based trainings or faith-based partnerships to train and support religious families and kinship caregivers to promote family reconciliation and preservation, decreasing the need for foster care services, and improving outcomes for LGBTQI+ youth.

Many commenters expressed that Federal funding for recruitment, retention, and support of kinship caregivers is limited, and made suggestions for additional or enhanced funding for title IV–E/IV–B agencies. Several commenters recommended flexibility for states to offer exceptions or alternatives to the requirements of this rule for kinship caregivers when it is in the best interest and desire of a child.

A few commenters also urged HHS to enhance support for kinship placements, such as finding ways for agencies to get more Federal funding for pre-placement and in-placement supports, like mental or behavioral health services, skills-based trainings, and the ability to become a therapeutic foster home. They suggested that agencies enhance the staff dedicated to kinship support, increase engagement with kin early in a case, increase assistance to kinship navigator programs, and offer more support to kin to become licensed.

Other commenters said that LGBTQI+ children should not be placed with kin caregivers unless those caregivers have been designated as supportive for LGBTQI+ youth, meeting the requirements the rule would impose on any other placement.

Response: ACF recognizes the vital role that kin caregivers play in supporting children in the child welfare system. Indeed, a robust body of evidence suggests that children in foster care have better outcomes when they are placed with kin caregivers.[33]

ACF appreciates the opportunity to clarify that title IV–E/IV–B agencies are encouraged to continue their work to improve access to kinship care alongside implementing the requirements of this regulation. Indeed, ACF anticipates that in many instances, expanding access to kinship care and complying with the requirements of this rule will not be in tension. For example, some LGBTQI+ children may enter the foster care system unrelated to a familial conflict over their sexual orientation or gender identity. Other children who enter foster care because of a conflict with family over their LGBTQI+ status or identity may have a supportive relative who is willing to serve as a kin caregiver and a Designated Placement.

While ACF is not adopting commenter's requests to include an exception from the requirements of this rule for kin caregivers, ACF has revised the final rule, as explained above, to provide that when a request for a placement change or services is made, the title IV–E/IV–B agency must consider whether additional services and training would allow the current provider to meet the conditions for a Designated Placement. If so, the title IV–E/IV–B agency must use the case review system to regularly review the status of a placement that has elected to become a Designated Placement to ensure progress towards meeting the conditions of such a designation. These steps would also apply to kin placements.

ACF strongly encourages title IV–E/IV–B agencies to identify or develop services that effectively prioritize preserving placement stability by offering kin caregivers the resources, training, and support needed to serve as Designated Placements and otherwise meet the specific needs of LGBTQI+ children.

In many instances, ACF anticipates that kin caregivers will be the provider who can best meet the needs of an LGBTQI+ child. In some cases, the kinship caregiver will not wish to seek designation or serve as a supportive placement for a child as identified in paragraph (b)(1). Where the child prefers the kinship placement, and where the kinship caregiver can provide a safe and appropriate placement under this rule, even if it is not a Designated Placement as outlined in paragraph (b)(1), the kinship placement may often be in the children's best interest; in those circumstances, the kinship placement would not be inconsistent with this rule.

As the proposed rule laid out, title IV–E agencies may use Federal IV–E funds to provide trainings for providers seeking to become a Designated Placement or to recruit new Designated Placement providers. We appreciate the opportunity to clarify that providing additional resources and training to kinship caregivers to allow them to serve as a Designated Placement for an LGBTQI+ child, when caregivers choose to do so, would be an allowable use of IV–E funds. In addition, a recently published ACF final rule allows a title IV–E agency to claim title IV–E Federal financial participation (FFP) for the cost of foster care maintenance payments (FCMP) on behalf of an otherwise eligible child who is placed in a relative or kinship licensed or approved foster family home when the agency uses different licensing or approval standards for relative or kinship foster family homes and non-relative foster family homes.[34]

Impact of the Regulation on Foster Provider Availability and Participation

Requests for Comment on Recruitment of Providers To Support LGBTQI+ Children

In the NPRM, we requested public comment on how ACF can best support agencies in recruiting providers who

[33] Epstein, (2017) Kinship Care is Better for Children and Families; Generations United. (2016). Children Thrive in Grandfamilies: *https://www.grandfamilies.org/Portals/0/Documents/General%20Kinship%20Publications/ABA%20CLP%20full%20kinship%20edition%20-%20julyaug2017.pdf*. Miller, ''Creating a Kin-First Culture,'' July 1, 2017; Child Welfare Information Gateway. (2022). Kinship care and the child welfare system. U.S. Department of Health and Human Services, Administration for Children and Families, Children's Bureau. *https://www.childwelfare.gov/pubs/f-kinshi/*).

[34] 45 CFR part 1355. See 88 FR 66700, September 28, 2023 (*https://www.federalregister.gov/documents/2023/09/28/2023-21081/separate-licensing-or-approval-standards-for-relative-or-kinship-foster-family-homes#:~:text=In%20addition%2C%20the%20final%20rule,related%2Fnon%2Dkinship%20foster%20family*).

will be able to provide safe and appropriate placements for LGBTQI+ children.

Comments: Many commenters responded with several suggestions on how to support states and tribes' recruitment efforts. Some commenters expressed concern that Federal funding for recruitment, retention, and support for foster family caregivers is limited. They suggested that HHS convene workgroups and provide more guidance/best practices/technical assistance on recruitment strategies for foster family homes, collaborate with agencies to provide training for prospective foster families and employees of childcare institutions, make additional financial resources available to foster families, target assistance to rural areas, and adopt nondiscrimination protections prohibiting agencies from rejecting prospective LGBTQI+ providers. Other commenters made suggestions on how title IV–E/IV–B agencies can increase their pool of available providers. They suggested regularly reporting to state legislatures and the public on the pool of available providers and recruitment efforts.

Several commenters recommended that agencies expand partnerships with organizations representing/working with the LGBTQI+ community, faith organizations, and individuals with lived experience, and increase use of social media to enhance recruitment within the LGTBQI+ community. They encouraged agencies to be flexible in delivering foster family trainings (such as flexible times, virtual, etc.) and to also recruit people to support LGBTQI+ youth in other ways, such as being a guardian ad litem or mentor. A few commenters made suggestions on revisions to the training curriculum related to recruitment, such as including modules on youth development.

Response: ACF appreciates commenters' recommendations for how title IV–E/IV–B agencies can improve recruitment of providers and foster families to serve as Designated Placements. ACF agrees these are promising practices and may share additional best practices and technical assistance through additional guidance. As clarified in the NPRM, IV–E agencies may draw down funds under title IV–E for certain activities to comply with this rule, including recruiting and training providers to be Designated Placements.

Concerns About a Shortage of Providers

Comment: Many commenters (both in support and opposition of the NPRM) expressed a concern that the proposal's provisions would exacerbate a nationwide shortage of placements and services. Commenters said that the NPRM focuses on recruiting placements for LGBTQI+ children instead of all children in foster care. They also argued the NPRM did not include providing support for families and kin to become safe and supportive homes for LGBTQI+ children and expressed concern that this could lead to children being placed outside of their communities or separation from siblings. They expressed concerns either that faith-based providers would be ''disqualified'' from being placements or ''driven away'' due to their views, or that the NPRM would lead to agencies labeling faith-based families as ''hostile'' or ''abusive'' due to sincerely held religious beliefs.

Moreover, a commenter stated that placing the onus on states and tribes to confirm and affirm that a foster family home is safe and appropriate when there is already a shortage of foster homes will end up hurting the children that this regulation is purporting to protect. One commenter questioned the NPRM's assertion that enough foster parents can be found to replace those that would be lost as a result of their religious beliefs.

A few commenters elevated concerns about the lack of behavioral health care providers who specialize in working with LGBTQI+ youth. Some commenters were concerned that LGBTQI+ training would be added to the list of caseworker requirements without considering the capacity of the workforce to provide quality services. Another commenter said that some states already have a reimbursement structure that considers the unique needs of individual children and felt this NPRM would be cumbersome to implement. Some commenters offered suggestions, including:

- Issuing ACF guidance on how agencies should balance the requirements of this NPRM with other placement considerations such as: prioritizing kinship placements; no placement change unless a child is unsafe; conferring with youth on whether they want to remain in the current placement; and factors such as sibling unification, least restrictive setting, school, friends, and community.
- Utilizing incentives for recruiting more placements and evidence-based trainings/resources for supporting the child welfare workforce and providers to become Designated Placements.
- Building in flexibility for agencies to make exceptions or alternatives to Designated Placement criteria for kinship caregivers, emergency, and short-term placements, to offer religious exemptions for staff members, and to consider the best interest of a child.

Response: ACF appreciates the concerns raised by commenters about potential impacts of the final rule on the availability of services and placements. In response to these comments and suggestions offered, we note that the rule provides a two-year ramp up period for title IV–E/IV–B agencies; that title IV–E funds may be used for recruitment and training efforts; and that we have clarified in the final rule how kin and other potential or existing placements for LGBTQI+ children can be supported to become Designated Placements. ACF also notes that the NPRM did not assert that recruitment of foster parents to provide LGBTQI+ supporting placements would ''replace'' providers who did not seek to qualify as Designated Placements. Rather, ACF anticipates that additional outreach efforts by states and tribes to recruit providers will expand, not reduce, overall supply. And in response to comments expressing concern that some providers and families would be lost or disqualified from providing foster placements, we added language to the final rule clarifying it shall not be construed to require or authorize penalization of any provider that is not considered or seeking consideration as a Designated Placement for LGBTQI+ children. When states and tribes select organizations to participate in the child welfare program, ACF would recommend that states and tribes do not adopt selection criteria that disadvantage any faith-based organizations that express religious objections to providing Designated Placements for LGBTQI+ children.

Youth Disclosure of LGBTQI+ Status

Comment: Many commenters stated that by requiring that LGBTQI+ youth request a supportive placement, that they will be forced to disclose their sexual orientation or gender identity, and that forcing children to ''come out'' in order to receive services places an unfair onus on them. Several commenters provided suggestions for how to ascertain a youth's sexual orientation and gender identity information. Several commenters recommended varying ages at which it would be appropriate for a caseworker to inquire about a child's identity. Commenters said it was important to inform youth that there are resources available as part of regular, ongoing case practice. Others felt there may be many reasons why a youth will choose to not disclose their sexual orientation and gender identity, such as preventing a change in placement to stay with

siblings, avoiding changing schools, or leaving communities. Examples shared included a fear of coming forward to identify as LGBTQI+ due to unforeseen consequences in their lives or a fear of rejection—consequences that represent an added burden for youth already navigating stressful experiences. Commenters questioned how the NPRM's provisions would help these youth, or youth who would be ''presumed'' to be cisgender/heterosexual, and that choosing nondisclosure should not prevent them from being treated appropriately.

Response: ACF understands many LGBTQI+ children may choose not to disclose their LGBTQI+ identity to their caseworker. Commenters cited research showing that two key reasons LGBTQI+ children in foster care choose not to share their sexual orientation or gender identity with their caseworker are (a) fear of rejection by the caseworker and (b) fear of a placement change. Some measures to allay those fears were provided in the NPRM and remain in the final rule, including (a) ensuring that Title IV–B and IV–E agency employees who have responsibility for placing children in foster care, making placement decisions, or providing services are adequately prepared with the appropriate knowledge and skills to serve an LGBTQI+ child related to their sexual orientation, gender identity, and gender expression, and (b) prohibiting an unwarranted placement change as a form of prohibited retaliation due to a child's disclosure of or perceived LGBTQI+ status or identity. To further address these concerns, the final rule adds the requirement that the notice to inform children of the availability of Designated Placements or services to make their current placement more supportive must include informing the child that under no circumstances will there be retaliation against them for disclosure of their LGBTQI+ status or identity or their request for a Designated Placement, and to describe the process by which a child may report a concern about retaliation.

To further address commenters' concerns that children's fears that a request for a new placement will necessarily result in a placement change and possible separation from siblings and community, as well as the concerns of commenters who said it was important to inform youth that there are resources available as part of regular, ongoing case practice, ACF made changes in the final rule at § 1355.22(b)(2) to require providing a child: 1) with the option to request their current placement be offered services to become a Designated Placement; and 2) with an opportunity to express their needs and concerns. Further, § 1355.22(b)(3) of the final rule requires that, before initiating any placement changes, the title IV–E/IV–B agency must consider whether additional services and training would allow the current provider to meet the conditions for a Designated Placement, if the current provider wishes to do so, rather than necessarily generating a placement change, particularly for children placed with kin, siblings, in close proximity to their family of origin, and/or in a family-like setting. The final rule also adds at § 1355.22(d)(2)(iii) that prohibited retaliation against a child with or perceived to have an LGBTQI+ identity or status includes restricting access to siblings and family members.

In response to commenters who stated that children choosing not to disclose their LGBTQI+ identity should not prevent them from being treated appropriately, the final rule expands the definition of prohibited retaliation, requires informing children about protections from retaliation, and expands the notification requirements to subcontractors and providers of the prohibition on retaliation based on a child's actual or perceived LGBTQI+ status or identity. Specifically, as noted above, the final rule requires the notification of the availability of Designated Placements to provide information on the prohibition on retaliation and how to report retaliation. Further, the final rule retains the requirement from the NPRM that the title IV–E/IV–B agency must ensure that LGBTQI+ children have access to age- or developmentally appropriate services that are supportive of their sexual orientation and gender identity, including clinically appropriate mental and behavioral health supports, and must ensure that all its contractors and subrecipients who have responsibility for placing children in foster care, making placement decisions, or providing services are informed of the procedural requirements including the requirement to comply with prohibitions on retaliation. The final rule extends the requirement of informing placement providers of procedural requirements, including the prohibition on retaliation, to all providers.

Research on LGBTQI+ Children in Foster Care

In the NPRM, we described a significant body of evidence demonstrating that LGBTQI+ youth are overrepresented in the child welfare system and face worse outcomes.

Comment: Many commenters expressed their support and appreciation for the proposed rule's overview of research on the disparities that LGBTQI+ youth face in foster care. Other commenters raised concerns about specific studies cited by HHS. Some commenters argued that data cited by HHS overstates the extent of LGBTQI+ children in the foster care population, criticizing one study cited as having a small sample size and citing a previous local survey from 2014 which found 19 percent of foster youth surveyed identify as LGBTQI+.

Response: ACF thanks the commenters for their support for the rule's discussion of research on the disparities that LGBTQI+ youth face in foster care. In response to concerns about studies about the size of the LGBTQI+ foster youth population, ACF based its estimate on the three recent studies cited above, one of which is a more recent (2021) local survey than the 2014 local survey, and two others which draw on larger data sources (national data in one case and California statewide data in the other).[35]

Comment: One commenter stated that research about the impact of family acceptance or rejection on LGBTQI+ youth is methodologically flawed.

Response: ACF believes that two key studies cited in the NPRM about the impact of family acceptance or rejection on LGBTQI+ youth have sound methodology. The first utilized quantitative scales to assess retrospectively the frequency and nature of parent and caregiver responses to a lesbian, gay, or bisexual (LGB) sexual orientation in adolescence. The study was based on in-depth interviews with 224 LGB young adults aged 21–25 and found dramatic disparities in health outcomes between youth who experienced high levels of family rejection compared to those who experienced low levels of family

[35] Baams, Laura., Stephen T. Russell, and Bianca D.M. Wilson. LGBTQ Youth in Unstable Housing and Foster Care, American Academy of Pediatrics, Volume 143, Issue 3, March 2019, *https://doi.org/10.1542/peds.2017-4211*. Fish, J., Baams, L., Wojciak, A.S., & Russell, S.T. (2019), Are Sexual Minority Youth Overrepresented in Foster Care, Child Welfare, and Out-of-Home Placement? Findings from Nationally Representative Data. Child Abuse and Neglect, *https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7306404/*. Institute for Innovation and Implementation at University of Maryland's School of Social Work and the National Quality Improvement Center on Tailored Services, Placement Stability, and Permanency for LBTQ2S Children and Youth in Foster Care (2021). Cuyahoga Youth Count: A Report on LGBTQ+ Youth Experience in Foster Care, *https://theinstitute.umaryland.edu/media/ssw/institute/Cuyahoga-Youth-Count.6.8.1.pdf*.

rejection.[36] An additional study cited in the NPRM on the critical importance of accepting caregiver behavior for positive mental health outcomes for LGBTQI+ youth was based on a 2022 survey of over 30,000 LGBTQ youth in the United States, which included questions regarding considering and attempting suicide that were identical to those used by the Centers for Disease Control and Prevention (CDC) in their Youth Risk Behavior Surveillance System (YRBS) and had overall findings which were corroborated by data from the YRBS survey.[37] Other studies find that it is ''clear from existing research that family acceptance and rejection is crucial to the health and well-being of LGBT youth.'' [38] This illustrates the importance of Designated Placements for LGBTQI+ children in foster care.

Comment: Two commenters criticized a 2021 study, which showed that children in foster care who identify as LGBTQI+ report a perception of poor treatment by the foster care system more frequently than their non-LGBTQI+ counterparts, as having ''significant limitations.'' [39]

Response: The data in this study is corroborated by five other studies cited by HHS.[40] Children in foster care who identify as LGBTQI+ are less likely to report at least ''good'' physical and mental health and are less likely to have at least one supportive adult on whom they can rely for advice or guidance, than their non-LGBTQI+ counterparts in foster care.[41]

Comment: Other commenters criticized a study on mental health disparities faced by LGBTQI+ youth as being unreliable and subject to bias.

Response: We note that the study cited by HHS is based on a sample size of over 40,000 youth surveyed and provides the adjusted odds ratio and a probability value of under .001 (showing that results are highly unlikely to be due to chance), and the NPRM cited two additional studies showing disproportionately poor mental health outcomes for LGBTQI+ foster youth.[42]

Nondiscrimination Provisions

Comments: Several commenters suggested that ACF issue stronger language on protections for children in foster care from discrimination on the basis of disability and gender identity. They specified that there are no anti-discrimination laws in many states to prohibit discrimination against LGBTQI+ prospective foster parents. Another commenter suggested that ACF adopt a similar anti-discrimination policy as in other Federal programs.

Other commenters recommended that the final rule forbid discrimination based on any characteristics in any part of the child welfare system. They argued that foster children, parents, kin caregivers, and prospective and current foster and adoptive parents have constitutional rights to due process and equal protection. A commenter also stated that ''discrimination is the proper and appropriate term instead of retaliation'' as that term was used in the proposed rule.

Response: Both the NPRM and this final rule focus on improving how the child welfare system meets the particular needs of LGBTQI+ foster children, based on the extensive evidence showing the difficulties those children disproportionately face. ACF is open to considering future policymaking that would address discrimination in broader ways, including discrimination on the basis of other characteristics, where ACF has legal authority to do so. We note that HHS's Office for Civil Rights enforces several statutes that prohibit various forms of discrimination in programs funded by the Department, including the title IV–E/IV–B program. Those statutes include section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, which prohibits disability discrimination by recipients of Federal financial assistance, and title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, which prohibits discrimination by recipients of Federal financial assistance on the basis of race, color, or national origin, including discrimination on the basis of shared ancestry and ethnic characteristics.[43] The Department has already promulgated regulations implementing these prohibitions, see 45 CFR part 80 (title VI); *id.* part 84 (section 504). On September 14, 2023, HHS issued a proposed rule to update its section 504 regulation. 88 FR 63392. Whether additional antidiscrimination rules are necessary or consistent with ACF's statutory authority would be appropriately considered after the conclusion of this rulemaking.

In regard to the comment arguing for the use of ''discrimination'' in the place of retaliation, retaliation is, by definition, an intentional act. It is a form of discrimination because the individual in question is being subjected to differential treatment. *Cf. Jackson* v. *Birmingham Board of Education,* 544 U.S. 167 (2005) (holding that retaliation is a form of intentional discrimination under title IX of the Education Amendments of 1972). We use the term ''retaliation'' in the final rule because a key goal of this provision is to ensure

[36] Ryan, C., Huebner, D., Diaz, R.M., & Sanchez, J. (2009). *Family rejection as a predictor of negative health outcomes in white and latino lesbian, gay, and bisexual young adults.* Pediatrics, 123(1), *https://publications.aap.org/pediatrics/article-abstract/123/1/346/71912/Family-Rejection-as-a-Predictor-of-Negative-Health?redirectedFrom=fulltext.*

[37] The Trevor Project, 2022 National Survey on LGBTQ Youth Mental Health, *https://www.thetrevorproject.org/survey-2022/assets/static/trevor01_2022survey_final.pdf.*

[38] Katz-Wise SL, Rosario M, Tsappis M. Lesbian, Gay, Bisexual, and Transgender Youth and Family Acceptance. Pediatr Clin North Am. 2016 Dec;63(6):1011–1025. doi: 10.1016/j.pcl.2016.07.005. PMID: 27865331; PMCID: PMC5127283, *https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5127283/.*

[39] Matarese, M., Greeno, E., Weeks, A., Hammond, P. (2021). The Cuyahoga youth count: A report on LGBTQ+ youth's experience in foster care. Baltimore, MD: The Institute for Innovation & Implementation, University of Maryland School of Social Work, *https://theinstitute.umaryland.edu/media/ssw/institute/Cuyahoga-Youth-Count.6.8.1.pdf.*

[40] McCormick, A., Schmidt, K., and Terrazas, S. (2017) LGBTQ Youth in the Child Welfare System: An Overview of Research, Practice, and Policy, Journal of Public Child Welfare, 11:1, 27–39, DOI: 10.1080/15548732.2016.1221368, *https://doi.org/10.1080/15548732.2016.1221368.* Wilson, B.D.M., Cooper, K., Kastanis, A., & Nezhad, S. (2014), Sexual and Gender Minority Youth in Foster care: Assessing Disproportionality and Disparities in Los Angeles, The Williams Institute, UCLA School of Law, *https://williamsinstitute.law.ucla.edu/wp-content/uploads/SGM-Youth-in-Foster-Care-Aug-2014.pdf.* Poirier, J., Wilkie, S., Sepulveda, K & Uruchima, T., *Jim Casey Youth Opportunities Initiative: Experiences and Outcomes of Youth Who Are LGBTQ,* 96.1 Child Welfare, 1–26 (2018), *https://www.proquest.com/docview/2056448464.https://www.proquest.com/docview/2056448464.* Wilson, B.D.M., & Kastanis, A.A. (2015). Sexual and gender minority disproportionality and disparities in child welfare: A population-based study. Children and Youth Services Review, 58, Pages 11–17, ISSN 0190–7409, *https://doi.org/10.1016/j.childyouth.2015.08.016.* Mountz, S., Capous-Desyllas, M., & Pourciau, E. (2018). 'Because we're fighting to be ourselves:' voices from former foster youth who are transgender and gender expansive. Child Welfare, Suppl.Special Issue: Sexual Orientation, Gender Identity/Expression, and Child Welfare, 96(1), 103–125, *https://www.proquest.com/scholarly-journals/because-were-fighting-be-ourselves-voices-former/docview/2056448509/se-2.*

[41] Jeffrey Poirier, *Jim Casey Youth Opportunities Initiative: Experiences and Outcomes of Youth Who Are LGBTQ,* 96.1 Child Welfare, 1–26 (2018), *https://www.proquest.com/docview/2056448464.*

[42] Institute for Innovation and Implementation at University of Maryland's School of Social Work and the National Quality Improvement Center on Tailored Services, Placement Stability, and Permanency for LBTQ2S Children and Youth in Foster Care (2021). Cuyahoga Youth Count: A Report on LBTQ+ Youth Experience in Foster Care, *https://theinstitute.umaryland.edu/media/ssw/institute/Cuyahoga-Youth-Count.6.8.1.pdf.* Wilson, B.D.M., Cooper, K., Kastanis, A., & Nezhad, S. (2014), Sexual and Gender Minority Youth in Foster care: Assessing Disproportionality and Disparities in Los Angeles, The Williams Institute, UCLA School of Law, *https://williamsinstitute.law.ucla.edu/wp-content/uploads/SGM-Youth-in-Foster-Care-Aug-2014.pdf.*

[43] *https://www.hhs.gov/civil-rights/for-individuals/special-topics/shared-ancestry-or-ethnic-characteristics-discrimination/index.html.*

that children do not experience harm that might deter them from seeking or benefiting from the protections afforded by the rule.

Implementation Costs

In the NPRM, we requested comments on whether state and tribal agencies are likely to incur additional substantial costs as a result of this rulemaking.

Comments: Numerous commenters stated there would be additional costs to implement this proposal and increased costs for FFP matching, some stating that the NPRM's estimates were too low and others describing the cost increases as ''substantial'' or ''significant.'' State and state attorneys general commenters were generally concerned about increasing costs to expand recruitment, retention, and training of providers, to reprogram case management systems to track costs and notification requirements, and to enforce and monitor the retaliation provisions. States also expressed a concern with the increased cost for children who are not title IV–E eligible, which is outside of the scope of this rule.

Response: ACF acknowledges there will be state and tribal costs to implement the final rule. Responses to comments on the cost estimate are provided in the Annualized costs to the Federal Government section. ACF is providing a more than two-year implementation period to allow time for states and tribes to address their unique funding issues. We also reiterate that title IV–E agencies may claim allowable recruitment and training costs under the title IV–E foster care program.

Requests for Technical Assistance and Implementation Supports and Questions About Implementation and Compliance Monitoring

In the NPRM, we requested public comment on how ACF can best support agencies, including those located in rural and other resource-limited areas, in fulfilling a placement that will facilitate access to age-appropriate resources, services, and activities for LGBTQI+ children in foster care.

Comments: Many commenters responded with several recommendations on how ACF can support agencies, providing additional funding/or grants for expanding and reimbursing service costs (*e.g.,* transportation, technology aids). A few organizations recommended ACF provide technical assistance/consultants to support rural provider recruitment. Other commenters recommended ACF utilizing local faith-based services, developing a national resource list of providers including virtual/online or telehealth services, and requiring agencies to display available resources and hotlines and to note the technical assistance that is available.

Response: We appreciate the comments and suggestions. While we are not making any changes to the final rule related to this, there are numerous technical assistance resources available through CB, for example the Capacity Building Center for States and the National Center for Diligent Recruitment. The primary manner in which ACF can support state and tribal efforts is through CB's technical assistance providers, which is addressed in detail in the below response to comment.

Comments: Many commenters requested technical assistance, sought specifics on how compliance will be monitored, and asked questions about implementation. Several commenters recommended changes to the NPRM that would require providers to notify the agency, describe children and provide a rationale for whom they are ''unwilling or unable to provide safe and appropriate placements or care.''

A few commenters suggested clarification and support for challenges related to the Interstate Compact on the Placement of Children, such as the need for more placements across jurisdictional lines. Some commenters asked for clarification on licensing requirements for childcare institutions and foster family homes regarding room sharing based on gender identity and procedures for foster parents, such as identifying the children for whom they are willing to provide a home. One commenter recommended a targeted plan for specially designated placements for LGBTQI+ children within the five-year Child and Family Services Plans (CFSPs) in the NPRM. Many commenters suggested that HHS provide extensive training guidance through implementation guidelines, more funding for family acceptance training, and pilot programs in rural areas regarding the NPRM's provisions.

Commenters requested technical assistance on capacity building and recruitment strategies. Many commenters asked for clarification on how agencies should respond in circumstances where providers and agencies cannot fulfill the requirements of the NPRM and on ''accountability'' for the provisions.

Response: On behalf of the Children's Bureau (CB), the Capacity Building Center for States (the Center) helps state and territorial child welfare agencies strengthen, implement, and sustain effective child welfare practices. The Center provides tailored technical assistance to states and territories on a wide array of topics to improve outcomes and overall system functioning, including support for states in implementing this final rule. At the request of a jurisdiction (or the Children's Bureau), customized assistance is available to support effective program improvement efforts. In collaboration with the state or territory (and counties as appropriate) and the Children's Bureau, the Center assists child welfare agencies in implementation and program improvement efforts. Center technical assistance support may include training, coaching, curriculum development, data analysis and individualized program consultation. Each state or territory has an identified Center Liaison who can assist in initiating technical assistance. Liaison contact information for each state and territory is readily available via the Center's website.

On behalf of the Children's Bureau, the Capacity Building Center for Tribes (the Center for Tribes) is also available to assist tribes with implementing the final rule. The Center for Tribes collaborates with American Indian and Alaska native nations to help strengthen tribal child and family systems and services. The Center for Tribes offers an array of services, including peer networking activities and individualized expert consultation. These services are available at no cost to assist with improving tribal child welfare practice and performance in several key areas, such as recruiting and training families to meet the individualized needs of children in care.

In addition, the Children's Bureau has recently funded the National Center for Diligent Recruitment, a new component of the AdoptUSKids project. This national center provides multiple forms of free technical assistance to support states, tribes, and territories in developing and implementing strategic, data-driven diligent recruitment plans. The goals of the technical assistance are to increase capacity to effectively collect and analyze quantitative and qualitative data to guide targeted recruitment efforts; to provide on-site, tailored support for the work of states, tribes, and territories in constructing robust diligent recruitment plans based on evidence-informed and evidence-based research; and to further the evidence-base of family finding, relative outreach, reunion support, and intensive recruitment and retention services within the communities of origin of the children/youth in the foster care system.

With respect to the suggestions regarding the Interstate Compact on the

Placement of Children (ICPC), the Federal Government has no authority over the ICPC. Rather the compact amendments are made and ratified through agreement among the Compact members and the incorporation of those changes in respective state statutes. There is a minimum requirement of member states agreeing to changes before the Compact itself is ratified. This is outside the scope of this rule.

IV. Response to Comments Raising Statutory and Constitutional Concerns

First Amendment and Religious Freedom

Comment: As discussed above in section III of this preamble, many commenters expressed concerns that religious families and organizations will have sincerely held religious beliefs and practices that conflict with the rule and as a result those families and organizations will be deemed to not be ''safe and appropriate'' by the Federal Government. These commenters asserted that both individuals and organizations of faith will be discouraged from applying or continuing to provide foster care services because they will be penalized for their beliefs and practices.

Other commenters expressed concern that the proposed rule violates providers' First Amendment right to religious liberty. Commenters asserted that the proposed rule would prohibit them from fully participating in the foster care program. For example, commenters said that expressing or practicing their sincerely held beliefs about gender, sexuality, or marriage to a foster child in their home could result in being labelled as hostile or unsafe for the child.

Other commenters asserted that the rule will result in faith-based providers and individuals being excluded from helping large numbers of children in foster care. One commenter said that if ACF's data is accurate, excluding such providers would preclude them from providing care to potentially one-third of older children in foster care age 12–21.

Another commenter said that it is important to protect faith-based agencies from regulations that run contrary to their beliefs and practices; such protection, the commenter asserted, will ensure a diverse set of agencies to serve diverse populations, including placing children with specific or special needs such as older children and sibling groups.

Response: ACF values the vital role that religious families and faith-based organizations play in providing care and services for children in the Child Welfare program and appreciates that many families are compelled by their faith to offer safe and loving foster homes.

As noted previously, the final rule has been revised to clarify the general requirement that all providers must provide safe and appropriate placements for all foster children, and we believe this clarification will avoid any unintended implication that providers not wishing to offer Designated Placements would not be considered safe and appropriate.

ACF disagrees with the commenter's suggestion that this final rule discriminates against faith-based providers, as none of the provisions disqualify eligible providers from participating in the title IV–E and IV–B programs because of their religious character. *Espinoza* v. *Mont. Dep't of Revenue,* 140 S. Ct. 2246, 2255 (2020) (citing *Trinity Lutheran Church of Columbia, Inc.* v. *Comer,* 137 S. Ct. 2012, 2021 (2017)). This rule welcomes faith-based organizations and religious foster parents to continue participate in the program, and ACF anticipates that many will choose to do so without any religious objections. The obligation to provide an environment that supports the child's LGBTQI+ status or identity under this rule applies only to those providers who have chosen to be Designated Placements. We anticipate that numerous faith-based organizations and religious foster parents will choose to be Designated Placements. But this rule does not require any provider to make that choice, and it does not impose any penalty or adverse consequence on providers with religious objections to serving as a Designated Placement. Indeed, the final rule makes clear in paragraph (j) that nothing in the rule requires or authorizes a state or tribe to penalize a provider that—for whatever reason—chooses not to be a Designated Placement. Rather, the rule places the responsibility on states and tribes—rather than on providers—to find Designated Placements for LGBTQI+ identifying children.

ACF agrees that it is important to protect faith-based agencies from any obligation to comply with a regulatory requirement that violates statutory or constitutional protections of religious freedom. It is also important to retain a diverse set of agencies to serve diverse populations. ACF has determined that this regulation is consistent with these goals. In ACF's view, this rule should not dissuade any entity that does not meet the definition of a Designated Placement, whether for religious or secular reasons, from continuing to participate in the foster care program. ACF does not anticipate that this rule will cause faith-based providers to discontinue their participation in the program, or that it will substantially reduce the number of placement agencies available for children. ACF expects that states and tribes will not impose burdens on religious exercise when they have the discretion to work with the objections of a faith-based provider, and that any faith-based provider with a religious objection to a requirement in this rule will exercise their right to seek an accommodation by submitting a request to their state's or tribe's title IV–E/IV–B agency, which must promptly forward the request to ACF.

ACF takes seriously its obligations under the Constitution and Federal laws supporting religious exercise, freedom of conscience, and free speech, including the First Amendment and RFRA, and will continue to strongly enforce HHS regulations that ensure religious organizations must be considered eligible on the same basis as any other organization to participate in programs administered with title IV–E and IV–B funds. See 45 CFR 87.3(a) (2014) (''part 87''). That rule prohibits states and tribes from discriminating for or against an organization on the basis of the organization's religious character, motives, or affiliation, or lack thereof, or on the basis of conduct that would not be considered grounds to favor or disfavor a similarly situated secular organization. Also, that rule states that nothing in that regulation ''should be construed to preclude HHS from making an accommodation, including for religious exercise, with respect to one or more program requirements on a case-by-case basis in accordance with the Constitution and laws of the United States.'' See 45 CFR 87.3(b) (2014). In addition, this final rule has been revised in paragraph (i) to make clear that if application of any requirement under this rule would violate Federal protections for religious freedom, conscience, and free speech, that application will not be required.

Additionally, under part 87 states and tribes must inform grant subrecipients and contractors of their religious freedom rights in both solicitations for sub-grants and awards. See 45 CFR 87.3(n) (2014). ACF will consider any request for religious accommodation under RFRA or any other applicable authority protecting religious freedom to this rule's requirements. Under ACF's established practice, a state or tribe may not disqualify from participation in the program a provider that has requested the accommodation unless and until the

provider has made clear that the accommodation is necessary to its participation in the program and HHS has determined that it would deny the accommodation. See 45 CFR 87.3(c) and (q) (2014).

Comment: A number of commenters expressed concern that a final rule would abridge the First Amendment's protection of free speech. A commenter wrote that the rule would preclude legitimate sharing of ideas and perspectives and would prevent children and young people in care from encountering ideas and perspectives beyond their current ones. Some commenters argued that requiring agencies and foster families to use a child's correct pronouns or chosen name would violate the First Amendment by unconstitutionally forcing speech on foster care providers. Commenters argued that the First Amendment does not permit the government to compel ideological speech. Similarly, commenters contended that the rule would impede citizens' free speech more than would be necessary to achieve legitimate government ends. A commenter wrote that by omitting up-front exemptions, the proposed rule sought to chill speech. A couple of commenters asserted that concepts included in the proposed rule that relate to a child's identity place individuals and organizations of faith at risk of being accused of retaliation as described in the proposed rule. These commenters wrote that being penalized for retaliation because they were exercising their religious beliefs unconstitutionally infringes on and burdens religious providers' First Amendment rights both to free speech and free exercise.

Response: ACF is committed to upholding First Amendment rights to free speech and religious exercise for all providers and children in the child welfare system.

As to the commenters' concern that this rule violates the Free Speech Clause of the First Amendment, ACF also disagrees for two reasons. First, this rule does not govern the purely independent actions of private parties. Rather, it merely sets the terms on which an entity that chooses to provide services under a federally funded program must provide those services, without imposing any restrictions on any expression those entities engage in outside of the scope of the program. ACF is entitled to ensure that the providers of federally funded services carry out the Federal program in a way that ensures that the purposes of the Federal funding are met. *See Rust* v. *Sullivan,* 500 U.S. 173, 192–99 (1991); *Agency for Int'l Dev.* v. *All. for Open Soc'y Int'l, Inc.,* 570 U.S. 205, 217 (2013). No individual or entity is compelled to participate as a provider in the title IV–E/IV–B program—and, as this final rule makes clear, even among those who do choose to participate, no provider is compelled to become or seek to become a Designated Placement for LGBTQI+ children. And nothing in the rule purports to regulate any provider in their conduct outside of the scope of the title IV–E/IV–B program.

Second, any provider who chooses not to become a Designated Placement must simply comply with longstanding obligations under the title IV–E/IV–B programs to ensure that all foster children are placed in environments that provide safe and appropriate care for all children in foster care, as well as the nonretaliation provisions set forth in this regulation. As this final rule clarifies, the Department anticipates that as a general matter providing a placement that is safe and appropriate or complying with these nonretaliation requirements would not impose a substantial burden on providers' religious freedom, conscience or free speech rights, even aside from the voluntary nature of a provider's participation in the title IV–E/IV–B program. For example, as noted in section III of this preamble, a title IV–E/IV–B agency must ensure that each placement is safe and appropriate, meaning that no provider engages in acts of harassment, abuse, or mistreatment. Harassment, mistreatment, and abuse as contemplated by the rule are conduct, not speech. This is particularly so because harassment under the rule requires severe or pervasive acts that create a hostile environment, a standard that applies elsewhere in the law.

ACF disagrees with the commenters' concern that this rule generally violates the Free Speech Clause of the First Amendment or the religious exercise for all providers for several reasons. ACF has a compelling interest in providing these protections for children in the foster system as a general matter. ACF provides Federal funding to states and tribes to provide appropriate foster care placements for all children; to ensure all children are placed consistent with the child's best interest; and to provide support for meeting the safety, permanency, and well-being needs of all children.

As ACF has documented in the preambles for the proposed rule and this final rule, an extensive body of research shows that the treatment LGBTQI+ youth receive from their families and caregivers related to their sexual orientation or gender identity is highly predictive of their mental health and wellbeing, which the title IV–E/IV–B programs serve to protect.

This final rule requirement that all providers refrain from retaliating against children because of their sexual orientation or gender identity merely reflects the ordinary requirement that all children be provided safe and proper care in foster care. We expect that in the typical case the rule's protection against retaliation will be the least restrictive means of furthering the compelling interest in protecting the mental health and wellbeing of LGBTQI+ children. Should a provider establish that an application of the retaliation requirement imposes a substantial burden on the exercise of religion, ACF will assess whether that particular application is the least restrictive means of furthering a compelling interest.

However, as to the commenter's concern that the rule violates the right to religious exercise, we reiterate that Federal protections for religious exercise, and the Department's regulatory protections for seeking religious accommodation, continue to apply. When applying those protections to a particular case, ACF will consider as appropriate whether the application of this rule's protections to the particular party is the least restrictive means of furthering a compelling interest. When reviewing any request for religious accommodation ACF will conduct a case-by-case analysis in assessing whether application of the Rule's protections complies with RFRA and any other relevant Federal religious protection. We also expect title IV–E/IV–B agencies to similarly engage in assessing whether they are applying this rule and any state's or tribe's requirements in the manner that least restricts religious exercise.

Comment: A number of commenters noted that language protecting faith-based providers was included in the preamble of the NPRM but not in the regulation text. However, they wrote that the government's obligation to accommodate the religious freedom and conscience rights of private foster care providers should be incorporated into the rule text to create binding law on the Federal Government, states, and tribes.

Response: While the Constitutional and statutory protections would be applicable whether or not incorporated in regulatory text, text has been added at § 1355.22(i) stating that insofar as the application of any requirement under this part would violate applicable Federal protections for religious freedom, conscience, and free speech, such application shall not be required.

ACF further notes that all providers that are impacted by this rule are already covered by an HHS regulation at 45 CFR part 87 that protects religious freedom, nondiscrimination, and conscience rights. Consistent with the regulation at 45 CFR 87.3(n) and (q) as amended in 2014, state and tribal child welfare agencies must ensure that their notices or announcements of award opportunities include language that is substantially similar to that in section (a) of appendix A to part 87. In relevant part, those appendices require that sub-awards and contracts inform sub-awardees of their right to carry out child welfare programs consistent with ''religious freedom, nondiscrimination, and conscience protections in Federal law.''

A provider that requests any religious accommodation may submit the request to its State or Tribal title IV–E/IV–B agency. If the request concerns a religious objection to an obligation that is required or necessitated by this proposed rule as finalized, the title IV–E/IV–B agency must promptly forward the request to ACF, which will consider the request in collaboration with the HHS Office of the General Counsel.

Moreover, in response to concerns that the rule might be understood as requiring or authorizing the penalization of providers who decline to provide Designated Placements, the final rule has also been revised, at § 1355.22(j) to provide that nothing in this regulation shall be construed as requiring or authorizing a state or tribe to penalize a provider that does not seek or is determined not to qualify as a Designated Placement from participation in the state's or tribe's program under titles IV–E and IV–B.

Statutory Authority

Comment: A group of state attorneys general commented that they believed the proposed rule exceeded ACF's statutory authority under titles IV–B and IV–E of the Social Security Act. In support of their position, they argued that the IV–B and IV–E statutory requirements for agencies to ensure that foster children have ''case plans'' aimed at providing ''safe and proper'' care and ''appropriate'' placements that serve their ''best interests'' with providers who are ''prepared adequately with appropriate knowledge and skills'' do not authorize ACF to impose the specific requirements of the proposed rule. They describe the statutory requirements that ACF relies on as ''generalized provisions.'' In addition, these commenters argued that state family laws generally view the best interest of the child standard as flexible and fact-specific in determining appropriate placements, and that Congress did not intend ''to grant HHS this federal veto power over children's placements.''

Response: ACF disagrees that this rule exceeds ACF's statutory authority under titles IV–B and IV–E of the Social Security Act. The rule is consistent with the authority granted to ACF in the statutory provisions cited in the Legal Authority for the Final Rule section of this preamble, which promote the wellbeing and safety of children in foster care:

—Titles IV–E and IV–B of the Social Security Act (the Act) require title IV–E/IV–B agencies to provide case plans for all children in foster care that include a plan for assuring that the child receives safe and proper care and that services are provided to the parents, child, and foster parents in order to improve the conditions in the parents' home, facilitate return of the child to his own safe home or the permanent placement of the child, and address the needs of the child while in foster care, including discussion of the appropriateness of the services that have been provided to the child under the plan. Section 475(1)(B) of the Social Security Act, 42 U.S.C. 675(1)(B).

—Agencies must also have case review systems through which they ensure that each foster child's case plan is ''designed to achieve placement in a safe setting that is the least restrictive (most family like) and most appropriate setting available and in close proximity to the parents' home, consistent with the best interest and special needs of the child[.]'' Section 475(5) of the Social Security Act, 42 U.S.C. 675(5)(A). In order to receive title IV–E and IV–B funds, agencies must have plans approved by ACF that provide for case plans and case review systems that meet these statutory requirements. Sections 471(a)(16) and 422(b) of the Social Security Act, 42 U.S.C. 671(a)(16) and 622(b).

—States and tribes must certify in their title IV–E plans that they will ensure that before a child in foster care is placed with prospective foster parents, the prospective foster parents ''will be prepared adequately with the appropriate knowledge and skills to provide for the needs of the child [and] that the preparation will be continued, as necessary, after the placement of the child.'' Section 471(a)(24) of the Social Security Act, 42 U.S.C. 671(a)(24).

—Agencies must ensure that foster parents, as well as at least one official at any child care institution providing foster care, receive training on how to use and apply the ''reasonable and prudent parent standard,'' a standard characterized by careful and sensible parental decisions that maintain the health, safety, and best interests of a child while at the same time encouraging the emotional and developmental growth of the child, that a caregiver shall use when determining whether to allow a child in foster care under the responsibility of the State to participate in extracurricular, enrichment, cultural, and social activities. Social Security Act 471(a)(24) and (a)(10) and 475(10)(A), 42 U.S.C. 671(a)(24) and (a)(10) and 675(10)(A).

—Agencies must develop and implement standards to ensure that children in foster care placements are provided quality services that protect their safety and health. Social Security Act section 471(a)(22), 42 U.S.C. 671(a)(22).

—The Act authorizes the Secretary to review state compliance with the title IV–E and IV–B program requirements. Specifically, the Act requires the Secretary to determine whether state programs are in substantial conformity with state plan requirements under titles IV–E and IV–B, implementing regulations promulgated by the Secretary and the states' approved state plans. Section 1123A of the Social Security Act, 42 U.S.C. 1320a–2a.

As explained in detail in the NPRM, at 45 CFR 1355.22, we implement these statutory requirements for safe and proper care, placement in appropriate settings, appropriate and quality services, and adequate preparation of placement providers by requiring that LGBTQI+ children must be offered placements with providers who are committed to establishing an environment that supports their LGBTQI+ status or identity, trained to provide for their needs, and will facilitate their access to appropriate services that support their health and well-being. We further implement these statutory requirements by requiring that LGBTQI+ children must be provided with supportive services, protected from retaliation on the basis of their LGBTQI+ identity or status, and have their privacy protected. 42 U.S.C. 675(1)(B) and (5). For transgender and gender non-conforming children, we implement the statutory requirement for appropriate placements by requiring that they be offered placements consistent with their gender identity. ACF came to these conclusions based on our careful and thorough review of the evidence regarding LGBTQI+ children in foster care, as described in section II of the preamble.

Commenters cite a Federal district court decision, *Shane* v. *Cnty. of San Diego,* in support of their position. 677 F. Supp. 3d 1127, 1140 (S.D. Cal. 2023). However, that case does not address ACF's statutory authority. Instead, it addresses the standard under the doctrine of qualified immunity for holding a state government officer liable for money damages based on an alleged deprivation of a Federal right. Such cases may proceed only where the Federal right at issue is ''clearly established'' in case law. In *Shane,* the district court concluded that the state

government officers could not be held liable for their alleged failure to include adequate mental health and substance abuse protocols in the child's case plan because ''the Court has not identified any case law that establishes that a case plan must contain this level of specificity.'' *Id.* At 1140. (S.D. Cal. 2023). The court continued, ''[n]either the Ninth Circuit nor other circuits have otherwise examined what specific treatments need to be included in a case plan to be compliant with the CWA [Adoption Assistance and Child Welfare Act of 1980].'' *Id.* The district court's conclusion that existing caselaw had not addressed ''what specific treatments need to be included in a case plan'' (*Id.)* to comply with IV–B and IV–E is not relevant to this rulemaking. The lack of caselaw addressing a specific question regarding interpretation of the IV–E statute does not in any way limit ACF's ability to promulgate regulations interpreting and implementing the statute. With this rule, ACF specifies how the statutory ''case plan'' and ''case review'' requirements apply for LGBTQI+ foster children.

Regarding commenters' assertion that state family laws generally view the best interest of the child standard as flexible and fact-specific in determining appropriate placements, this rule does not prevent states or tribes from complying with their own state or tribal laws and policies regarding the best interest of the child in making placement decisions unless those laws or policies directly conflict with the requirements of the rule. ACF expects that title IV–E/IV–B agencies will continue to consider the many factors (such as kinship relationship, proximity to the child's school, etc.) that go into determining the most appropriate placement for a child. ACF recognizes and values the important role child welfare agencies play in balancing multiple needs to identify the most appropriate placement for each foster child. This rule simply clarifies that, for LGBTQI+ foster children, the statutory case plan and case review requirements require access to a placement that is supportive of their LGBTQI+ status or identity.

Arbitrary and Capricious

Comment: Some state attorneys general commented that the proposed rule is arbitrary and capricious. They cite *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.* for the principle that ''[a]gency analysis cannot 'run[ ] counter to the evidence before the agency,' must show a 'rational connection between the facts found and the choice made,' and needs to 'consider' all 'important aspect[s] of the problem' the agency is addressing. 463 U.S. 29, 43 (1983) (citation omitted).'' Commenters argue that the agency did not sufficiently consider ''countervailing consequences'' of its proposed approach, including the additional bureaucratic requirements it creates, the cost of complying with the mandates, the risk that foster care providers would be subject to retaliation claims, the likelihood of providers leaving the system as a result, the increase in likelihood that children would have to move multiple times while in foster care and that requiring urgent investigations of complaints about placements would take resources away from physical abuse investigations. Commenters also argued that the rule would endanger children through its requirement for youth to be offered a placement consistent with their gender identity. Commenters also argued that the cost estimate is unrealistically low. Commenters also argued that the rule does not offer sufficient evidence to show that LGBTQI+ youth are overrepresented in foster care or have worse outcomes or experiences while in care.

Response: ACF has carefully considered all important aspects of this rule, including the possibility that it may have unintended negative consequences, consistent with the requirements of *Motor Vehicle Mfrs.,* 463 U.S. 29. ACF has explained its consideration of the factors that commenters cite here in its discussion in the preamble in the discussion of regulatory provisions in Section III. ACF also considered alternatives like sub-regulatory guidance in the Regulatory Impact Analysis below. Based on its careful consideration of these factors, among many others discussed in the proposed rule and this final rule, ACF has concluded that the final rule is supported by the weight of the evidence before the agency specifically related to wellbeing of children being served in foster care.

Spending Clause

Comment: Some state attorneys general commented that they believe that the proposed rule violates the Spending Clause of the U.S. Constitution. They argue that caselaw requires that ''if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously.'' *Pennhurst State Sch. & Hosp.* v. *Halderman,* 451 U.S. 1, 17 (1981). In their opinion, the IV–E and IV–B statutes do not authorize HHS to impose the requirements of this rule on state child welfare agencies.

Response: The IV–E and IV–B statutes are explicit that states and tribes may only qualify for IV–E and IV–B funding if they meet the statutory state plan requirements, described at 42 U.S.C. 671 and 622, which include the requirements to:

—Operate case review systems that assure that ''each child has a case plan designed to achieve placement in a safe setting that is the least restrictive (most family like) and most appropriate setting available and in close proximity to the parents' home, consistent with the best interest and special needs of the child[.]'' 42 U.S.C. 675(5), incorporated as a IV–E state plan requirement by 42 U.S.C. 671(a)(16) and as a IV–B state plan requirement by 42 U.S.C. 622(b)(8)(B).

—Ensure that case plans include a plan for assuring that the child receives safe and proper care and that services are provided to the parents, child, and foster parents in order to improve the conditions in the parents' home, facilitate return of the child to his own safe home or the permanent placement of the child, and address the needs of the child while in foster care, including a discussion of the appropriateness of the services that have been provided to the child under the plan. 42 U.S.C. 675(1)(B).

—Include a certification that, before a child in foster care under the responsibility of the State is placed with prospective foster parents, the prospective foster parents will be prepared adequately with the appropriate knowledge and skills to provide for the needs of the child, that the preparation will be continued, as necessary, after the placement of the child, and that the preparation shall include knowledge and skills relating to the reasonable and prudent parent standard for the participation of the child in age or developmentally-appropriate activities, including knowledge and skills relating to the developmental stages of the cognitive, emotional, physical, and behavioral capacities of a child, and knowledge and skills relating to applying the standard to decisions such as whether to allow the child to engage in social, extracurricular, enrichment, cultural, and social activities. 42 U.S.C. 671(a)(24).

—As a condition of each contract entered into by a child care institution to provide foster care, ensure the presence on-site of at least 1 official who, with respect to any child placed at the child care institution, is designated to be the caregiver who is authorized to apply the reasonable

and prudent parent standard to decisions involving the participation of the child in age or developmentally-appropriate activities, and who is provided with training in how to use and apply the reasonable and prudent parent standard in the same manner as prospective foster parents are provided the training pursuant to 42 U.S.C. 671(a)(24). 42 U.S.C. 671(a)(10).

Congress has expressly authorized the Secretary to ''make and publish such rules and regulations . . . as may be necessary to the efficient administration of the functions with which [the Secretary] is charged under [the Social Security Act].'' 42 U.S.C. 1302. This rule is necessary for the Secretary to fulfill his responsibility to ensure that child welfare agencies receiving IV–B and/or IV–E funding meet, for LGBTQI+ children in their care, the statutory mandates described above, including those to provide ''safe and proper care'' and ''appropriate'' placements.

ACF notes that the Supreme Court has held Congress need not in statute ''prospectively resolve every possible ambiguity concerning particular applications of the requirements of'' a spending program. *Bennett* v. *Kentucky Dep't of Education,* 470 U.S. 656, 669 (1985); *see also Mayweather* v. *Newland,* 314 F.3d 1062, 1067 (9th Cir. 2002) (''Congress is not required to list every factual instance in which a state will fail to comply with a condition. Such specificity would prove too onerous, and perhaps, impossible. Congress must, however, make the existence of the condition itself—in exchange for the receipt of federal funds—explicitly obvious.'') There is no question that the IV–B and IV–E statutes make explicitly obvious that states and tribes must comply with the IV–B and IV–E state plan requirements, including those related to case plans and case reviews, in order to qualify for Federal IV–B and IV–E funds.

Federalism Principles

Comment: Some state attorneys general and some members of Congress commented that they believe the proposed rule violates federalism principles. They stated that ''the U.S. Constitution leaves significant swaths of family, health, and safety regulation to the States' exercise of their constitutionally reserved police powers'' and argue that the proposed rule would shift the balance of power from states to the Federal Government. Commenters' primary concern is that the rule may preempt state laws limiting the availability of gender-affirming medical care for minors.

Response: ACF disagrees that this rule violates federalism principles. As discussed in the response directly above, the rule implements Federal statutory terms regarding the care title IV–E/IV–B agencies must provide to LGBTQI+ foster children in order to qualify for the Federal IV–B and IV–E financial assistance programs. The rule does not preempt state laws regarding gender-affirming medical care for minors generally. Thus, where the rule requires states to ensure that LGBTQI+ children have access to age- or developmentally appropriate services that are supportive of their sexual orientation and gender identity or expression, including clinically appropriate mental and behavioral health supports, it requires access only to those services and supports that are lawful in the state. When a state accepts funds under the title IV–E/IV–B program, it agrees to provide safe and proper care to children within the system funded by that program. This rule merely elaborates on what is necessary to provide such care in the specific context of LGBTQI+ children in that program. It does not preempt or require any change to state laws regulating medical care generally.

Nondelegation Doctrine

Comment: Some state attorneys general commented that they believe that the proposed rule violates the nondelegation doctrine of the U.S. Constitution. They stated that ''the nondelegation doctrine requires Congress to 'lay down' an 'intelligible principle' in an authorizing statute for the agency to follow. *Mistretta* v. *United States,* 488 U.S. 361, 372 (1989) (citation omitted). They then argued that the proposed rule's expansive interpretation of HHS's statutory authority ''cannot be squared with this foundational constitutional check. In HHS's view, the open-ended terms 'safe and proper care' and 'best interests and special needs of the child' are empty vessels waiting to enshrine any number of highly controversial requirements favored by federal agency heads.''

Response: ACF disagrees that this rule violates the nondelegation doctrine. Congress does not violate the nondelegation doctrine merely because it legislates in broad terms and leaves a certain degree of discretion to an executive agency, so long as Congress sets forth—as commenters acknowledged—''an intelligible principle'' to which the agency must conform. The Supreme Court has routinely upheld delegations to the Executive Branch ''under standards phrased in sweeping terms.'' *See Loving* v. *U.S.,* 517 U.S. 748, 771 (1996). Congress may permissibly delegate authority to the Executive Branch to regulate in a manner that is necessary to adhere to policy objectives in a statute. S*ee also Consumers' Rsch.* v. *Fed. Commc'ns Comm'n* (''The intelligible-principle test has long recognized 'that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.' [*Mistretta,* 488 U.S.] at 372, 109 S.Ct. 647; *Gundy,* 139 S. Ct. at 2123 (explaining that the Court's holdings recognize these considerations 'time and again').'' 67 F.4th 773, 787 (6th Cir. 2023)\.)\.

Congress here has charged the Secretary with ensuring that states and tribes operate case review systems in which ''each [foster] child has a case plan designed to achieve placement in a safe setting that is the least restrictive (most family like) and most appropriate setting available and in close proximity to the parents' home, consistent with the best interest and special needs of the child.'' 42 U.S.C. 675(5), 671(a)(16), 622(b)(8)(A)(ii). The case plan must also include a plan for assuring that each child receives ''safe and proper care'' 42 U.S.C. 675(1)(B). In addition, Congress has charged the Secretary with ''promulgat[ing] regulations for the review of [state IV–B and IV–E] programs to determine whether such programs are in substantial conformity with—State plan requirements under such parts B and E.'' 42 U.S.C. 1320a–2a(a). Those regulations must, among other things, describe ''the criteria to be used to measure conformity with such requirements and to determine whether there is a substantial failure to so conform.'' 42 U.S.C. 1320a–2a(b)(2) These portions of the statute, and others described in the Legal Authority for the Final Rule section of this preamble, provide the ''intelligible principle'' necessary for ACF to promulgate these regulations.

In a district court case, *CompRehab Wellness Grp., Inc.* v. *Sebelius,* No. 11–23377–CIV, 2013 WL 1827675 (S.D. Fla. Apr. 30, 2013), the court upheld against a nondelegation challenge a regulation promulgated pursuant to the Social Security Act's grant of rulemaking authority to the Secretary, which authorizes the Secretary to ''make and publish such rules and regulations . . . as may be necessary to the efficient administration of the functions with which [the Secretary] is charged under [the Social Security Act].'' 42 U.S.C.

1302. In finding the Social Security Act's grant of rulemaking authority to provide the necessary ''intelligible principle,'' the court stated that ''Essentially, what [the plaintiff] seeks is the invalidation of a statute granting authority to a named agency to regulate an identified federal program using statutory language well within the bounds of what has already been deemed constitutional.'' Id. at 6.

Although Congress has delegated authority ''from the beginning of the government,'' *Big Time Vapes, Inc.* v. *FDA,* 963 F.3d 436, 442 (5th Cir. 2020) (quoting *United States* v. *Grimaud, 220* U.S. 506, 517 (1911)), ''[o]n only two occasions—both in 1935 as part of its resistance to New Deal legislation—has the Court found a violation of the nondelegation doctrine,'' *Allstates Refractory Contractors, LLC* v. *Su,* 79 F.4th 755, 762 (6th Cir. 2023). One of those statutory provisions ''provided literally no guidance for the exercise of discretion,'' and the other ''conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring 'fair competition.' '' *Whitman* v. *Am. Trucking Ass'ns,* 531 U.S. 457, 474 (2001) (citing *Panama Refin. Co.* v. *Ryan,* 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp.* v. *United States,* 295 U.S. 495 (1935)). By contrast, in the almost 90 years since, the Supreme Court has consistently upheld ''Congress' ability to delegate power under broad standards,'' *Mistretta,* 488 U.S. at 373, and ''ha[s] 'almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law,' '' *Am. Trucking,* 531 U.S. at 474–75 (quoting *Mistretta,* 488 U.S. at 416 (Scalia, J., dissenting).

Major Questions Doctrine

Comment: Some state attorneys general commented that they believe that the proposed rule violates the major questions doctrine of the U.S. Constitution. Commenters argue that the proposed rule ''raises controversial questions of vast 'political significance,' yet does not reflect the type of clear congressional authorization the major-questions doctrine requires. *West Virginia* v. *EPA,* 142 S. Ct. 2587, 2613 (2022) (quoting *FDA* v. *Brown & Williamson,* 529 U.S. 120, 160 (2000)).'' They specifically refer to the requirement in the proposed rule for children to be offered a placement consistent with their gender identity if they are being placed in child care institutions, arguing that ''this mandate overrides state policies governing sex-segregated childcare institutions, which heed the privacy and safety interests in maintaining sex-segregated spaces—particularly for children.''

Response: ACF disagrees that this rule violates the major questions doctrine. This rule does not address matters of ''exceptional economic and political significance,'' which would be necessary for the major questions doctrine to apply. Courts have held the major questions doctrine to apply where a regulation imposes extremely large costs or has far-reaching effects on areas outside of the agency's traditional regulatory domain. (*See e.g., Biden* v. *Nebraska,* 143 S. Ct. 2355, 2358 (2023), overturning the Department of Education's rule that would ''establish a student loan forgiveness program that will cancel about $430 billion in debt principal and affect nearly all borrowers,'' and *W. Virginia* v. *Env't Prot. Agency,* 597 U.S. 697, 724 (2022), overturning an EPA rule that would ''empower[] it to substantially restructure the American energy market.'')

This rule has no such exceptional reach. It implements ACF's core responsibility to promote the wellbeing of foster children in programs that receive Federal funding through requiring state and tribal compliance with titles IV–B and IV–E of the Social Security Act. Commenters do not point to any aspects of the rule which they believe are of ''exceptional economic significance.'' With regard to ''exceptional political significance,'' the only section they specifically point to is the requirement for child welfare agencies to place transgender and gender nonconforming youth consistent with their gender identity.[44] That requirement is not of ''exceptional political significance.''

Rather, it simply clarifies, for LGBTQI+ children in foster care, the IV–E statutory requirements to place foster children in ''a safe setting that is the . . . most appropriate setting available . . . consistent with the best interest and special needs of the child.'' 42 U.S.C. 675(5). This is not a ''transformative expansion in [ACF's] regulatory authority,'' but simply a clarification of how to apply a longstanding statutory requirement to a specific subset of children in foster care. *See W. Virginia* v. *Env't Prot. Agency,* 597 U.S. 697, 724 (2022). The requirement to offer children a placement that is consistent with their gender identity is based on ACF's careful consideration of current research on best practices to promote the health and safety of such youth, as described in the Background of the preamble. This regulatory requirement does not preempt state or tribal laws regarding sex-segregated child care institutions. If a state law prohibits placement in sex-segregated institutions based on gender identity, then the title IV–E/IV–B agency should explore all other placement options in order to offer a foster child a placement consistent with their gender identity, while also meeting the child's other particular needs.

Fulton v. City of Philadelphia

Comment: Many commenters stated that the proposed rule impermissibly attempts to bypass the ruling in *Fulton* v. *City of Philadelphia,* 593 U.S. 522 (2021), by placing obligations on states instead of directly placing them on providers. Commenters said that the Religious Freedom Restoration Act (RFRA), 42 U.S.C. 2000bb *et seq.,* and state-level RFRA laws cannot be circumvented merely by making states do the work of foster care provider. The commenter said that foster families of faith will be negatively affected by the proposed rule. Similarly, a group of commenters said that the rule attempts to bypass and shift responsibility for compliance with *Fulton* and will not survive a court challenge.

Response: The proposed rule and this final rule do not circumvent RFRA or otherwise undermine or attempt to bypass the Supreme Court's ruling in *Fulton* v. *Philadelphia.* Rather, the rule, as proposed and adopted, primarily imposes obligation on states and tribes because Titles IV–E and IV–B of the Social Security Act allocate funding to states and tribes to administer Child Welfare programs. Consequently, when obligations in this rule are imposed on states and tribes, that designation of responsibility is in keeping with the structure of the program.

ACF does not believe that administration of this rule will cause states or tribes to undertake any measures that violate *Fulton,* the Constitution, or Federal laws that support and protect religious exercise and freedom of conscience such as RFRA, applicable Federal civil rights laws or HHS regulations including 45 CFR part 87 (''Equal Treatment for Faith-Based Organizations''). As explained in the preamble to the NPRM, a provider may submit a request for religious accommodation regarding any requirement of this rule to the state or tribe, which must promptly forward the

[44] Note that the proposed rule applied the requirement for transgender and gender non-conforming children to be offered placements consistent with their gender identity to congregate care placements, whereas the final rule makes the requirement applicable to all placements.

request to ACF. We will then evaluate the request to determine whether an exemption is appropriate under the standards of the Constitution, RFRA, and any other applicable law.

V. Implementation Timeframe

We received comments expressing concerns that the provisions in the rule added a layer of bureaucracy and/or burden on child welfare agencies. ACF acknowledges that there will be additional costs placed on state and tribal title IV–E/IV–B agencies. Therefore, ACF is providing more than two fiscal years for state and tribal title IV–E/IV–B agencies to implement the provisions of this final rule on or before October 1, 2026. We added § 1355.22(l) accordingly.

VI. Regulatory Impact Analysis

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 is supplemental to, and reaffirms the principles, structures, and definitions governing regulatory review as established in Executive Order 12866, emphasizing the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. Section 3(f) of Executive Order 12866, as amended by Executive Order 14094, defines ''a significant regulatory action'' as an action that is likely to result in a rule that may: (1) have an annual effect on the economy of $200 million or more (adjusted every 3 years by the Administrator of 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 impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or (4) raise legal or policy issues for which centralized review would meaningfully further the President's priorities or the principles set forth in the order. OIRA has determined that this rule does meet the criteria for a significant regulatory action under section 3(f) of Executive Order 12866. Thus, it was subject to Office of Management and Budget (OMB) review.

Costs and Benefits

The benefits of this final rule are that placing children in foster care with providers the agencies consider Designated Placements for LGBTQI+ children will reduce the negative experiences of such children by allowing them to have access to needed care and services and to be placed in nurturing placement settings with caregivers who have received appropriate training. Ensuring such placements may also reduce LGBTQI+ foster children's high rates of negative health outcomes, homelessness, housing instability and food insecurity. This rule promotes a supportive environment for LGBTQI+ children in foster care.

ACF acknowledges that there will be a cost to implement changes made by this rule as we anticipate that a majority of states and tribes would need to expand their efforts to recruit and identify providers and foster families that the state or tribe could identify as Designated Placements for LGBTQI+ children. This cost would vary depending on an agency's available resources to implement the rule.

Alternatives Considered

As an alternative to this final rule, ACF considered providing sub-regulatory guidance requiring agencies to implement the provisions of the final rule for LGBTQI+. However, this alternative was rejected because it would not have the force of law and thus could not effectively ensure that LGBTQI+ children and youth in foster care receive Designated Placements and services. ACF has already provided extensive resources and sub-regulatory guidance to agencies about improving the health and wellbeing of LGBTQI+ children in foster care, but those resources alone have not been sufficient to ensure that LGBTQI+ youth are protected from mistreatment in foster care.

Regulatory Flexibility Analysis

The Secretary certifies, under 5 U.S.C. 605(b), as enacted by the Regulatory Flexibility Act (Pub. L. 96–354), that this rule will not result in a significant impact on a substantial number of small entities. This rule does not affect small entities because it is applicable only to state and tribal title IV–E agencies, and those entities are not considered to be small entities for purposes of the Regulatory Flexibility Act.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act (Pub. L. 104–4) requires agencies to prepare an assessment of anticipated costs and benefits before finalizing any rule that may result in an annual 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 2023, that threshold is approximately $183 million. This rule does not contain mandates that will impose spending costs on state, local, or tribal governments in the aggregate, or on the private sector, in excess of the threshold.

Congressional Review

The Congressional Review Act (CRA) allows Congress to review major rules issued by Federal agencies before the rules take effect (see 5 U.S.C. 801(a)(1)(A)). The CRA defines a ''major rule'' as one that has resulted, or is likely to result, in (1) an annual effect on the economy of $100 million or more; (2) a major increase in costs or prices for consumers; individual industries; Federal, State, or local government agencies; or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, or innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets (see 5 U.S.C. chapter 8). OMB's Office of Information and Regulatory Affairs has determined that this final rule does not meet the criteria set forth in 5 U.S.C. 804(2).

Assessment of Federal Regulations and Policies on Families

Section 654 of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999 (Pub. L. 105–277) requires Federal agencies to determine whether a policy or regulation may affect family well-being. If the agency's determination is affirmative, then the agency must prepare an impact assessment addressing seven criteria specified in the law. This rule will not have an impact on family well-being as defined in the law.

Executive Order 13132 on Federalism

Executive Order (E.O.) 13132 requires that Federal agencies, ''to the extent practicable and permitted by law,'' consult with state and local government officials in the development of regulatory policies with federalism

implications. Consistent with E.O. 13132 and *Guidance for Implementing E.O. 13132* issued on October 28, 1999, for rules with federalism implications, the Department must include in ''a separately identified portion of the preamble to the regulation'' a ''federalism summary impact statement'' (secs. 6(b)(2)(B) & (c)(2)). In the NPRM, ACF stated the proposed rule would not have substantial direct impact on the relationship between the Federal Government and the states, or on the distribution of power and responsibilities among the various levels of government. However, we anticipated that the proposed rule would have a substantial direct impact on the cost that title IV–E agencies would incur to implement administrative procedures and recruit and train their workforce and providers. Accordingly, ACF included a federalism summary impact statement in the preamble to the NPRM. In that statement, ACF wrote ''To inform the final rule, ACF will seek to further consult with state and local governments and request that such governments provide comments on provisions in the proposed rule and on whether state and local governments are likely to incur additional substantial costs.''

The Department's federalism summary impact statement for the final rule is as follows—''A description of the extent of the agency's prior consultation with state and local officials''—

The public comment period for the NPRM was open for 60 days and closed on November 27, 2023. During this time, we solicited comments via *regulations.gov* and email. During this comment period, we held two informational calls on October 11 and 30, 2023, for states, Indian tribes, and the public. During these calls, we provided an overview of the proposed provisions and where to submit comments.

''A summary of the nature of their concerns and the agency's position supporting the need to issue the regulation''—

As we discussed in the preamble to this final rule, some government entity commenters expressed support and appreciation for the efforts of HHS to establish protections for LGBTQI+ youth in foster care. Other government entity commenters opposed the rule and stated generally a belief that the NPRM creates a separate and distinct process for LGBTQI+ youth that violates privacy, and raised concerns related to religious beliefs of providers. Government entity critics of the NPRM also argued that it creates a ''cumbersome fix'' for a problem that lacks clear definition while states are currently having issues finding enough providers for all children in foster care. They also argued that the NPRM's provisions would disincentivize families from serving as foster parent providers and would ''drive individuals and organizations of faith away.'' They also expressed concerns that most congregate care providers are not currently equipped to meet the provisions around placing children according to their gender identity. Finally, there were objections to what they saw as unfunded burdens on the agencies to develop new trainings, modify licensing and placement rules, and revisions to case management systems to track placements, notifications, and other requirements in the NPRM. The state AG letters raised legal concerns that the NPRM violates various statutory and constitutional requirements; these concerns are addressed in section IV of this preamble.

''A statement of the extent to which the concerns of state and local officials have been met'' (secs. 6(b)(2)(B) and 6(c)(2))—

As we discussed in the preamble to this final rule, safe and appropriate placements are a requirement for all children in foster care. This final rule simply clarifies that requirement for LGBTQI+ children and preserves substantial state discretion consistent with that requirement.

Paperwork Reduction Act

This final rule does not contain additional information collection requirements (ICRs) subject to review by the OMB under the Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501–3520. Information collection requirements for case plans required under title IV–E and IV–B are currently authorized under OMB number #0970–0428. This rule does not require changes to the existing information collection as there will be minimal burden associated with the proposed case plan requirements. Any additional costs would be minimal because agencies are already required to provide case review protections to children in foster care, and the rule provides more specificity for an LGBTQI+ child. While agencies will need to develop policies to comply with some of the provisions in the rule, the casework to provide safe placements, consult with children, and notify them of the procedures for reporting concerns or requests for placement changes are part of the agency's ongoing work with a child in foster care.

Information collection for the CFSR is currently authorized under OMB # is 0970–0214 and no changes are needed to that collection as this rule does not significantly change or add burden to the requirements. The CFSR already includes the review of case plan requirements for safe and appropriate placements for all children in foster care.

Annualized Cost to the Federal Government

ACF estimated that the proposed regulatory changes would cost the Federal Government $10,827,381 over a three fiscal year (2027–2029) period. ACF estimated that the combined total Federal and agency costs over three fiscal years would be $45,743,070.

The estimate for this final rule was derived using fiscal year (FY) 2021 data from the Adoption and Foster Care Analysis and Reporting System (AFCARS) on children in foster care, FY 2022 claiming data from the Form CB–496 ''Title IV–E Programs Quarterly Financial Report (Foster Care, Adoption Assistance, Guardianship Assistance, Prevention Services and Kinship Navigator Programs),'' National Child Abuse and Neglect Data System (NCANDS) child protection caseworker data collected between FY 2003 and FY 2014, state surveys, and the U.S. Department of Labor Bureau of Labor Statistics (BLS).

The portions of this final rule's requirements determined to have an identifiable impact on title IV–E/IV–B agency costs were as follows:

- To comply with the requirement that all LGBTQI+ children in foster care have access to a designated placement, agencies will likely need to increase the recruitment of providers who are qualified to provide safe and appropriate affirming care.
- Training agency caseworkers and supervisors on the procedural requirements in the final rule and on how to adequately serve LGBTQI+ foster children, and training placement providers seeking to become designated as a designated placement provider on how to meet the needs of LGBTQI+ children in foster care, as required in the proposal.

Assumptions: ACF made several assumptions when calculating administrative and training costs for this rule.

ACF assumes that quantifiable incremental costs with respect to the above activities will largely be incurred on behalf of children in foster care who are age 14 and older. ACF expects the population of children under age 14 who meet the proposed requirements of

paragraph (b)(2)(i)(A) or (B) to be relatively small, and therefore not likely to have a significant impact on cost. We are, however, accounting for the cost to recruit and train sufficient Designated Placement providers to serve all children in need of such a placement regardless of age. This is accomplished by calculating recruitment and training costs using the maximum expected level of designated placement needs for children ages 4 and older.

We assume that states and tribes will not be able to use title IV–B funding to implement this final rule. Children in foster care who are not title IV–E eligible are also subject to the proposed requirements based on the proposed rule's applicability to title IV–E and IV–B agencies. Title IV–B funding is available for 75 percent Federal financial participation (FFP) for recruitment and training of placement providers (section 424(a) of the Social Security Act). However, those funds are limited to an annual allotment provided to each title IV–B agency. Therefore, we assume agencies will likely need to cover 100 percent of the Designated Placement provision costs on behalf of non-title IV–E eligible children in foster care.

ACF assumes an overall annual one percent caseload growth rate in the foster care population based on our current title IV–E budgetary projections. Since this final rule focuses on older children in foster care, we increased this growth rate slightly (to an average of 1.4 percent annually) to consider an expected further growth in the age 18 and older foster care population, as more states opt to extend foster care through age 20.

This final rule will become effective at the beginning of FY 2027 and thus will apply to the entire population of children in foster care who are age 14 and older in that FY. ACF assumes that although implementation can begin earlier, the majority of incremental costs will be for the activities occurring in FY 2027. We expect costs in FYs 2028 and 2029 to be about half of those for FY 2027 since the required activities will affect primarily those children in care who are turning age 14 in the FY, or who are newly entering care at age 14 and older. It is possible that more of the costs will be concentrated in FY 2028, rather than FY 2029, if implementation occurs at a more accelerated pace. After the third year of implementation, we anticipate that incremental costs will largely be eliminated as available Designated Placement providers are recruited and the policies, procedures, and training requirements are implemented.

Federal cost estimate for implementation of Designated Placements: The table below displays the individual calculations by line. All entries in the table and the narrative below are rounded to the nearest whole number. The calculations to obtain these amounts, however, were performed without applying rounding to the involved factor(s).

Line 1. National number of children in foster care (FC). Line 1 of the table below displays the actual number of children in FC at the beginning of FY 2022 (baseline), which was 391,098. Line 1 also displays estimates of the annual number of children in FC in the subsequent FYs 2027, 2028, and 2029.

Line 2. National number of children in FC age 14 and older. Line 2 of the table below displays the actual number of children in FC who were age 14 and older at the beginning of FY 2022 (baseline) which was 92,852. We also provide estimates of the number of children in FC age 14 and older in the following subsequent FYs 2027, 2028, and 2029. In 2029 the caseload is estimated at 105,423.

Line 3. National average monthly number of children in title IV–E FC age 14 and older. Line 3 of the table below displays the actual number of title IV–E eligible children in FC age 14 or older at the beginning of FY 2022 (baseline), which was 36,817. This number is calculated by applying the percentage of all children in FC (title IV–E and non-IV–E eligible) that are age 14 or older to the reported count of title IV–E eligible children receiving FC administrative cost services. For example, in FY 2022 the title IV–E FC caseload for administrative costs was 155,075 and the percentage of all children in FC who were age 14 or older was 23.74 percent. Therefore, the calculated count of title IV–E eligible children in FC age 12 and older is 36,817 (155,075 × 23.74%). We also provide estimates of the number of children in FC age 14 and older in the following subsequent years: FYs 2027, 2028, and 2029.

Line 4. National number of children to be notified of Designated Placement requirements. Line 4 of the table below provides an estimate of the number of children in FC who must be notified of the Designated Placement provisions in proposed § 1355.22(a)(2)(i). For the first year of implementation (FY 2027) this number is the same as the Line 2 number (national number of children in foster care age 14 and older) since all of these children are required to be so notified. For FYs 2028 and 2029, we multiplied the national number of children in FC age 14 and older (Line 2) by the proportion of this population that entered care in that FY based on baseline year AFCARS data showing 40.64 percent. This step avoids counting children that are likely to have already received the notification in a prior FY. For example, in FY 2029 the national number of children that must be notified of Designated Placement requirements is 42,846 (105,423 (Line 2) × 40.64% (Line 4) = 42,846).

Line 5. Percentage of national foster care placements for children needing Designated Placements. Line 5 of the table below displays the estimated percentage of national foster care Designated Placements needed for children who identify as LGBTQI+. For each FY, we divided the number of children in foster care ages 14 and older (Line 4) by the expected total annual number of children entering foster care. Data available through surveys shows that about 30 percent of older children in foster care identify as LGBTQI+. An analysis of data collected from 2013–2015 in the California Health Kids Survey found that 30.4 percent of foster youth aged 10–18 identify as LGBTQ+.[45] Similarly, a 2021 study of foster children ages 12 through 21 in Cuyahoga County, Ohio, found that 32 percent identified as LGBTQI+.[46] For the purposes of this cost estimate, ACF's estimate of children age 14 and over in foster care who identify as LGBTQI+ is 30 percent. For example, in FY 2027 on Line 4, the national number of children to be notified of Designated Placement provisions is 103,423 and the base year total foster care entries is 206,812. ACF estimated 30 percent of older children in foster care identify as LGBTQI+. Therefore, Line 5, the percentage of national foster care placements for LGBTQI+ children needing designated placements, is 15.0 percent ((103,423 × 30 percent) ÷ 206,812). This estimate is purposefully high to account for some children under age 14 who may also need such designated placements.

Line 6. Total incremental costs (Federal and non-Federal) for recruiting Designated Placements. Line 6 of the table below displays the estimated total cost of recruiting placement providers to meet the proposed requirements for

[45] Baams, L., Russell, S.T, and Wilson, B.D.M. LGBTQ Youth in Unstable Housing and Foster Care, American Academy of Pediatrics, Volume 143, Issue 3, March 2019, *https://doi.org/10.1542/peds.2017-4211.*

[46] Institute for Innovation and Implementation at University of Maryland's School of Social Work and the National Quality Improvement Center on Tailored Services, Placement Stability, and Permanency for LBTQ2S Children and Youth in Foster Care (2021). Cuyahoga Youth Count: A Report on LBTQ+ Youth Experience in Foster Care, *https://theinstitute.umaryland.edu/media/ssw/institute/Cuyahoga-Youth-Count.6.8.1.pdf.*

Designated Placement providers for LGBTQI+ children in the foster care system. This estimate for each FY is based on data collected from ten title IV–E/IV–B agencies across the Nation with respect to their current annual budgets for foster care recruitment activities. We used this data to calculate a nationwide total estimated annual foster care recruitment cost of $185,998,176 based on an extrapolation of the provided data using FY 2022 foster care caseload information. This figure was adjusted for expected inflation (+2.0 percent per FY) thru FY 2027 resulting in an amount of $204,597,993 and was then multiplied by the calculated portion of the FC caseload ages 14 and older, and then further reduced to 30 percent of that number (estimated LGBTQI+ identification percentage) to reflect the maximum anticipated need for new Designated Placements in each FY. The resulting amount was then reduced by another 50 percent to reflect the likelihood that a significant portion of the Designated Placement recruitment budget would be obtained by refocusing the existing budget for recruitment costs towards Designated Placements. This would promote the agency's ability to comply with the proposed requirement in paragraph (a)(1), given agency recruitment budgets may be limited.

For example, in FY 2027 we estimate that up to 30 percent of notified children (Line 4) as a percentage of all newly placed children in that FY may require the availability of a placement that is designated by the agencies as a Designated Placement. This percentage for FY 2027 of 15.0 percent (31,027 ÷ 206,812) is then multiplied by the national estimated foster care recruitment cost budget $204,597,993) resulting in a total of $30,694,652. This figure is then reduced by 50 percent to reflect the anticipated incremental cost for Designated Placement provider recruitment efforts of $15,347,326. This estimate is purposefully high to account for some children under age 14 who may also need Designated Placements. The total cost for FYs 2025, 2026, and 2027 is $28,002,901.

Line 7. Total costs (Federal and non-Federal) for Designated Placement training (caseworkers, supervisors & providers). Line 7 of the table below provides the estimated total cost of training required for Designated Placements. This estimate for each FY is derived by first identifying the baseline cost of providing a model sexual orientation, gender identity or expression training curriculum developed by the National Quality Improvement Center on Tailored Services, Placement Stability, and Permanency for LGBTQ2S Children and Youth in Foster Care (QIC–LGBTQ2S); a project funded by ACF. This curriculum provides for a two-hour training that can be conducted in-person or remotely for an average group of 30 participants. The identified average cost of delivering this training is $300 plus overhead of 100 percent bringing the total cost to $600 or $20 per participant. Our estimate increases this figure by three percent per year to account for inflation.

We estimate the number of caseworker and casework supervisor (staff) in FY 2027 to be 100 percent of individuals in these positions. National foster care caseworker staffing level data was obtained from reports provided by six state title IV–E/IV–B agencies representing about 16 percent of the national FY 2021 foster care population. This data was then extrapolated using FC caseloads to obtain an estimate of the total number of national FC caseworkers in FY 2021. An estimated annual caseworker growth rate of +2.2 percent was also computed using national NCANDS child protection caseworker data collected between FY 2003 and FY 2014. This data results in an estimated FY 2027 national total of 39,929 FC caseworkers. The casework supervisor count uses the generally applied ratio of one supervisor for five workers resulting in an FY 2027 number of 7,986. The provider trainee population is calculated by using the count of children to be notified of Designated Placement provisions (Line 4) multiplied by 30 percent (maximum expected portion of these children identifying as LGBTQI+) and is then further reduced by the expectation that each provider will, on average, serve 1.5 children. This results in an FY 2027 Designated Placement provider trainee population of 23,270. The expected number of trainees for subsequent FYs is lower based on the expected number of newly placed children in each of these FYs.

Other costs included in the training estimate are staff participation costs and travel and per diem for in-person trainings conducted outside of the local area. Staff participation costs include salary and overhead for each worker spent in the training (two hours). Caseworker title average salary data (as of May 2022) sourced from the U.S. Department of Labor; Bureau of Labor Statistics (BLS) was used in the calculation along with an estimated overhead cost rate of 100 percent. This results in an FY 2022 (baseline) hourly cost (salary + overhead) of $55.98. The cost for two hours of activity is thus $111.97 per participant. A cost-of-living adjustment of +2 percent per year is than added for each subsequent year. Travel and per diem costs are estimated in FY 2022 (base year) as $100 per participant at in-person trainings which are expected to constitute 50 percent of total trainings. An inflation factor of three percent per year is applied to these costs for later FYs. For example, in FY 2027 we expect a total of 71,185 trainees (caseworkers, supervisors & foster care providers). Therefore, the 50 percent of that total expected to have travel & per diem costs is 35,592 trainees. At an average cost of $115 per participant the total cost in this category is $4,093,114. The total FY 2027 estimate for Designated Placement training is $11,064,847. This amount lowers to $3,406,624 for FY 2029. The total training cost for FYs 2027, 2028, and 2029 is $17,740,168.

Line 8. Total costs (Federal and non-Federal) for all Designated Placement activities. Line 8 displays the annual estimated total (Federal + non-Federal) costs for all recruitment and training activities for LGBTQI+ children. This is the sum of lines 6 and 7. We estimate these total costs in FY 2027 as $26,412,173 and the total cost for FYs 2027, 2028, and 2029 is $45,743,070.

Line 9. Total title IV–E FFP for all Designated Placement activity costs. Line 9 displays the annual estimated total title IV–E Federal share of costs for all placement activities for LGBTQI+ children. This is calculated by applying the applicable match rate and the estimated title IV–E participation (eligibility) rate that is generally used to allocate foster care administrative costs. Title IV–E agencies may claim FFP for 50 percent of the administrative costs that agencies incur to provide for activities performed on behalf of title IV–E eligible children in foster care, recruitment of foster homes and child-care institutions (CCIs), and certain other administrative activities identified in 45 CFR 1356.60. The agency must pay the remaining 50 percent non-Federal share of title IV–E administrative costs with state or tribal funds.

Title IV–E agencies may claim reimbursement for 75 percent of allowable training costs to provide for activities performed on behalf of title IV–E eligible children in foster care including training of agency caseworkers and supervisors (including staff participation costs) and training of foster care providers providing care to title IV–E eligible children. The title IV–E agency must pay the remaining 25 percent non-Federal share of title IV–E training costs with state or tribal funds. For example, the FY 2027 amount is

calculated by using the FY 2027 estimated title IV–E foster care participation rate of 39.65 percent along with the applicable FFP rates of 50 percent for administrative costs and 75 percent for training costs. We estimate these total title IV–E FFP costs beginning in FY 2027 as $6,333,200 and the total cost for FYs 2027, 2028, and 2029 is $10,827,381.

Line 10. Total title IV–E non-Federal share for all Designated Placement activity costs. Line 10 displays the annual estimated total title IV–E non-Federal (state or tribe) share of costs for all Designated Placement activities for LGBTQI+ children. This is calculated by applying the applicable non-Federal share match rate and the estimated non-IV–E participation (eligibility) rate that is generally used to allocate foster care administrative costs. For example, the FY 2027 amount is calculated by using the FY 2027 estimated title IV–E foster care participation rate of 39.65 percent along with the applicable non-Federal share matching rates of 50 percent for administrative costs and 25 percent for training costs. We estimate these total title IV–E non-Federal share costs beginning in FY 2027 as $4,139,530 and the total cost for FYs 2027, 2028, and 2029 is $7,310,288.

Line 11. Total title IV–B non-Federal share for all Designated Placement activity costs. Line 11 displays the annual estimated total title IV–B non-Federal (state or tribe) share of costs for all Designated Placement activities. This is calculated by deducting such placement activity costs that are allocable to title IV–E from such total costs. Although costs allocated to title IV–B are subject to Federal matching at the 75 percent rate, as explained previously we assume that none of these costs will be federally reimbursed through title IV–B due to the limited annual allotments for the title IV–B program. Therefore, agencies may need to fund the cost entirely from state or tribal funds or other sources of funding. We estimate these total title IV–B non-Federal share costs beginning in FY 2027 as $15,939,443 and the total cost for FYs 2027, 2028, and 2029 is $27,605,401.

Line 12. Total title IV–E and IV–B non-Federal share for all Designated Placement activity costs. Line 12 displays the annual estimated total title IV–E and IV–B non-Federal share of costs for all Designated Placement activities. This is the sum of amounts on Lines 10 and 11. We estimate these total title IV–E and IV–B non-Federal share costs beginning in FY 2027 as $20,078,973 and the total cost for FYs 2027, 2028, and 2029 is $34,915,689.

Year	2022 (baseline)	2027	2028	2029	Three-year total
1. National number of children in foster care (FC)	391,098	415,095	418,895	422,730	.....
2. National number of children in FC age 14 and older	92,852	103,423	104,418	105,423	.....
3. National average monthly number of children in title IV–E FC age 14 and older	36,817	41,008	41,403	41,801	.....
4. National number of children to be notified of Designated Placement provisions	N/A	103,423	42,438	42,846	.....
5. Percentage of national FC placements for children needing Designated Placements	N/A	15.0%	6.2%	6.2%	.....
6. Total incremental costs (Federal and non-Federal) for Designated Placement recruitment	N/A	$15,347,326	$6,297,488	$6,358,087	28,002,901
7. Total costs (Federal and non-Federal) for Designated Placement training (caseworkers, supervisors & providers)	N/A	$11,064,847	$3,268,697	$3,406,624	17,740,168
8. Total Federal and non-Federal costs for all Designated Placement activities (Lines 6+7)	N/A	$26,412,173	$9,566,185	$9,764,712	45,743,070
9. Total title IV–E FFP for all Designated Placement Activity costs	N/A	$6,333,200	$2,220,573	$2,273,609	10,827,381
10. Total title IV–E non-Federal share for Designated Placement activity costs	N/A	$4,139,530	$1,572,534	$1,598,224	7,310,288
11. Total title IV–B non-Federal share for Designated Placement activity costs	N/A	$15,939,443	$5,773,079	$5,892,879	27,605,401
12. Total titles IV–E and IV–B non-Federal share for placement Designated activity costs (Lines 10+11)	N/A	$20,078,973	$7,345,613	$7,491,103	34,915,689

ACF received several comments on the cost estimate.

Comment: One commenter expressed concerns that the fiscal impact calculations of this regulation are based on estimates of the number of LGBTQI+ children related to surveys conducted (one completed in California in 2014 and one completed in Ohio in 2021) rather than AFCARs data.

Response: AFCARS does not collect information on LGBTQI+ status or identity. Therefore, ACF believes that these surveys are the best available data to estimate the potential population to be served through this regulatory change.

Comment: Commenters expressed that the proposed rule underestimated the recruitment costs, and the cost estimate is unrealistic.

Response: As noted in the NPRM, the ACF estimate covers the maximum potential population for which foster home recruitment will be needed. It is also expected that as policies and procedures are modified to incorporate Designated Placements into existing recruitment activities, the incremental costs will decrease. We thus believe the estimate cost for recruitment to be reasonable.

Comment: One commenter stated that the basis for the cost estimate is not clear.

Response: ACF is basing its estimate that incremental costs of recruitment will no longer be in effect after FY 2027 on an expectation that recruiting activities for Designated Placements will be incorporated into existing recruitment contracts and services as well as the development of a significant pool of existing foster family homes that are trained to serve as Designated Placements.

Comment: One commenter indicated that their experience with 'estimates' of the cost of new proposals is alarmingly low. They always cost more than originally estimated.

Response: ACF understands the concern raised and has made a careful assessment of the likely costs based on information currently available.

Comment: One commenter stated the NPRM failed to adequately consider the costs state agencies will incur to comply with mandates. For example, state agencies will need to develop protocols and systems for implementing the rule's new oral and written notification regimes. State agencies also face significant costs to enforce and monitor the retaliation regime, including the costs of preparing and providing materials to all foster care providers.

Response: ACF determined that incremental costs for the Designated Placement regulatory changes were most likely to be concentrated in recruitment and training costs. We recognize that some other incremental costs may

occur, but do not expect them to be significant.

VII. Tribal Consultation Statement

Executive Order 13175, *Consultation and Coordination With Indian Tribal Governments,* requires agencies to consult with Indian tribes when regulations have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes and either impose substantial direct compliance costs on tribes or preempt state law. *Consultation and Coordination With Indian Tribal Governments,* 65 FR 67249. Similarly, ACF's Tribal Consultation Policy says that consultation is triggered for a new rule adoption that significantly affects tribes, meaning the new rule adoption has substantial direct effects on one on more Indian tribes, on the amount or duration of ACF program funding, on the delivery of ACF programs or services to one or more Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. This final rule does not meet either standard for consultation.

Some title IV–E/IV–B tribal agencies may need to amend their practices to ensure that a placement is available for and provided to an LGBTQI+ or Two-Spirit child in foster care that supports the child's identity. However, we do not expect the costs to be substantial and have received no comments indicating so. Tribal title IV–E agencies may claim FFP for title IV–E foster care administrative and training costs for a portion of the administrative costs incurred.

ACF is committed to consulting with Indian tribes and tribal leadership to the extent practicable and permitted by law. ACF engaged in consultation with Indian tribes and their leadership on the September 2023 NPRM as described below.

Description of Consultation

On September 29, 2023, ACF issued a letter to tribal leaders announcing the date, purpose, virtual location, and registration information for tribal consultation and shared it widely through a variety of peer groups and email list-serves. Tribal Consultation was held via a Zoom teleconference call on October 30, 2023. A report of the tribal consultation may be found on the CB website at: *https://www.acf.hhs.gov/cb/report/tribal-consultation-nprms-legal-foster-care.* In summary, the consultation participants expressed the importance of recognizing LGBTQI+ resources that are specific to each tribe because of differing traditions. A participant made the point that that there could be a potential conflict between placing a child in accordance with the ICWA placement preferences and the NPRM provisions on safe and appropriate placements. We agree that there could be numerous factors in Federal law and the final rule that impact an agency's decision on a case-by-case basis, which they will need to take into account in Federal law and the final rule. Participants requested clarification on what the law requires when there is a conflict between what a child is expressing and what the parents want for the child. This issue is addressed earlier in the preamble. Several participants commented that ACF can support tribal agencies by providing flexible funding to develop resources for LGBTQI+ youth. While flexible funding is not available at this time to implement the final rule, as noted in the NPRM, title IV–E administrative costs are available to claim recruitment and training costs.

List of Subjects in 45 CFR Part 1355

Adoption and foster care, Child welfare, Grant programs—social programs.

(Catalog of Federal Domestic Assistance Program Number 93.658, Foster Care Maintenance; 93.659, Adoption Assistance; 93.645, Child Welfare Services—State Grants).

Approved: April 23, 2024.

Xavier Becerra,

Secretary, Department of Health and Human Services.

For the reasons set forth in the preamble, ACF amends 45 CFR part 1355 as follows:

PART 1355—GENERAL

■ 1. The authority citation for part 1355 continues to read as follows:

Authority: 42 U.S.C. 620 *et seq.,* 42 U.S.C. 670 *et seq.;* 42 U.S.C. 1302.

■ 2. Add § 1355.22 to read as follows:

§ 1355.22 Designated Placement requirements under titles IV–E and IV–B for LGBTQI+ children.

LGBTQI+ children (including children with lesbian, gay, bisexual, transgender, queer, or questioning, and intersex status or identity) shall be placed and receive services in accordance with the following requirements:

(a) *Protections generally applicable.* As part of meeting the requirement to provide a safe and appropriate placement for all children in foster care, the title IV–E/IV–B agency must ensure that all placements, including those for LGBTQI+ children, are free from harassment, mistreatment, or abuse.

(b) *Designated Placements and services for LGBTQI+ children.* The title IV–E/IV–B agency must meet the following requirements for each LGBTQI+ child in foster care:

(1) *Designated Placements.* The title IV–E/IV–B agency must ensure there is a Designated Placement available for all LGBTQI+ children in foster care who request or would benefit from such a placement. Nothing in this section requires any provider to become or serve as a Designated Placement. As used in this section, for a placement to be specifically designated for an LGBTQI+ child, the provider must meet the protections generally applicable as defined at paragraph (a) of this section and:

(i) Commit to establish an environment that supports the child's LGBTQI+ status or identity;

(ii) Be trained with the appropriate knowledge and skills to provide for the needs of the child related to the child's self-identified sexual orientation, gender identity, and gender expression. The training must reflect evidence, studies, and research about the impacts of rejection, discrimination, and stigma on the safety and wellbeing of LGBTQI+ children, and provide information for providers about professional standards and recommended practices that promote the safety and wellbeing of LGBTQI+ children; and

(iii) Facilitate the child's access to age- or developmentally appropriate resources, services, and activities that support their health and well-being as described in paragraph (e) of this section.

(2) *Process for notification of and request for Designated Placements.* The IV–E/IV–B agency must implement a process by which an LGBTQI+ child may request a Designated Placement as described in paragraph (b)(1) of this section or request that their current placement be offered services to become a Designated Placement. The title IV–E/IV–B agency's process for considering such a request must provide the child with an opportunity to express their needs and concerns. The process must safeguard the privacy and confidentiality of the child, consistent with section 471(a)(8) of the Act and 45 CFR 205.50, and must include the following components:

(i) Notice of the availability of Designated Placements and the ability to request that services be offered to their

current placement must be provided to, at minimum:

(A) All children age 14 and over; and

(B) Children under age 14 who:

(*1*) Have been removed from their home due, in whole or part, to familial conflict about their sexual orientation, gender identity, gender expression or sex characteristics; or

(*2*) Have disclosed their LGBTQI+ status or identity or whose LGBTQI+ status or identity is otherwise known to the agency;

(ii) The notice must be provided in an age- or developmentally appropriate manner, both verbally and in writing, and must inform the child of how they may request a Designated Placement or services for their current placement and the process the title IV–E/IV–B agency will use in responding to their request; and

(iii) The notice must inform the child of the nonretaliation protections described at paragraph (d) of this section and describe the process by which a child may report a concern about retaliation.

(3) *Placement and services decisions and changes.* When making placement and service decisions related to an LGBTQI+ child, the title IV–E/IV–B agency shall give substantial weight to the child's expressed concerns or requests when determining the child's best interests. To promote placement stability, when an LGBTQI+ child requests a Designated Placement and before initiating any placement changes, the title IV–E/IV–B agency must consider whether additional services and training would allow the current provider to meet the conditions for a Designated Placement. If so, and if the current provider is willing to meet the conditions for a Designated Placement, the IV–E/IV–B agency must use the case review system to regularly review the provider's progress towards meeting the conditions of such a designation.

(c) *Process for reporting concerns about placements and concerns about retaliation.* The title IV–E/IV–B agency must implement a process for LGBTQI+ children to report concerns about a placement that fails to meet the applicable requirements of this section, and to report concerns about retaliation as described in paragraph (d) of this section. The process must safeguard the privacy and confidentiality of the child, consistent with section 471(a)(8) of the Act and 45 CFR 205.50. The title IV–E/IV–B agency must respond promptly to an LGBTQI+ child's reported concern, consistent with the agency's timeframes for investigating child abuse and neglect reports depending on the nature of the child's report.

(d) *Retaliation prohibited.* (1) The title IV–E/IV–B agency must have a procedure to ensure that neither the title IV–E/IV–B agency, nor any provider, nor any entity or person acting on behalf of the agency or a provider retaliates against an LGBTQI+ child in foster care based on the child's actual or perceived LGBTQI+ status or identity, any disclosure of that status or identity by the child or a third party, or the child's request or report related to the requirements for placements or services under this part.

(2) Conduct by the title IV–E/IV–B agency, provider, or any entity or person acting on behalf of the agency or a provider that will be considered retaliation includes, but is not limited to:

(i) Harassment, mistreatment, or abuse as described in paragraph (a) of this section.

(ii) Attempts to undermine, suppress, change, or stigmatize a child's sexual orientation or gender identity or expression through ''conversion therapy.''

(iii) Unwarranted placement changes, including unwarranted placements in congregate care facilities, or restricting an LGBTQI+ child's access to LGBTQI+ peers, siblings, family members, or age- or developmentally appropriate materials and community resources.

(iv) Disclosing the child's LGBTQI+ status or identity in ways that cause harm or risk the privacy of the child or that infringe on any privacy rights of the child.

(v) Using information about the child's LGBTQI+ status or identity to initiate or sustain a child protection investigation or disclosing information about the child's LGBTQI+ status or identity to law enforcement in any manner not permitted by law.

(vi) Taking action against current or potential caregivers (including foster parents, pre-adoptive parents, adoptive parents, kin caregivers and birth families) because they support or have supported a child's LGBTQI+ status or identity.

(e) *Access to supportive and age- or developmentally appropriate services.* The title IV–E/IV–B agency must ensure that LGBTQI+ children have access to age- or developmentally appropriate services that are supportive of their sexual orientation and gender identity or expression, including clinically appropriate mental and behavioral health supports.

(f) *Placement of transgender and gender non-conforming children in foster care.* When considering placing a child, the title IV–E/IV–B agency must offer the child a placement consistent with their gender identity. The title IV–E/IV–B agency must also consult with the child to provide an opportunity to voice any concerns related to placement.

(g) *Compliance with privacy laws.* The title IV–E/IV–B agency must comply with all applicable privacy laws, including section 471(a)(8) of the Act and 45 CFR 205.50, in all aspects of its implementation of this section. Information that reveals a child's LGBTQI+ status or identity may only be disclosed in accordance with law and any such disclosure must be the minimum necessary to accomplish the legally-permitted purposes.

(h) *Training and notification requirements.* In addition to meeting the requirements of paragraph (b)(1)(ii) of this section, the title IV–E–/IV–B agency must:

(1) Ensure that its employees who have responsibility for placing children in foster care, making placement decisions, or providing services:

(i) Are trained to implement the procedural requirements of this section; and

(ii) Are adequately prepared with the appropriate knowledge and skills to serve an LGBTQI+ child related to their sexual orientation, gender identity, and gender expression.

(2) Ensure that all its contractors and subrecipients who have responsibility for placing children in foster care, making placement decisions, or providing services are informed of the procedural requirements to comply with this section, including the required non-retaliation provisions outlined in paragraph (d) of this section.

(3) Ensure that all placement providers are informed of the procedural requirements to comply with this section, including the required non-retaliation provision outlined in paragraph (d) of this section.

(i) *Protections for religious freedom, conscience, and free speech.* Insofar as the application of any requirement under this section would violate applicable Federal protections for religious freedom, conscience, and free speech, such application shall not be required.

(j) *No penalties for providers that do not seek to qualify as Designated Placements.* Nothing in this section shall be construed to require or authorize a State or Tribe to penalize a provider in the titles IV–E or IV–B programs because the provider does not seek or is determined not to qualify as a Designated Placement under this section.

(k) *Severability.* Any provision of this section held to be invalid or

unenforceable as applied to any person or circumstance shall be construed so as to continue to give the maximum effect to the provision permitted by law, including as applied to persons not similarly situated or to dissimilar circumstances, unless such holding is that the provision of this section is invalid and unenforceable in all circumstances, in which event the provision shall be severable from the remainder of this section and shall not affect the remainder thereof.

(l) *Implementation.* Title IV–E/IV–B agencies must follow the requirements of this section beginning on October 1, 2026.

(m) *No effect on more protective laws or policies.* Nothing in this section shall limit any State, Tribe, or local government from imposing or enforcing, as a matter of law or policy, requirements that provide greater protection to LGBTQI+ children than this section provides.

■ 3. Amend § 1355.34 by revising paragraph (c)(2)(i) to read as follows:

§ 1355.34 Criteria for determining substantial conformity.

* * * * *

(c) * * *

(2) * * *

(i) Provide, for each child, a written case plan to be developed jointly with the child's parent(s) that includes provisions: for placing the child in the least restrictive, most family-like placement appropriate to the child's needs, and in close proximity to the parents' home where such placement is in the child's best interests; for visits with a child placed out of State/Tribal service area at least every 12 months by a caseworker of the agency or of the agency in the State/Tribal service area where the child is placed; for documentation of the steps taken to make and finalize an adoptive or other permanent placement when the child cannot return home; and for implementation of the requirements of § 1355.22(b) and (d) as applicable (sections 422(b)(8)(A)(ii), 471(a)(16), and 475(5)(A) of the Act and § 1355.22(b) and (d));

* * * * *

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Part IX

Department of Homeland Security

8 CFR Parts 212, 214, 245, et al.
Classification for Victims of Severe Forms of Trafficking in Persons; Eligibility for ''T'' Nonimmigrant Status; Final Rule

DEPARTMENT OF HOMELAND SECURITY

8 CFR Parts 212, 214, 245, and 274a

[CIS No. 2507–11; DHS Docket No. USCIS–2011–0010]

RIN 1615–AA59

Classification for Victims of Severe Forms of Trafficking in Persons; Eligibility for "T" Nonimmigrant Status

AGENCY: U.S. Citizenship and Immigration Services (USCIS), Department of Homeland Security.

ACTION: Final rule.

SUMMARY: On December 19, 2016, the Department of Homeland Security (DHS) published an interim final rule (2016 interim rule) amending its regulations governing the requirements and procedures for victims of a severe form of trafficking in persons seeking T nonimmigrant status. The 2016 interim rule amended the regulations to conform with legislation enacted after the publication of the initial regulations and to codify discretionary changes based on DHS's experience implementing the T nonimmigrant status program since it was established in 2002. DHS is adopting the 2016 interim rule as final with several clarifying changes based on USCIS experience implementing the interim rule, in response to comments received, and due to an organizational change to move the regulations to a separate subpart as explained in the **SUPPLEMENTARY INFORMATION** section below. This final rule is intended to respond to public comments and clarify the eligibility and application requirements so that they conform to current law.

DATES: This rule is effective August 28, 2024.

Comments on the Paperwork Reduction Act section of this final rule must be submitted by July 1, 2024.

FOR FURTHER INFORMATION CONTACT: Rená Cutlip-Mason, Office of Policy and Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, by mail at 5900 Capital Gateway Dr, Camp Springs, MD 20529–2140; or by phone at 240–721–3000 (this is not a toll-free number). Individuals with hearing or speech impairments may access the telephone numbers above via TTY by calling the toll-free Federal Information Relay Service at 1–877–889–5627 (TTY/TDD).

SUPPLEMENTARY INFORMATION:

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I. Executive Summary

A. Purpose of the Regulatory Action

The T nonimmigrant status regulations—which include the eligibility criteria, application process, evidentiary standards, and benefits associated with the T nonimmigrant classification (commonly known as the ''T visa'' [1])—have been in effect since a 2002 interim rule. *New Classification for Victims of Severe Forms of Trafficking in Persons; Eligibility for ''T'' Nonimmigrant Status,* 67 FR 4783 (Jan. 31, 2002) (2002 interim rule). Since the publication of that interim rule, the public submitted comments on the regulations, and Congress enacted numerous pieces of related legislation. DHS published a 2016 interim rule to respond to the public comments, clarify requirements based on statutory changes and its experience operating the program for more than 14 years, and amend provisions as required by legislation. *Classification for Victims of Severe Forms of Trafficking in Persons; Eligibility for ''T'' Nonimmigrant Status,* 81 FR 92266 (Dec. 19, 2016). In July 2021, DHS reopened the public comment period for the interim rule for 30 days, and subsequently extended the deadline for comments. This final rule adopts the changes in the 2016 interim rule, with some modifications. The rationale for the 2016 interim rule and the reasoning provided in the preamble to the 2016 interim rule remain valid with respect to many of those regulatory amendments, and DHS adopts such reasoning to support this final rule. In response to the public comments received on the 2016 interim rule, DHS has modified some provisions in the final rule. DHS has also made some technical changes in the final rule. The changes are summarized in the following section I.B. Responses to public comments, and substantive changes being made in response, are discussed in detail in section III.

B. Summary of Changes Made in the Final Rule

1. Definitions

In the final rule, DHS has updated several definitions to clarify them and ensure that they are consistent with those in the Trafficking Victims Protection Act of 2000 (TVPA), as amended. *See* 22 U.S.C. 7102; new 8 CFR 214.201. The rule strikes language from the definition of ''involuntary servitude'' which had been derived from the *United States* v. *Kozminski,* 487 U.S. 931 (1988), decision. DHS has also added definitions of the terms ''serious harm'' and ''abuse or threatened abuse of the legal process.'' Additionally, DHS has added a definition of ''incapacitated or incompetent.'' DHS has clarified in the definition of law enforcement agency several additional examples of what may constitute such an agency. In addition, DHS has amended the definition for ''Law Enforcement Agency declaration.'' DHS has also included a new definition for the term ''law enforcement involvement.'' Finally, DHS has struck repetitive language from the definition of ''reasonable request for assistance.''

2. Bona Fide Determination Process

DHS has moved the definition of ''bona fide determination,'' (BFD) to define the process in the relevant provision of the regulations for clarity. *See* new 8 CFR 214.204(m), 214.205.

DHS has also amended provisions regarding BFDs, which reflect a modified process. *See* new 8 CFR 214.204(m), 214.205, and 274a.12(c)(40). The new streamlined process will include case review and background checks. Once an individual whose application has been deemed bona fide files a Form I–765, Application for Employment Authorization under new 8 CFR 274.a12(c)(40), USCIS will consider whether an applicant warrants a favorable exercise of discretion and will be granted deferred action and a BFD employment authorization document.[2]

3. Evidence of Extreme Hardship

In response to comments, DHS is clarifying the regulations to state that hardship to persons other than the applicant will be considered when determining whether an applicant would suffer the requisite hardship, only if the evidence specifically demonstrates that the applicant will suffer hardship upon removal as a result of hardship to a third party. New 8 CFR 214.209(c)(2).

4. Technical Changes

a. Reorganization of 8 CFR Part 214

This rule moves the regulations for T nonimmigrant status to a separate subpart of 8 CFR part 214 to reduce the length and density of part 214 and to make it easier to locate specific provisions. In addition to the renumbering and redesignating of paragraphs, the rule has reorganized and reworded some sections to improve readability, such as in new sections 8 CFR 214.204(d)(1) (discussing the law enforcement agency (LEA) declaration) and 8 CFR 214.208(e)(1) (discussing the trauma exception to the general requirement of compliance with any reasonable law enforcement requests for assistance). The rule also divides overly long paragraphs into smaller provisions to improve the organization of the regulations.

The Administrative Procedure Act (APA) exempts from the prior notice and opportunity for comment requirements, ''. . . rules of agency organization, procedure or practice.'' 5 U.S.C. 553(b)(A). Restructuring the regulations and moving them to a separate subpart resulted in no substantive changes to program requirements. This rule's changes to renumber paragraphs and improve readability affects rules of agency organization, procedure or practice, and those portions of the rule are exempt from the notice-and-comment requirements under 5 U.S.C. 553(b)(A).

Table 1 lists where provisions of 8 CFR 214.11 that were codified in the 2016 interim rule have been moved to in this final rule.

[1] Although T nonimmigrant status is known as the ''T visa'' colloquially, such a classification is not entirely accurate. T–1 applicants must be physically present in the United States or at a port of entry on account of the trafficking in persons to be eligible for T–1 nonimmigrant status, so they do not obtain a ''T visa'' to enter the United States. T–1 nonimmigrants may seek derivative T nonimmigrant status for certain family members. *See* new 8 CFR 214.211(a). Some of these family members may reside outside the United States and, if eligible, can join the T–1 nonimmigrant in the United States. Before family members with approved applications for derivative T nonimmigrant status can enter the United States, the family members must first undergo processing with the Department of State (DOS) at a U.S. Embassy or Consulate to obtain a T visa abroad. This is known as consular processing. USCIS will decide based on the application filed by the T–1 nonimmigrant whether an overseas family member qualifies for derivative T nonimmigrant status. DOS will then separately determine that family member's eligibility to receive a visa to enter the United States. A family member outside of the United States is not a derivative T nonimmigrant until they are granted a T–2, T–3, T–4, T–5, or T–6 visa by the DOS and are admitted to the United States in T nonimmigrant status. *See* new 8 CFR 214.211(a).

[2] Persons seeking or granted T nonimmigrant status pay no fee for Form I–765. *See* 8 CFR 106.3(b)(2)(viii).

Table 1. Redesignation Table	
Previous section	New section
214.11(a)	214.201
214.11(b)	214.202
214.11(c)	214.203
214.11(d)	214.204
214.11(e)	214.205
214.11(f)	214.206
214.11(g)	214.207
214.11(h)	214.208
214.11(i)	214.209
214.11(j)	214.210
214.11(k)	214.211
214.11(l)	214.212
214.11(m)	214.213
214.11(n)	214.214
214.11(o)	214.215
214.11(p)	214.216

b. Terminology Changes

USCIS is making technical clarifications throughout the regulation in amending the use of the term ''alien'' and replacing it with ''victim,'' ''applicant,'' ''survivor,'' or ''noncitizen'' where appropriate. USCIS is also updating terminology to be gender neutral throughout.

Throughout the regulations, DHS has made revisions to reference ''detection, investigation, or prosecution'' rather than just ''investigation or prosecution'' for consistency and accuracy.

DHS has also removed the term ''principal T nonimmigrant'' from the regulations and replaced it with the term ''T–1 nonimmigrant.'' The term ''principal T nonimmigrant'' did not appear elsewhere in the CFR, whereas ''T–1 nonimmigrant'' is used consistently to describe a victim of a severe form of trafficking in persons who has been granted T–1 nonimmigrant status.

c. Definition of Eligible Family Member

DHS has made a technical clarification to the definition of ''eligible family member.'' The 2016 Interim Rule defines this term as a family member who may be eligible for derivative T nonimmigrant status based on their relationship to a noncitizen victim and, if required, upon a showing of a present danger *or* retaliation; however, the statute indicates that the derivative must face a present danger *of* retaliation as a result of escape from the severe form of trafficking or cooperation with law enforcement. INA sec. 101(a)(15)(T)(ii)(III). As such, DHS has made a technical revision to the regulatory text to comply with Congressional intent. *See* new 8 CFR 214.201.

d. Clarification To Address T Visa Evidentiary Standard and Standard of Proof

DHS is also clarifying the evidentiary standard and standard of proof that apply to the adjudication of a T visa application. This rule retains the standard that applicants may submit any credible evidence relating to their T visa applications for USCIS to consider. *See* new 8 CFR 214.204(l).

e. Interview Authority

DHS is removing the interview provision at former 8 CFR 214.11(d)(6) to avoid redundancy. This section indicated that USCIS may require an applicant for T nonimmigrant status to participate in a personal interview. USCIS is removing this provision, because USCIS authority to require any individual filing a benefit request to appear for an interview is already covered at 8 CFR 103.2(b)(9).

f. USCIS Review

DHS has stricken ''de novo'' from 8 CFR 214.11(d)(5) and (8) (redesignated as 8 CFR 214.204(l)(2) and (n)) to reflect that USCIS conducts an initial review, not a ''de novo'' review.

g. Travel Authority

DHS has clarified that a noncitizen granted T nonimmigrant status must apply for advance parole to return to the United States after travel abroad pursuant to section 212(d)(5) of the INA, 8 U.S.C. 1182(d)(5). Compliance with advance parole procedures is required to maintain T nonimmigrant status upon return to the United States and remain eligible to adjust status under section 245(l) of the INA, 8 U.S.C. 1255(l). *See* new 8 CFR 214.204(p), 214.211(i)(4); 8 CFR 245.23(j).

h. Departure From the United States as a Result of Continued Victimization

DHS wishes to clarify that the ''continued victimization'' criteria referenced at 8 CFR 214.207(b)(1) does not require that the applicant is currently a ''victim of a severe form of trafficking in persons.'' Instead, continued victimization can include ongoing victimization that directly results from past trafficking. For example, if an applicant experienced harm such as abduction, abuse, threats, or other trauma that resulted in continuing harm, that applicant's reentry could be a result of their continued victimization, even though they were not trafficked upon reentry. As such, the applicant may be able to satisfy the physical presence requirement if they establish that their reentry into the United States was the result of continued victimization tied to ongoing or past trafficking. *See* new 8 CFR 214.207(b)(1).

i. Severe Form of Trafficking in Persons

DHS has revised the regulatory text so that references to ''trafficking'' and ''acts of trafficking'' are consistent with the INA, for consistency and clarity. These changes are intended to clarify for applicants when ''a severe form of trafficking in persons'' applies to a particular eligibility requirement and when instead ''trafficking'' or ''acts of trafficking'' apply to an eligibility requirement. For example, applicants must demonstrate that they have complied with reasonable requests for assistance in the investigation or prosecution of ''acts of trafficking'' or the investigation of crime where ''acts of trafficking'' are at least one central reason for the commission of the crime, pursuant to section 101(a)(15)(T)(i)(III)(aa) of the INA, 8 U.S.C. 1101(a)(15)(T)(i)(III)(aa), as distinct from a ''severe form of trafficking in persons'' that applies to other eligibility requirements, such as section 101(a)(15)(T)(i)(I) of the INA, 8 U.S.C. 1101(a)(15)(T)(i)(I). *See, e.g.,* new 8 CFR 214.201, 214.204(c), 214.208(a) and (c) through (e), 214.209(b), 214.211(a), 214.212(a) and (e), 214.215(b) (addressing ''acts of trafficking''); 214.201, 214.202(a) and (e), 214.204(g), 214.206(a), 214.207(a) and (b), 214.208(b), 214.209(b), 214.215(a) (discussing ''severe form of trafficking in persons'').

j. Extreme Hardship Involving Unusual and Severe Harm

DHS has amended previous 8 CFR 214.11(i)(1) because the previous citation at 8 CFR 240.58 no longer exists. *See* new 8 CFR 214.209(a).

k. Waiting List

DHS has revised previous 8 CFR 214.11(j) for clarity, and reorganized the provision at new 8 CFR 214.210, to reflect how the waiting list works in conjunction with the amended bona fide determination process.

l. Appeal Rights and Procedures

USCIS has clarified appeal rights and procedures at new 8 CFR 214.213(c). *See* 8 CFR 103.3. USCIS has further clarified the existing practice that an automatic revocation cannot be appealed. *See* new 8 CFR 214.213(a).

m. References to Forms

The phrase ''form designated by USCIS'' has been replaced in several places with an official form name. Form numbers have also been removed throughout and replaced by form names.

n. Law Enforcement Endorsement

DHS has updated references to ''Law Enforcement Endorsement'' to instead refer to ''Law Enforcement Declaration.'' This update more effectively captures the declaration process in the T visa program. In addition, DHS has deleted the requirement under 8 CFR 214.11(d)(3)(i) that a law enforcement agency (LEA) declaration must include ''the results of any name or database inquiries performed'' because the information is redundant, as USCIS conducts background checks on the applicant as part of its adjudication.

o. Assistance in the Investigation or Prosecution for Adjustment of Status

Prior to TVPRA 2008, the INA referenced the Attorney General at INA section 245(l)(1)(C), 8 U.S.C. 1255(l)(1)(C), which describes the requirement of assisting in an investigation or prosecution of acts of trafficking. TVPRA 2008 amended the INA so that the Secretary of Homeland Security is now only required to consult with the Attorney General as appropriate. *See* INA sec. 245(l)(1)(C), 8 U.S.C. 1255(l)(1)(C). As a result of TVPRA 2008, DHS has sole jurisdiction over the entire T nonimmigrant adjustment of status process, including the determination of whether an applicant complied with any reasonable requests for assistance in the investigation or prosecution of acts of trafficking, and DHS consults the Attorney General as it deems appropriate.[3] The regulations state that the Attorney General has jurisdiction to determine whether an applicant received any reasonable request for assistance in the investigation or prosecution of acts of trafficking, and, if so, whether they complied with that request. *See* previous 8 CFR 245.23(d). This required applicants for adjustment of status to submit a document issued by the Attorney General (or their designee) certifying the applicant had complied with any reasonable requests for assistance. *See* previous 8 CFR 245.23(f). After TVPRA 2008, however, an applicant was no longer required to obtain a certification from the Attorney General to demonstrate compliance with any reasonable requests in the investigation or prosecution of acts of trafficking, and immigration officers were no longer required to deny an application for lack of an Attorney General certification.[4] Instead, officers were required to determine whether the applicant had met the statutory requirement to comply with any reasonable request for assistance. Therefore, consistent with DHS' longstanding practice, and the changes made to the INA by TVPRA 2008, DHS amends 8 CFR 245.23(d) and (f) in this rule to indicate that an applicant is not required to provide a certification letter from the Attorney General regarding their compliance with any reasonable request for assistance in the investigation or prosecution of acts of trafficking. DHS has stricken any reference to the Attorney General in these sections; applicants must establish their compliance with any reasonable request for assistance to the satisfaction of USCIS only.

C. Costs and Benefits

As discussed further in the preamble below, this final rule adopts the changes from the 2016 interim final rule (IFR), with some modifications. The rationale for the 2016 interim rule and the reasoning provided in the preamble to the 2016 interim rule remain valid with respect to these regulatory amendments; therefore, DHS adopts such reasoning to support this final rule. In response to the public comments received on the 2016 interim rule, DHS has modified some provisions for this final rule. In addition, DHS has also made some technical changes in the final rule.

This final rule clarifies some definitions and amends the bona fide determination (BFD) provisions to implement a new process. This final rule also clarifies evidentiary requirements for hardship and codifies the evidentiary standard of proof that applies to the adjudication of an application for T nonimmigrant status. Lastly, DHS made technical changes to the organization and terminology of 8 CFR part 214.

For the 10-year period of analysis of the rule using the post-IFR baseline, DHS estimates the annualized costs of this rule will be $807,314 annualized at 3 and 7 percent. Table 1 in section IV provides a more detailed summary of the final rule provisions and their impacts.

II. Background and Legislative Authority

Congress created T nonimmigrant status in the TVPA. *See* Victims of Trafficking and Violence Protection Act

[3] *See* U.S. Citizenship and Immigr. Servs., U.S. Dep't of Homeland Security, ''William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008: Changes to T and U Nonimmigrant Status and Adjustment of Status Provisions; Revisions to Adjudicator's Field Manual (AFM) Chapters 23.5 and 39 (AFM Update AD10–38)'' (2010), *https://www.uscis.gov/sites/default/files/document/memos/William-Wilberforce-TVPRAct-of-2008-July-212010.pdf* (TVPRA Memo).

[4] *See* TVPRA memo.

of 2000, div. A, TVPA, Public Law 106–386, 114 Stat. 1464 (Oct. 28, 2000). Congress has since amended the TVPA, including the T nonimmigrant status provisions, several times: Trafficking Victims Protection Reauthorization Act (TVPRA) of 2003, Public Law 108–193, 117 Stat. 2875 (Dec. 19, 2003); Violence Against Women Act (VAWA) 2005, Public Law 109–162, 119 Stat. 2960 (Jan. 5, 2006); Technical Corrections to VAWA 2005, Public Law 109–271, 120 Stat. 750 (Aug. 12, 2006); TVPRA 2008, Public Law 110–457, 122 Stat. 5044 (Dec. 23, 2008); VAWA 2013, Public Law 113–4, titles viii, xii, 127 Stat. 54 (Mar. 7, 2013); Justice for Victims of Trafficking Act (JVTA), Public Law 114–22, 129 Stat 227 (May 29, 2015). The TVPA may be found in 22 U.S.C. 7101–7110; 22 U.S.C. 2151n, 2152d.

The TVPA and subsequent reauthorizing legislation provide various means to detect and combat trafficking in persons, including tools to effectively prosecute and punish perpetrators of trafficking in persons, and protect victims of trafficking through immigration relief and access to Federal public benefits. T nonimmigrant status is one type of immigration relief available to victims of a severe form of trafficking in persons who assist LEAs in the investigation or prosecution of the perpetrators of these crimes.

The Immigration and Nationality Act (INA) permits the Secretary of Homeland Security (Secretary) to grant T nonimmigrant status to individuals who are or were victims of a severe form of trafficking in persons and have complied with any reasonable request by an LEA for assistance in an investigation or prosecution of crime involving acts of trafficking in persons (or are under 18 years of age or are unable to cooperate due to physical or psychological trauma), and to certain eligible family members of such individuals.[5] *See* INA sec. 101(a)(15)(T)(i)(I), (III), (ii), 8 U.S.C. 1101(a)(15)(T)(i)(I), (III), (ii). Applicants for T–1 nonimmigrant status must be physically present in the United States, American Samoa, or the Commonwealth of the Northern Mariana Islands, or at a port-of-entry to the United States, on account of a severe form of trafficking in persons. This includes being physically present on account of having been allowed to enter the United States to participate in investigative or judicial processes associated with an act or a perpetrator of trafficking. *See* INA sec. 101(a)(15)(T)(i)(II), 8 U.S.C. 1101(a)(15)(T)(i)(II). In addition, an applicant must demonstrate that they would suffer extreme hardship involving unusual and severe harm if removed from the United States. *See* INA sec. 101(a)(15)(T)(i)(IV), 8 U.S.C. 1101(a)(15)(T)(i)(IV). T nonimmigrant status allows eligible individuals to: remain in the United States for a period of not more than four years (with the possibility for extensions in some circumstances), receive work authorization, become eligible for certain Federal public benefits and services, and apply for derivative status for certain eligible family members. *See* INA sec. 214(o), 8 U.S.C. 1184(o); INA sec. 101(i)(2), 8 U.S.C. 1101(i)(2); 22 U.S.C. 7105(b)(1)(A); TVPA 107(b)(1); section 431 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, as amended, 8 U.S.C. 1641(c)(4); INA sec. 101(a)(15)(T)(ii), 8 U.S.C. 1101(a)(15)(T)(ii). T nonimmigrants who qualify may also be able to adjust their status and become lawful permanent residents. INA sec. 245(l), 8 U.S.C. 1155(l).

[5] The primary applicant who is the victim of trafficking may also be referred to as the ''principal T nonimmigrant'' or ''principal applicant'' and receives T–1 nonimmigrant status, if eligible. The principal applicant may be permitted to apply for certain family members who are referred to as ''eligible family members'' or ''derivative T nonimmigrants'' and if approved, those family members receive T–2, T–3, T–4, T–5, or T–6 nonimmigrant status. The term derivative is used in this context because the family member's eligibility derives from that of the principal applicant.

III. Response to Public Comments on the 2016 Interim Final Rule

A. Summary of Public Comments

On December 19, 2016, DHS published an interim final rule (IFR) in the **Federal Register** and received 17 public comments. 81 FR 92266 (Dec. 19, 2016). On July 16, 2021, DHS reopened the public comment period for the IFR rule for 30 days to provide the public with further opportunity to comment on the interim final rule. 86 FR 37670 (July 16, 2021). DHS received multiple requests from stakeholders to extend the deadline for submitting public comments during the reopened public comment period. In response to that request, DHS extended the reopened comment period for an additional 30 days, to provide a total of 60 days for the public to submit comments. DHS received an additional 41 comments on the IFR during the reopened comment period. In total, between the two comment periods, DHS received 58 comments. DHS has reviewed all the public comments and addresses them in this final rule.

B. General and Preliminary Matters

Most comments came from representatives of nonprofit legal service providers who provided detailed recommendations based on their experience advocating for and providing services to trafficking victims. Commenters also included members of the public and individual law practitioners.

1. General Support for the Rule

Comment: Most commenters were generally in favor of the 2016 interim rule. Several commenters supported DHS's decision to issue detailed regulations that reflect statutory changes since the initial 2002 interim rule; some commenters mentioned the confusion that has been caused by having outdated regulations that did not reflect subsequent statutory changes. Some commenters expressed concern about the growing epidemic of human trafficking in the United States and globally. Commenters expressed support for the following:

- Eliminating the requirement that applicants for T nonimmigrant status provide three passport-sized photographs with their applications, which saves victims and assisting nonprofit organizations time and money;
- Removing the filing deadline for applicants whose trafficking occurred before October 28, 2000, recognizing that there was no statutory requirement for the deadline;
- Clarifying that if a T nonimmigrant cannot file for adjustment of status within the 4-year filing deadline and can show exceptional circumstances, they may be eligible to receive an extension of status and may potentially be able to adjust status to a lawful permanent resident;
- Updating regulatory language to reflect statutory changes to the categories of eligible family members and clarifying age-out protections for family members who are eligible at the time of filing but exceed the required age before USCIS adjudicates the application;
- Clarifying that T nonimmigrant applicants are exempted from the public charge ground of inadmissibility;
- Revising the waiver authority for grounds of inadmissibility during the T nonimmigrant application stage and the T adjustment of status stage;
- Providing additional guidance that an individual need not actually perform labor, services, or commercial sex acts to meet the definition of a ''victim of a severe form of trafficking in persons'';
- Clarifying the ''any credible evidence'' standard;

• Referencing the confidentiality provisions that apply to applicants for T nonimmigrant status under 8 U.S.C. 1367(a)(2) and (b);

• Exempting applicants who, due to trauma, are unable to comply with any reasonable request by a law enforcement agency;

• Clarifying that presence in the Commonwealth of the Northern Mariana Islands after being granted T nonimmigrant status qualifies towards meeting the requisite physical presence requirement for adjustment of status;

• Conforming the regulatory definition of sex trafficking to the revised statutory definition in section 103(10) of the TVPA, 22 U.S.C. 7102(10), as amended by section 108(b) of the JVTA, 129 Stat. 239;

• Expanding the definition of ''Law Enforcement Agency'' to include State and local agencies, as well as those that detect and investigate trafficking;

• Removing the requirement that an applicant establish they had no ''opportunity to depart'' the United States and clarifying the circumstances in which an applicant who has left the United States can establish physical presence in the United States on account of trafficking;

• Clarifying that ''involuntary servitude'' encompasses ''the use of psychological coercion''; and

• Removing the extreme hardship requirement for overseas derivative family members.

Response: DHS acknowledges and appreciates commenters' support of the rule. DHS agrees with the substance of these comments and believes these changes provide greater clarity and further align the T visa program with its statutory purpose.

2. Additional Comments

Commenters also requested that DHS modify certain provisions in the 2016 interim rule. Although there was some variation in the proposed changes, there was also significant overlap in their comments. DHS considered the comments received and all other material contained in the docket in preparing this final rule. This final rule does not address comments beyond the scope of the 2016 interim rule, including, for instance, those that express general opinions, those that include personally identifying information, or those that request that USCIS establish a regular timeline for regulatory updates. All comments and other docket material are available for viewing at the Federal Docket Management System (FDMS) at *www.regulations.gov* and searching under Docket Number USCIS–2011–0010.

Many commenters wrote about several subjects. Comments are summarized for clarity and combined with other comments on the same subject matter. The substantive comments received on the 2016 interim rule and DHS responses are discussed in depth below.

C. Terminology

Comment: Several commenters requested terminology changes to the regulation, including replacing ''victim'' with ''survivor,'' using gender neutral language throughout, and replacing ''alien'' with a more appropriate term.

Response: DHS agrees with these recommendations and has made technical clarifications throughout the regulation in amending the use of the term ''alien'' and replacing it with ''victim,'' ''applicant,'' ''survivor,'' or ''noncitizen'' where appropriate, while recognizing that ''alien'' is the statutorily-defined term used by Congress in INA sec. 101(a)(15)(T), 8 U.S.C. 1101(a)(15)(T) and INA sec. 214(o), 8 U.S.C. 1184(o).[6] DHS has also updated terminology to be gender neutral throughout.

D. Definitions

DHS added U.S. Code citations to the regulations that will be afforded due regard throughout subpart B of 8 CFR part 214 based on amendments to subsequent reauthorizing legislation.

1. Involuntary Servitude

Comment: Commenters wrote that they supported DHS removing the citation to *United States* v. *Kozminski,* 487 U.S. 931 (1988), from the definition of ''involuntary servitude'' and made several suggestions for further clarifying the definition. Several commenters requested that DHS delete language derived from the *Kozminski* decision to avoid confusion and promote consistency with the statutory definition of ''involuntary servitude'' at 22 U.S.C. 7102, which codifies section 103 of the TVPA and subsequent amendments.

Response: DHS agrees to delete the language derived from the *Kozminski* decision from the rule's involuntary servitude definition that is inconsistent with the TVPA's definition at 22 U.S.C. 7102(8). As stated in the preamble to the 2002 interim rule, Congress intended to expand the definition of involuntary servitude that was used in *Kozminski* by broadening the types of criminal conduct that could be labeled ''involuntary servitude.'' 67 FR 4786.

a. Abuse of the Legal System and Serious Harm

Comment: One commenter wrote that DHS should acknowledge that traffickers may specifically traffic individuals to force them to commit crimes for the benefit of the trafficker, force victims to commit crimes as a control mechanism, and target individuals with criminal histories for trafficking due to that person's reluctance or inability to seek redress from law enforcement agencies.

Response: DHS acknowledges that traffickers target individuals for these reasons, but does not feel it appropriate or necessary to include references to such practices in the regulations.

Comment: Multiple commenters proposed that the definitions section of the regulation adopt the current terms of ''abuse or threatened abuse of the legal process'' and ''serious harm'' from the criminal provisions related to ''forced labor'' in 18 U.S.C. 1589 and ''sex trafficking'' in 18 U.S.C. 1591, respectively. The commenters stated that these additional definitions would clarify for attorneys, LEAs, and advocates that ''serious harm'' is not based on subjective severity but broadly encompasses the surrounding circumstances, including financial and reputational harm. They commented further that many practitioners do not realize that ''abuse or threatened abuse of legal process'' can include administrative or civil processes and that the inclusion of these two definitions would be consistent with Congressional intent regarding how these terms should be interpreted in the trafficking context.

Response: DHS agrees with these proposed changes and the commenters' stated rationale. As stated in the preamble to the 2002 interim rule on T nonimmigrant status, the TVPA defines ''a severe form of trafficking in persons'' to include ''involuntary servitude.'' For purposes of T nonimmigrant status, this inclusion and other relevant definitions from section 103 of the TVPA, as amended, 22 U.S.C. 7102, apply. *See* 67 FR 4783, 4786. In defining ''severe form of trafficking in persons,'' the TVPA ''builds upon the Constitutional prohibition on slavery, on the existing criminal law provisions on slavery and peonage (Chapter 77 of title 18, U.S. Code, sections 1581 *et seq.*), on the case law interpreting the Constitution and these statutes (specifically *United States* v. *Kozminski,* 487 U.S. 931, 952 (1988)), and on the new criminal law prohibitions contained in the TVPA.''

[6] *See* INA sec. 101(a)(3), 8 U.S.C. 1101(a)(3) (The term ''alien'' means any person not a citizen or national of the United States).

Id. Furthermore, ''[t]he statutory definition of involuntary servitude [in the TVPA] reflects the new Federal crime of 'forced labor' contained in section 103(5) of the TVPA, and expands the definition of involuntary servitude contained in *Kozminski*.'' *Id.* Thus, DHS agrees that it is appropriate to draw from the definition of ''serious harm'' in the statute that criminalizes forced labor, 18 U.S.C. 1589. Accordingly, DHS incorporates these definitions in new 8 CFR 214.201.

b. Reasonable Person Standard

Comment: One commenter requested that the Department state within the involuntary servitude definition that the reasonable person standard applies to those with mental, cognitive, and physical disabilities or those who have been trafficked by a family member.

Response: DHS acknowledges that these factors are considered in individual cases but declines to adopt this language within the definition of involuntary servitude, as DHS does not feel it is necessary or prudent to address every possible scenario within the regulations and that such factors are best addressed in sub-regulatory guidance.[7]

c. Involuntary Servitude Induced by Domestic Violence

Comment: One commenter requested that the Department codify within the definition of involuntary servitude that the trafficker could be the victim's ''paramour or relative.'' Other commenters stated that USCIS inaccurately characterizes domestic relationships and presumes that the presence of domestic violence negates the possibility of trafficking.

Response: DHS acknowledges that trafficking can occur alongside intimate partner abuse, and involuntary servitude and domestic violence may coexist in some situations; however, DHS declines the commenter's suggestion. DHS believes that the regulations are not intended to explicitly capture every possible situation, and that this degree of specificity would not be helpful, and may inadvertently preclude scenarios that are not explicitly described in the regulation.

In determining whether threats, abuse, or violence create a condition of involuntary servitude that constitutes a severe form of trafficking in persons, DHS evaluates a number of factors, including but not limited to whether the situation involves compelled or coerced labor or services and is induced by force, fraud, or coercion. Although domestic violence and trafficking may intersect, not all work that occurs as the result of domestic violence constitutes involuntary servitude. To distinguish between domestic violence and labor trafficking resulting from domestic violence, an individual must demonstrate that the perpetrator's motive is or was to subject them to involuntary servitude.

d. Mixed Motives

Commenter: Several commenters wrote that DHS has incorrectly suggested that a trafficker's sole purpose must be involuntary servitude, and that a trafficker's intent cannot also be extortion or for monetary gain. They request DHS clarify that an applicant may meet the definition of a severe form of trafficking in persons if at least one purpose of the perpetrator's force, fraud, or coercion is to subject the person to involuntary servitude, peonage, debt bondage, slavery, or a commercial sex act. Commenters also request that DHS specify in the preamble of the final rule that a severe form of trafficking in persons may occur during smuggling even if the smugglers also have the purpose of subjecting the victim or their families to other crimes such as extortion, if they also have the purpose of subjecting them to, *inter alia,* involuntary servitude or commercial sex.

Response: DHS agrees that a trafficker may simultaneously have multiple motivations, including a desire to subject the victim to involuntary servitude and a desire for monetary gain through extortion. DHS acknowledges, as commenters note, that human trafficking rarely occurs in a vacuum. In the process of exerting force, fraud, and/or coercion on their victims, perpetrators may commit other crimes during the scheme to initiate and maintain control over the victim, including false imprisonment, assault, sexual assault, domestic violence, and extortion.

A perpetrator's motivations can be multifaceted. For example, smugglers who intend to extort an individual during a smuggling arrangement may also intend to compel forced labor or services that place the person into a condition of servitude, even where the forced labor or services end upon completion of the smuggling arrangement. Nonetheless, DHS recognizes that not all smuggling arrangements can or will qualify as a severe form of trafficking in persons, particularly where smugglers force a person to perform an act or multiple acts outside of a condition of servitude during a smuggling operation. For example, a person may be forced to perform certain labor during a smuggling arrangement to facilitate the smuggling operation or avoid detection at the border, which would not qualify as involuntary servitude and therefore would not constitute trafficking or a severe form of trafficking in persons. In addition, there may be situations where an individual is forced to perform labor for another purpose, and not for the purpose of involuntary servitude, peonage, debt bondage, or slavery. As with any T visa application, DHS considers all the evidence on a case-by-case basis before making a final determination on an application.

Although DHS agrees with the commenter, no changes have been made to the regulatory text in response to this comment given DHS' consideration of these factors when evaluating evidence in cases involving smuggling, as detailed in existing USCIS policy guidance.[8]

2. Law Enforcement Agency (LEA)

Comment: One commenter suggested using the term ''law enforcement agency'' (LEA) consistently throughout the regulation to provide clarity.

Response: DHS agrees with this comment and has amended the regulation to use the term ''law enforcement agency'' consistently throughout, rather than ''law enforcement'' or ''law enforcement officer.''

Comment: Multiple commenters expressed support for DHS expanding the definition of an LEA. Some commenters stated support for the rule's clarification that LEAs can provide

[7] For example, *see* U.S. Citizenship and Immigr. Servs., U.S. Dep't of Homeland Security, ''Volume 3, Humanitarian Protection and Parole, Part B, Victims of Trafficking, Chapter 2, Eligibility Requirements, Section B, Victim of Severe Form of Trafficking in Persons, Subsection 3, Definition of Coercion,'' *https://www.uscis.gov/policy-manual/volume-3-part-b-chapter-2* (discussing analyzing coercion using a ''reasonable person'' standard) (last updated Oct. 20, 2021). As discussed elsewhere, DHS also applies a victim-centered approach in its adjudications, which takes into consideration all relevant factors in the case, including a victim's individual circumstances. *See, e.g.,* U.S. Citizenship and Immigr. Servs., U.S. Dep't of Homeland Security, ''Volume 3, Humanitarian Protection and Parole, Part B, Victims of Trafficking, Chapter 7, Adjudication, Section A, Victim-Centered Approach,'' *https://www.uscis.gov/policy-manual/volume-3-part-b-chapter-7* (last updated Oct. 20, 2021).

[8] *See* U.S. Citizenship and Immigr. Servs., U.S. Dep't of Homeland Security, ''Volume 3, Humanitarian Protection and Parole, Part B, Victims of Trafficking, Chapter 2, Eligibility Requirements, Section B, Victim of Severe Form of Trafficking in Persons, Subsection 7, Difference Between Trafficking and Smuggling,'' *https://www.uscis.gov/policy-manual/volume-3-part-b-chapter-2 (last updated Oct. 20, 2021).*

Form I–914, Supplement B, Declaration of Law Enforcement Officer for Victim of Trafficking in Persons,[9] even when there is no formal investigation or prosecution. Several commenters requested that the rule further expand the LEA definition to include additional agencies, which would help inform victims of their reporting options and identify similar local and state counterpart agencies that would meet the LEA definition. Commenters wrote that employees of some Federal agencies have expressed confusion over their certification authority because they are explicitly designated as certifying agencies in the regulations for U nonimmigrant status but not in this regulation. *See* 8 CFR 214.14(a). Several commenters also requested DHS add tribal authorities to the list of authorized LEAs.

Response: Although the list of agencies included is not exhaustive, DHS agrees that expanding the list will provide clarity to victims, stakeholders, and the LEAs themselves, and has updated the definition accordingly. DHS has also amended the definition to include tribal authorities. Including a more expansive list will assist certifiers and will be an operational efficiency, as adjudicators will not need to evaluate in each case whether a specific agency meets the definition of an LEA.

3. Law Enforcement Involvement

Comment: DHS received comments related to the term ''law enforcement involvement,'' which is a concept used to analyze whether an applicant is physically present in the United States on account of trafficking (''physical presence''). Commenters requested additional clarification regarding the physical presence requirement, discussed in further detail in section J, below.

Response: DHS has defined ''law enforcement involvement'' under new 8 CFR 214.207(c)(4) to mean LEA action beyond simply receiving the applicant's reporting of victimization, to include the LEA interviewing the applicant, liberating the applicant from their trafficking, or otherwise becoming involved in detecting, investigating, or prosecuting the acts of trafficking. Liberation of an applicant from their trafficking will suffice to establish law enforcement involvement where the record indicates that the LEA detected the applicant's trafficking as part of this process. This definition will provide clarity to adjudicators and stakeholders as to the extent of involvement required for physical presence under new 8 CFR 214.207(c)(4).

4. Reasonable Request for Assistance

Although DHS did not specifically receive comments on this topic, as a technical edit DHS has removed the term ''reasonable'' from the definition of the term ''reasonable request for assistance,'' because the initial inquiry for DHS is to determine whether a request was made. After the threshold determination that a request was made by the LEA, the reasonableness of that request is analyzed. Accordingly, the reasonableness is assessed using the list of factors at new 8 CFR 214.208(c) (formerly 8 CFR 214.11(h)(2)). DHS retained ''reasonable request for assistance'' in other sections to reflect this analysis. DHS removed the paragraph at 8 CFR 214.11(a) describing the factors to consider the reasonableness of a request, because this language was duplicative of the language contained at 8 CFR 214.11(h)(2) (redesignated as 8 CFR 214.208(c)). Several revisions were made to the language at 8 CFR 214.208(c), which are discussed further below.

5. Commercial Sex Act

Comment: Commenters requested DHS interpret the term ''commercial sex act'' broadly, beyond what the commenters understood the current definition of ''anything of value'' may encompass, to avoid confusion and maintain consistency with the statute and legal precedent.

Response: DHS acknowledges that the term ''anything of value'' has been interpreted very broadly and encompasses things other than monetary or financial gain. ''Anything of value'' may include a range of activity that does not always have an exact monetary value attached to it, including but not limited to safety, protection, housing, immigration status, work authorization, or continued employment. Given Congressional intent and the significant precedent interpreting the term broadly, DHS has determined that it is not necessary to specifically reflect this range of activity in the regulatory text.

6. Severe Form of Trafficking in Persons

Comment: One commenter wrote that DHS should clarify that attempted trafficking may constitute a severe form of trafficking in persons by adding the following language to the definition of ''severe form of trafficking in persons'': ''This definition does not require a victim to have actually performed labor, services, or a commercial sex act.''

Response: DHS agrees that it is not necessary for the victim to actually perform the labor or commercial sex act(s) to be eligible for T nonimmigrant status. For example, a victim may be recruited through force, fraud, or coercion for the purpose of performing labor or services but be rescued or have escaped before performing any labor or services; however, DHS declines to adopt the commenter's suggestion to state this directly in the definition of a severe form of trafficking in persons, as the fact that attempted trafficking may qualify as trafficking is already clarified at 8 CFR 214.206(a) (formerly 8 CFR 214.11(f)).

E. Evidence and Burden and Standard of Proof

USCIS has historically considered ''any credible evidence'' when evaluating T visa applications. T nonimmigrant applicants are instructed to submit any credible, relevant evidence to establish that they have been a victim of a severe form of trafficking in persons, and that they have complied with any reasonable request for assistance from law enforcement. To this end, DHS has included new language in 8 CFR 214.204(f) indicating that all evidence demonstrating cooperation with law enforcement will be considered under the ''any credible evidence'' standard, for consistency with the remainder of the rule, which states that applicants may submit any credible evidence relating to their T applications for USCIS to consider. *See* new 8 CFR 214.204(l).

The ''preponderance of the evidence'' standard of proof is distinct from the evidentiary requirements and standard set by regulation. *Matter of Chawathe,* 25 I&N Dec. 369 (AAO 2010). USCIS has historically applied a ''preponderance of the evidence'' standard when determining whether the T applicant has established eligibility and has included that standard at new 8 CFR 214.204(l). To meet this standard, the applicant must prove that facts included in their claim are ''more likely than not'' to be true. *Id.* at 369. To determine whether an applicant has met their burden under the ''preponderance of evidence'' standard, DHS considers not only the quantity, but also the quality (including relevance, probative value, and credibility) of the evidence. *Id.* at 376.

This standard of proof should not be confused with the burden of proof. The burden of proving eligibility for the

[9] The title of the Form I–914, Supplement B, is being changed in this rule to ''Declaration for Trafficking Victim.''

benefit sought remains entirely with the applicant. *Id.* at 375.

1. Reasonable Person Standard

Comment: One commenter requested DHS acknowledge in the preamble or regulation that individuals with cognitive, mental, and physical impairments are at greater risk for trafficking and face greater barriers to escape trafficking. The commenter stated that this should be acknowledged so that whenever a reasonableness standard is used, it should be interpreted as a reasonable person with the cognitive, mental, and physical impairments of the specific applicant.

Response: DHS acknowledges that individuals with impairments are at greater risk for exploitation. DHS does not believe that this is necessary or appropriate to include in the regulation. DHS considers all relevant evidence in adjudicating each case, including the circumstances and any vulnerabilities of an individual applicant when determining reasonableness.[10] Despite the existence of certain vulnerabilities, however, each applicant retains the burden of proof to establish eligibility by a preponderance of the evidence.

2. Credibility of Evidence

Comment: Commenters suggested that DHS amend provisions regarding initial evidence at 8 CFR 214.11(d)(2) and (3) (redesignated here as 8 CFR 214.204(c) and (e)) to state that a victim's statement alone may prove victimization.

Response: DHS declines to amend 8 CFR 214.11(d)(2) and (3) (redesignated here as 8 CFR 214.204(c) and (e)) to explicitly state that a victim's statement alone may prove victimization. While DHS may determine, based on the facts and circumstances of a particular case, that a personal statement alone may be sufficient to prove victimization, in such a scenario, the victim's statement would have to be sufficiently detailed, plausible, and consistent in order to satisfy evidentiary requirements. With all T visa applications, DHS makes an individualized determination of whether trafficking has been established based on the evidence in each particular case. DHS notes that it has revised the requirements for a victim's personal statement included in the list of evidence in redesignated 8 CFR 214.204(c) (Initial evidence). These additions are intended to clarify what is expected to be included in a victim's personal statement to establish eligibility and will reduce barriers for victims of trafficking. The revisions in § 214.204(c)(1) are intended to align with longstanding USCIS policy guidance and practice, and are consistent with the program's evidentiary standards.

Comment: One commenter requested DHS clarify that evidence is not rendered less credible because of the amount of time that has elapsed between an applicant's eligibility for T nonimmigrant status and when they filed their application. The commenter also requested DHS clarify that evidence, including personal statements and psychiatric evaluations, is not less credible because it was generated in response to a Request for Evidence.

Response: DHS acknowledges there may be legitimate reasons why significant time elapses between an applicant's trafficking and when they file for T nonimmigrant status. DHS also acknowledges that individuals produce evidence that was not initially submitted with their application in response to Requests for Evidence (RFEs) for various reasons. DHS emphasizes that any credible evidence will be evaluated in determining an applicant's eligibility but declines to include this level of specificity within the regulation. DHS acknowledges that due to the nature of victimization, victims may be unable to provide information or documentation that would otherwise be available to establish eligibility. USCIS instructs adjudicators to be mindful of the ways trauma may impact victims, including their recollection of traumatic experiences, which may shift over time.[11]

3. Opportunity To Respond to Adverse Information

Comment: Multiple commenters discussed RFEs [12] that require applicants to explain inconsistencies identified by adjudicators in the applicant's administrative record to which the applicant is not privy. The commenters stated that the inconsistent evidence typically is found within records of other agencies and that attorneys often cannot obtain this information in a timely manner through requests under the Freedom of Information Act (FOIA), 5 U.S.C. 552, as amended. The commenters also wrote that advocates have reported that U.S. Customs and Border Protection (CBP) interviews were conducted without the use of trauma-informed techniques and did not lead to accurate identification of trafficking victims. The commenters wrote that statements taken during these interviews can later appear to be inconsistent statements. The commenters stated that the full content of the CBP interviews is not released in response to a FOIA request and that the applicant is not able to correct the inconsistent statements.

The commenters requested that DHS change the regulation to state that DHS will consider the totality of the evidence submitted along with the administrative record in evaluating the T visa application, and that if information contained in the administrative record could result in an unfavorable determination, the applicant must be given a copy of the information and must be provided an opportunity to meaningfully respond to such adverse evidence.

Response: DHS agrees that all evidence should be assessed in its totality. DHS also agrees that it is important for applicants and their advocates to understand derogatory information on which the decision will be based; however, other regulatory provisions currently address this issue. Specifically, under 8 CFR 103.2(b)(16)(i), when a decision will be adverse and is based on derogatory information ''of which the applicant or petitioner is unaware, [they] shall be advised of this fact and offered an opportunity to rebut the information and present information in [their] own behalf before the decision is rendered.'' Accordingly, when there is derogatory information of which the applicant is unaware and upon which an adverse decision will be based, USCIS will comply with existing laws and regulations in advising an applicant of the derogatory information and offer them an opportunity to rebut such information through an RFE, Notice of Intent to Deny, or other formal notice under 8 CFR 103.2(b)(8)(iii), (b)(16)(i) and 214.205(a)(1), except as otherwise provided in 8 CFR 103.2(b)(16).

[10] *See* U.S. Citizenship and Immigr. Servs., U.S. Dep't of Homeland Security, ''Volume 3, Humanitarian Protection and Parole, Part B, Victims of Trafficking, Chapter 3, Documentation and Evidence for Principal Applicants,'' *https://www.uscis.gov/policy-manual/volume-3-part-b-chapter-3 (discussing ''any credible evidence'' and the nature of victimization) (last updated Oct. 20, 2021).*

[11] As of the time of the publication of this regulation, further policy guidance describing USCIS' interpretation of the T nonimmigrant regulation can be found in the USCIS Policy Manual. *See* U.S. Citizenship and Immigr. Servs., U.S. Dep't of Homeland Security, ''Volume 3, Humanitarian Protection and Parole, Part B, Victims of Trafficking,'' *https://www.uscis.gov/policy-manual/volume-3-part-b* (last updated Oct. 20, 2021).

[12] 8 CFR 103.2(b)(8)(ii) (''If all required initial evidence is not submitted with the benefit request or does not demonstrate eligibility, USCIS in its discretion may deny the benefit request for lack of initial evidence or for ineligibility or request that the missing initial evidence be submitted within a specified period of time as determined by USCIS.'').

4. Requests for Evidence (RFE)

Comment: Some commenters expressed concern about a trend of increasing RFEs from USCIS. They indicate that the RFEs do not indicate what evidence is lacking, are boilerplate, and create unnecessary work for practitioners and anxiety for survivors. The commenters state that issuance of RFEs has increased processing times, leaving survivors vulnerable. Finally, the commenters state that these RFEs have resulted in unprecedented denial rates.

Response: DHS acknowledges the concerns stakeholders are raising regarding RFE trends in the program. USCIS strives to apply a victim-centered, trauma-informed approach in each adjudication while also ensuring that the statutory requirements for T nonimmigrant status are met. In addition, USCIS has recently issued significant guidance in the Policy Manual aimed at clarifying evidentiary requirements for both applicants and adjudicators and reducing the need for RFEs.[13] Along with these updates, USCIS included training to adjudicators on the updates. Adjudicators also receive ongoing training on this and other issues. In addition, USCIS reviews trends in the program and revises any guidance if necessary. For example, if USCIS notices patterns in inquiries or questions asked at stakeholder engagements, it prompts review and potential revision of internal procedures.

F. Application

1. Applicant Statements

Comment: One commenter proposed that 8 CFR 214.11(d)(2)(i) (redesignated here as 8 CFR 214.204(c)(1)), which requires applicants to provide a written statement describing their victimization, include an exemption for victims who are minors and victims who invoke the trauma exception from the requirement to comply with reasonable LEA requests. They wrote that DHS could determine on a case-by-case basis whether to waive the requirement of a signed statement. They noted that preparing a statement can re-traumatize victims, even when the victim is assisted by trauma-informed service providers. The commenter stated that the statement may not be necessary when the victimization is apparent from other evidence.

Response: DHS understands that applicants could be re-traumatized by retelling their experience of victimization. Nevertheless, the information provided in the victim's personal statement is very important for USCIS. It allows USCIS to fully understand the facts of the case from the victim's perspective and helps USCIS determine whether the eligibility requirements are met. In addition, it would not be efficient and would cause unnecessary processing delays for USCIS to determine on a case-by-case basis whether a statement was necessary and, when necessary, request one after reviewing the initial filing. Therefore, DHS maintains the requirement that applicants provide a written statement describing their victimization in this final rule. 8 CFR 214.204(c)(1).

2. Interviews of Applicants

Comment: Commenters suggested that 8 CFR 214.11(d)(6) explicitly state that interviews of applicants for T nonimmigrant status are not required, and that DHS could request an interview. They asserted that this change would encourage victims who have faced high levels of trauma to come forward to apply for immigration relief.

Response: DHS is sympathetic to the issues victims face and applies a victim-centered and trauma-informed approach but declines to adopt this recommendation. DHS still reserves the discretion to require an interview for all immigration benefits, including applicants for T nonimmigrant status, as it deems necessary. In such circumstances, interviews can be an important method of obtaining further information when determining eligibility for T nonimmigrant status. As discussed above, DHS has removed the interview provision at 8 CFR 214.11(d)(6) to avoid redundancy with 8 CFR 103.2(b)(9).

3. Notification to the Department of Health and Human Services (HHS)

Comment: One commenter wrote to welcome the addition of a provision indicating that upon receiving an application for T nonimmigrant status from a minor under the age of 18, USCIS will notify HHS to facilitate interim assistance. Multiple commenters discussed the automatic nature of USCIS's notification to HHS upon receiving an application for T nonimmigrant status from a minor. *See* 8 CFR 214.11(d)(l)(iii) (redesignated here as 8 CFR 214.204(b)(4)). These commenters wrote that, in some instances, a referral to HHS can result in premature termination of some State-funded benefits that may be more comprehensive than the Federal interim assistance obtained through HHS. The commenters requested that the rule be amended to include an exception to the provision mandating automatic notification of HHS upon receiving an application for T nonimmigrant status from a minor.

Response: DHS understands the commenters' concerns and appreciates why minor applicants may want to access more expansive State-funded benefits. DHS is unable to change the regulations in response to these concerns, however, because TVPRA 2008 section 212(a)(2), 22 U.S.C. 7105(b)(1)(H), requires that DHS notify HHS no later than 24 hours after discovering that a person who is under 18 years of age may be a victim of a severe form of trafficking in persons.

4. Notification of Approval of T Nonimmigrant Status

The rule at 8 CFR 214.11(d)(9) (redesignated as 8 CFR 214.204(o)) states that upon approving an application for T–1 nonimmigrant status, USCIS may notify others ''as it determines appropriate, including any LEA providing an LEA endorsement and the HHS Office of Refugee Resettlement, consistent with 8 U.S.C. 1367.''

Comment: Commenters requested that DHS clarify in the rule which agencies or bodies that it considers appropriate to receive information about applicants for T nonimmigrant status or to limit the language to the entities listed in the rule.

Response: DHS has maintained the current broader language because it provides USCIS and applicants with more flexibility in implementing these provisions than an exhaustive list would. USCIS may identify other entities that are appropriate to receive this information and instances in which the notification would be beneficial to the T–1 nonimmigrant and/or an LEA and its efforts to combat trafficking. The final rule continues to require that the disclosure of any information must be consistent with the restrictions on information sharing in 8 U.S.C. 1367. USCIS has issued guidance and training to those who adjudicate applications for T nonimmigrant status to ensure there is no inappropriate sharing of applicant information, and to ensure any information sharing action is consistent with 8 U.S.C. 1367.

G. Law Enforcement Declarations

As noted in new 8 CFR 214.204(e), applicants may wish to submit evidence

[13] U.S. Citizenship and Immigr. Servs., U.S. Dep't of Homeland Security, ''Volume 3, Humanitarian Protection and Parole, Part B, Victims of Trafficking, Chapter 3, Documentation and Evidence for Principal Applicants,'' *https://www.uscis.gov/policy-manual/volume-3-part-b-chapter-3* (last updated Oct. 20, 2021).

from LEAs, including an LEA declaration, to help establish their eligibility. Although an LEA declaration is an optional form of evidence and does not have any special evidentiary weight, it may support a T nonimmigrant application by providing detailed, relevant information about the applicant's victimization and compliance with reasonable requests for assistance. DHS received several comments on LEA declarations, discussed below.

1. Declaration Signature

Comment: One commenter supported the clarification that a formal investigation or prosecution is not required for an LEA to complete the declaration, and stated that the requirement that a law enforcement declaration be signed by a supervising official may add an unnecessary step to this more flexible approach.

Response: DHS declines to adopt this recommendation. First, the Law Enforcement Declaration is an optional form of evidence. Second, maintaining the status quo in requiring a supervisor's signature adds a level of review to DHS's flexible approach, which acknowledges that whether an investigation or prosecution occurs is outside of a victim's control.

2. Withdrawn Declarations and Revoked Continued Presence (CP)

DHS has updated terminology at new 8 CFR 214.204(h). DHS has replaced the term ''revocation'' relating to law enforcement declarations with ''withdrawal'' for accuracy and to avoid any confusion that status is being revoked.

a. Withdrawn Declarations

Comment: Commenters requested that DHS delete the language in 8 CFR 214.11(d)(3)(ii) (redesignated here as 8 CFR 214.204(h)) that provides that disavowed or withdrawn LEA declarations will no longer be considered evidence. Commenters suggested that rather than leaving it to the discretion of the LEA to provide a written explanation of its reasons for disavowing or withdrawing the declaration, the LEA should be required to do so. Commenters stated that an application should not be rejected based solely on one factor or one piece of evidence. They wrote that USCIS must provide a T nonimmigrant the opportunity to review and respond to the documentation from the LEA. Commenters also suggested adding language to 8 CFR 214.11(d)(3)(ii) (redesignated here as 8 CFR 214.204(h)) and 8 CFR 214.11(m)(2)(iv) (redesignated here as 8 CFR 214.213(b)(4)) to state that before revoking T nonimmigrant status due to a revocation or disavowal of an LEA declaration, USCIS would review the application and reassess the applicant's eligibility for T–1 nonimmigrant status in light of the LEA's explanation for the revocation, and consider all other evidence provided by the applicant under the ''any credible evidence'' standard. Finally, they stated that if USCIS determines that the application no longer meets the requirements, USCIS should issue a Notice of Intent to Revoke or a Request for Evidence.

Response: The rule at 8 CFR 214.213(b)(4) provides that USCIS may revoke T nonimmigrant status based on withdrawal by the LEA, but does not require USCIS to automatically revoke T nonimmigrant status upon a disavowal or withdrawal of the Supplement B. DHS recognizes that a Supplement B may be withdrawn or disavowed for reasons unrelated to the applicant's cooperation with the LEA's reasonable request for assistance. For example, an LEA may receive additional information indicating the initial Supplement B was issued in error. The law enforcement declaration is one piece of evidence that USCIS considers in determining whether an applicant meets the eligibility requirements for T nonimmigrant status based on the totality of the evidence. *See, e.g.,* new 8 CFR 214.204(c) and (l). Furthermore, 8 CFR 214.213(b)(4) indicates that the LEA must provide an explanation for any withdrawal or disavowal for it to serve as the basis for revocation. Therefore, DHS clarifies in this rule that a disavowed or withdrawn Supplement B will not be completely disregarded. After withdrawal or disavowal, the LEA declaration will *generally* no longer be considered as evidence of the applicant's compliance with requests for assistance in the LEA's detection, investigation, or prosecution; however, a disavowed or withdrawn Supplement B may be considered for other eligibility requirements (such as evidence of victimization) along with any other credible evidence relevant to the application. *See* new 8 CFR 214.204(f) and (h). DHS will determine whether the disavowed or withdrawn Supplement B will be considered as evidence of compliance by assessing the reasons for the disavowal or withdrawal. Once the Supplement B is disavowed or withdrawn, DHS will determine the reason for the disavowal or withdrawal and then determine what purpose, if any, for which it may be used. DHS notes that if there is an explanation from the LEA for the withdrawal or disavowal, adjudicators should consider that explanation in determining whether to still consider the declaration as evidence of compliance with requests for assistance.

DHS acknowledges that even if a declaration is disavowed or withdrawn, an individual may still meet the eligibility requirements for T nonimmigrant status, and a withdrawal or disavowal will not always lead to revocation of T nonimmigrant status. In addition, prior to issuing a Notice of Intent to Revoke (NOIR) based on the withdrawal or disavowal of the Supplement B, DHS would reassess an applicant's eligibility based on all available evidence. If DHS intends to revoke T nonimmigrant status following the withdrawal or disavowal of a Supplement B, DHS will issue a NOIR to inform the individual of the agency's intent to revoke T nonimmigrant status and the basis for intended revocation. The individual would then be able respond to the NOIR with additional evidence to overcome any noted deficiencies or discrepancies. The NOIR would detail or summarize the reasons for withdrawal or disavowal from the LEA and any other bases for intended revocation, but DHS declines to codify a requirement that USCIS provide a copy to the individual.

b. Revoked Continued Presence

DHS has similarly clarified that if the DHS Center for Countering Human Trafficking (CCHT) revokes a grant of Continued Presence (CP), generally the CP grant will no longer be considered as evidence of the applicant's compliance with the corresponding LEA investigation or prosecution but may be considered for other purposes. *See* new 8 CFR 214.204(i). If DHS determines that the revocation of the CP grant was unrelated to an applicant's compliance, for example revocation based on departing without advance parole or for subsequent criminal conduct, it may continue to consider the grant of CP as evidence of the applicant's compliance with the LEA investigation or prosecution.

3. Requirement To Sign Law Enforcement Declaration

Comment: One commenter stated DHS should clarify in the regulations that immigration judges and ICE counsel should be required to sign law enforcement declarations. The commenter wrote that a directive to immigration judges and ICE attorneys should indicate that they, and not just Homeland Security Investigations (HSI),

should be able to detect trafficking and certify in the process.

Response: DHS declines to adopt this recommendation. DHS cannot require any certifying agencies to certify a case, as signing the LEA Declaration is at the discretion of the LEA and the LEA Declaration is not a required piece of initial evidence. However, DHS agrees that immigration judges and ICE attorneys may submit declarations upon detection of trafficking consistent with applicable law and agency policy. However, DHS may accept declarations from immigration judges and ICE attorneys should such declarations be permissible under applicable law and agency policy.

H. Bona Fide Determination (BFD)

By statute, a determination that an application for T nonimmigrant status is bona fide (T BFD) enables trafficking survivors to obtain certain stabilizing benefits, including access to Federal services and benefits via the issuance of Certification Letters from HHS,[14] and the ability to obtain an administrative stay of removal.[15] The preamble to the 2016 IFR provided that USCIS may grant deferred action if the application for T nonimmigrant status is deemed bona fide, and the applicant could request employment authorization based on the grant of deferred action.[16] Although an extensive BFD process was codified in the 2016 IFR, such a process has not been implemented in the last decade outside of litigation cases due to resource constraints and the inefficiencies of the prior process. Under the extensive BFD review process set forth in the IFR, USCIS generally adjudicated the merits of T nonimmigrant applications in the same amount of time that it would take to issue a BFD. Therefore, it has generally been more efficient to adjudicate the T visa application alone than to conduct both a BFD review and full adjudication of the same application.

The revised BFD process codified in this rule at 8 CFR 214.205 is as follows: USCIS will conduct an initial review of the T nonimmigrant status application filed on or after the effective date for completeness and conduct and review the results of background checks to determine if the application is bona fide and the applicant merits a favorable exercise of discretion to receive a grant of deferred action and employment authorization. Applicants must file a Form I–765, Application for Employment Authorization, under proposed 8 CFR 274a.12(c)(40) to receive a BFD Employment Authorization Document (EAD), even if they have indicated on Form I–914, Application for T Nonimmigrant Status that they are requesting an EAD. If an applicant has not already filed a Form I–765, they will be notified in writing that they may do so, to receive a BFD EAD under 8 CFR 274a.12(c)(40). DHS strongly recommends that applicants file a Form I–765, Application for Employment Authorization, simultaneously with their T nonimmigrant status application to facilitate expeditious case processing.[17] If DHS issues a request for evidence in a case filed before the effective date of the final rule, DHS will automatically convert previously filed applications for employment authorization filed under 8 CFR 274a.12(a)(16) and (25), to applications for the newly created BFD EAD classification. This will limit the need for applicants to submit new requests or information, and enable DHS to focus on the adjudication, rather than the process of issuing multiple notices, including first notifying the applicant that they have a pending bona fide application, and then notifying the applicant that they are eligible for employment authorization. If initial review does not establish that the application is bona fide, USCIS will conduct a full T nonimmigrant status eligibility review. If the full review establishes eligibility and the statutory cap has been reached, the application will be considered bona fide.

In the situation where DHS is issuing a request for evidence and thus conducts a bona fide determination on an application filed before the effective date of this rule, if an applicant with a pending bona fide application has not previously filed an application for employment authorization, DHS will issue a notice of eligibility to apply for a BFD EAD, indicating that the individual should designate category ''(c)(40)'' on the application. *See* new 8 CFR 274a.12(c)(40).

After receipt of the Form I–765, USCIS will then consider whether the applicant warrants a favorable exercise of discretion to be granted deferred action, and if granted deferred action, whether they will be granted a discretionary employment authorization document.

In the interim rule, DHS provided that employment authorization for a bona fide T nonimmigrant applicant to whom USCIS grants deferred action would be requested under category ''(c)(14),'' 8 CFR 274a.12(c)(14). 81 FR 92285. DHS has decided to record T BFD EADs as a separate category from other EADs that are based on a grant of deferred action. Accordingly, in this rule DHS amends 8 CFR 274a.12 to establish a specific eligibility category for applicants for T nonimmigrant status whose applications have been deemed bona fide. These BFD EADs will be issued under category (c)(40). *See* new 8 CFR 274a.12(c)(40). DHS notes that a bona fide determination, or an initial grant or renewal of a BFD EAD and deferred action does not guarantee that DHS will approve the principal applicant or their derivative family members for T nonimmigrant status.

Comment: Several commenters wrote that USCIS has justified its operational practice of fully adjudicating the T visa application rather than initiating the BFD review process by claiming that because there is no T visa application backlog, it is more efficient to conduct a full adjudication. Commenters urged USCIS to uphold the regulatory mandate to provide BFDs. They emphasized that BFDs provide work authorization, which allows survivors to be self-sufficient and help reduce the risk of revictimization as well as provide access to federally funded public benefits. Commenters also wrote that BFDs are much more important given increased processing times, especially as applicants lose access to time-limited social services benefits. Commenters indicated that USCIS' failure to conduct BFDs has had a negative impact on trafficking survivors in removal proceedings and has led to survivors being removed while their applications were pending. Multiple commenters noted that applicants are forced to proceed with other forms of relief in removal proceedings while awaiting a decision on their T visa application, which wastes administrative resources and inflicts needless trauma.

Response: DHS acknowledges that processing times have increased in recent years. DHS also understands the important stabilizing benefits the BFD

[14] 22 U.S.C. 7105(b)(1)(E)(i)(II)(aa).

[15] INA sec. 237(d)(1); 8 U.S.C. 1227(d)(1). This statutory provision authorizes the Secretary of Homeland Security to grant an administrative stay of removal to an individual whose Application for T Nonimmigrant Status sets forth a ''prima facie case for approval,'' until the application is approved or there is a final administrative denial on the application after the exhaustion of administrative appeals. A determination that the application is ''bona fide'' is also sufficient to establish that the applicant has established a ''prima facie case for approval'' within the meaning of section 237(d)(1) of the INA, 8 U.S.C. 1227(d)(1). ''Prima facie'' means that the application appears sufficient on its face, which is encompassed by the bona fide determination described at 8 CFR 214.205.

[16] *See* 81 FR 92279.

[17] There is no fee for a Form I–765 filed by an applicant seeking T nonimmigrant status. 8 CFR 106.3(b)(2)(viii).

can provide to trafficking survivors, and that a lack of a viable BFD process can have negative impacts on victims. DHS is committed to implementing a streamlined and operationally efficient BFD process through the final rule and has codified a new BFD process at new 8 CFR 214.205, consistent with DHS's victim-centered approach. Pursuant to new 8 CFR 214.204(m), USCIS will conduct a BFD review for applicants in the United States once they have applied for principal or derivative T nonimmigrant status. DHS has also amended 8 CFR 214.11(d)(7) (redesignated as 8 CFR 214.204(m)) to state that USCIS will conduct an initial review of an eligible family member's Application for Derivative T Nonimmigrant Status once the principal's application has been deemed bona fide. However, as a matter of discretion, USCIS generally will not grant deferred action and employment authorization to an eligible family member based on a bona fide determination unless the principal applicant has received a positive bona fide determination.

Comment: Several commenters stated that the IFR's inclusion of an inadmissibility determination as part of the BFD is contrary to Congressional intent. They recommended that either the filing of a waiver of inadmissibility constitute *prima facie* evidence of eligibility, or that USCIS implement the same procedures used in the U visa BFD context, which eliminates the requirement that USCIS assess an applicant's admissibility as part of the BFD process. Some commenters further recommended that DHS amend the standard for finding an application to be bona fide to mirror the requirements to establish a prima facie case in an application for benefits available under VAWA. *See* 8 U.S.C. 1641; 8 CFR 204.2(c)(6).

Response: DHS agrees with the commenters' suggestion to remove the inadmissibility determination from the BFD process. The BFD process is an initial review, and an assessment of the applicant's admissibility is not necessary to determine whether an application is bona fide. In addition, as commenters noted, considering admissibility twice during adjudication would be inefficient and burdensome and would delay the BFD process. Accordingly, DHS has eliminated the requirement that USCIS analyze an applicant's admissibility as part of the BFD process, but will implement other safeguards, including background checks, to ensure the applications are bona fide, that the applicants merit a favorable exercise of discretion and do not present a threat to national security, and to maintain the integrity of the program.

Comment: Commenters also requested DHS eliminate 8 CFR 214.11(e)(1)(ii), which requires a T visa applicant to demonstrate that their application ''does not appear to be fraudulent,'' because the fraud assessment is superfluous to the other BFD requirements.

Response: DHS agrees with the commenters' rationale. Because USCIS considers an applicant's compliance with initial evidence requirements and background checks in the T visa BFD process, as well as whether the applicant merits a favorable exercise of discretion, it is unnecessary to separately analyze whether the application appears to be fraudulent. DHS has removed consideration of whether an application appears to be fraudulent from the BFD review process. An applicant who attempts to gain an immigration benefit through fraud is inadmissible,[18] and would not be granted deferred action or a BFD EAD.

Comment: Commenters urged DHS to implement a BFD review process for T derivative applicants, applying the standards set forth in the Policy Manual for eligible family members of U visa applicants.

Response: DHS understands the importance of BFDs not just for principal applicants, but for their eligible family members. Conducting BFD reviews and providing initial benefits to eligible family members is also consistent with a victim-centered approach, as it provides victims needed support from stabilized family members. DHS will conduct BFDs for eligible family members who are in the United States at the time of review, if the principal has already received a BFD.

Comment: Several commenters requested that USCIS commit to a 30- or 90-day timeline for making a bona fide determination and notifying applicants of the outcome in 8 CFR 214.11(e)(2) (redesignated here as 8 CFR 214.205(c)).

Response: Although DHS recognizes that being without work authorization or Federal benefits may be a hardship for applicants, it declines to mandate that USCIS conduct a BFD within a certain number of days. USCIS strives to process all immigration benefits in a reasonable and timely manner; however, USCIS cannot guarantee that the determination will be completed within any set number of days. The volume of applications to be reviewed will vary over time, each application is unique, and some may be complex. In addition, there are aspects of the determination beyond USCIS' control (for example, background checks) that may take longer than 90 days.

Comment: Some commenters recommended that qualified trafficking survivors on the waiting list should be granted BFDs and should have access to employment authorization and Federal benefits to ensure their safety, and so they are not vulnerable to exploitation or trafficking.

Response: DHS acknowledges the importance of these benefits for trafficking survivors, which is why USCIS will initiate the BFD process upon initial review of the application. After considering the comments on the interim final rule and our recent experience with the program, DHS has added 8 CFR 214.205(a)(3), which provides that USCIS will conduct a full T nonimmigrant status eligibility review of any applications that do not initially receive a favorable BFD. Applicants who are determined eligible following the T nonimmigrant status eligibility review will then be issued a BFD if the statutory cap has been met. In addition, applicants with a favorable BFD may be considered for deferred action and may request employment authorization based on a grant of deferred action. 8 CFR 214.205(d)(1).

DHS notes that the T visa waiting list has never been utilized in the history of the program due to the statutory cap never being reached. However, if the statutory cap is met, USCIS will place all applications that have been issued a BFD on the waiting list, including those that are deemed eligible for a BFD following a T nonimmigrant status eligibility review. 8 CFR 214.210(b). This revision will allow BFD recipients to be on the waiting list without having to provide additional information, avoid USCIS having to perform additional processing of cases with a BFD to place them on the waiting list, and provide all applications on the waiting list equal status of BFD, instead of some receiving a BFD and others being deemed approvable but for the unavailability of a visa.

This change will not affect the order in which applications are processed. The following fiscal year, when a new statutory cap becomes available, the oldest pending applications that are on the waiting list and have been granted a BFD will be processed first. The oldest application may not necessarily be approved in date-received order depending on updates and additional evidence that may be needed to adjudicate the application to a final decision. The date that applicants receive a BFD will generally not affect

[18] *See* INA 212(a)(6)(C)(i), 8 U.S.C. 1182(a)(6)(C)(i).

the order in which their application will be processed for cap adjudication.

Comment: Several commenters encouraged DHS to add language to the final rule that requires ICE to take affirmative steps to seek a BFD from USCIS for detainees with pending applications for T nonimmigrant status, which commenters note would lead to a stay of removal.

Response: DHS declines to add this language to the final rule as unnecessary, because all applications filed after the effective date of the final rule will receive a BFD review. In addition, in August 2021, ICE issued a Directive that addresses using a victim-centered approach with noncitizen crime victims, including applicants for T nonimmigrant status.[19] The ICE directive specifies that ICE will coordinate with USCIS to ''seek expedited adjudication of victim-based immigration applications and petitions'' and that in the cases of a detained individual with a pending application for a victim-based immigration benefit, ICE will request USCIS expedite the decision.[20] USCIS will continue to coordinate with ICE on this process.

I. Evidence To Establish Trafficking

Comment: Several commenters wrote that they appreciate that 8 CFR 214.11(f)(1) (redesignated here as 8 CFR 214.206(a)) includes examples of evidence that may be submitted to demonstrate a trafficker's purpose in cases where no commercial sex act or forced labor occurred. They also stated that they approve of the non-exhaustive list at 8 CFR 214.11(f)(1) (redesignated 8 CFR 214.206(a)) of examples of evidence that may be submitted to demonstrate the trafficker's purpose in this type of scenario. However, these same commenters also recommended that DHS expand the list of possible evidence and expressed that trafficking victims may not be able to supply the types of evidence in the list. They suggested DHS add additional types of evidence; clarify that all forms of evidence are acceptable; and clarify that no form of evidence is preferred over another. Specifically, commenters wrote that DHS should clarify that a law enforcement declaration or grant of Continued Presence are not required or preferred forms of evidence. The commenters also requested that 8 CFR 214.11(f)(l) (redesignated here as 8 CFR 214.206(a)) be revised to state that a victim's statement alone could be sufficient in proving attempted victimization.

Response: DHS agrees with the commenters' rationale and has amended the list of evidence in new 8 CFR 214.206(a). Although the list is not intended to be exhaustive, the regulation may have unintentionally emphasized certain types of evidence. In amending this list, DHS emphasizes that alternate forms of evidence can be submitted to establish an individual is a victim of a severe form of trafficking, or to establish the trafficker's purpose. DHS acknowledges there are some types of evidence that victims are more likely to have. Each form of evidence alone may be sufficient under the any credible evidence standard, and no form of evidence is preferred over another. As noted above, DHS declines to amend the regulatory text to explicitly state that a victim's statement alone may prove victimization. While DHS may determine, based on the facts and circumstances of a particular case, that a personal statement alone may be sufficient to prove victimization, in such a scenario, the victim's statement would have to be sufficiently detailed, plausible, and consistent in order to satisfy evidentiary requirements. With all T visa applications, DHS makes an individualized determination of whether trafficking has been established based on the evidence in each particular case. However, DHS encourages applicants to submit any additional credible evidence that could help establish their claim.

Comment: One commenter wrote that they were concerned about the statement in the Preamble to the 2016 IFR that a victim can submit any credible evidence from any reliable source that shows the purpose for which the victim was recruited, transported, harbored, provided, or obtained. *See* 81 FR 92272. That commenter requested that DHS clarify that reliable sources could include not only direct evidence, but also circumstantial evidence as well as the victim's own statement. The commenter asked that DHS assess the purpose or motivation of the trafficker in the same way it assesses the motive of a persecutor in asylum cases.

Response: DHS declines to specify in the regulation that circumstantial evidence and the applicant's affidavit can be submitted to establish the trafficker's purpose or motive. The evidentiary standards that DHS applies to all T nonimmigrant status eligibility requirements are based on an understanding that victims of severe forms of trafficking in persons often have difficulty acquiring evidence and that the best available evidence may include circumstantial evidence. But, as noted above, under the regulations an applicant's affidavit may be sufficient if it is sufficiently detailed, plausible, and consistent in order to satisfy evidentiary requirements. DHS declines to adopt asylum standards, as trafficking and asylum are distinct and involve unique forms of relief.

J. Physical Presence [21]

1. Applicability of Physical Presence Requirement

Comment: One commenter requested DHS replace the language in 8 CFR 214.11(g)(1) (redesignated here as 8 CFR 214.207(a)) that reads ''The requirement reaches an alien who'' with ''An applicant must demonstrate one of the following requirements.'' The commenter stated the wording was confusing for applicants and practitioners.

Response: DHS agrees that the language in 8 CFR 214.11(g)(1) caused confusion. DHS revised this section (new 8 CFR 214.207) to make it active tense and clarified the applicability of the physical presence standard, such that it reads: ''An applicant must demonstrate that they are physically present under one of the following grounds . . . .''

2. Passage of Time Between Trafficking and Filing the T Visa

Comment: Commenters stated that DHS has imposed a *de facto* deadline for physical presence, leading adjudicators to erroneously conclude that the mere passage of time signifies that an individual's physical presence in the United States is unrelated to their trafficking. The commenters claim this excludes many bona fide victims, who may file for T nonimmigrant status long after their trafficking. Commenters also recommended DHS explicitly consider when a survivor learned of their status as a victim of trafficking, by modifying § 214.11(g)(4) (redesignated here as 8 CFR 214.207(c)).

Response: DHS acknowledges the commenters' concerns and has clarified in the text of multiple provisions of the regulation that physical presence may be established regardless of the length of time that has passed between the trafficking and filing of the application. For example, DHS has clarified that under 8 CFR 214.207(a)(2) and (3), the applicant may satisfy the physical

[19] U.S. Immigr. & Customs Enforcement, U.S. Dep't of Homeland Security, ''ICE Directive 11005.3: Using a Victim-Centered Approach with Noncitizen Crime Victims'' (2021), *https://www.ice.gov/doclib/news/releases/2021/11005.3.pdf* (ICE Directive).

[20] *Id.*

[21] DHS also received comments regarding physical presence and law enforcement involvement, which are addressed above in Section D, Definitions.

presence requirement if they were liberated from a severe form of trafficking in persons by an LEA at any time prior to filing their T visa application. This is intended to clarify that there is no *de facto* deadline for filing. DHS has also already clarified its interpretation via policy guidance, consistent with the legislative intent behind the program.[22] In addition, under 8 CFR 214.207(a)(4), DHS has added that the current presence may be directly related, ''regardless of the length of time that has passed between the trafficking and filing'' of the applicant's T visa application.

DHS acknowledges that survivors of trafficking experience serious consequences because of their victimization that can delay filing, including lack of access to legal representation, trauma, lack of support, and even lack of knowledge that they are a victim of trafficking. DHS emphasizes that the passage of time alone does not negate an applicant's ability to establish physical presence on account of the trafficking. In addition, DHS has clarified in the regulation that when analyzing physical presence, it will consider when and how an applicant learned that they were a victim of human trafficking.[23] DHS acknowledges that many survivors may delay filing for legitimate reasons; however, the applicant still bears the burden of establishing that their current presence in the United States is on account of trafficking.

3. LEA Liberation and LEA Involvement

Comment: Many commenters requested DHS remove 8 CFR 214.11(g)(1)(ii) and (iii) (redesignated here as 8 CFR 214.207(a)(2) and (3)) because there has been no guidance clarifying the practical distinction between these provisions versus paragraph (g)(1)(iv) (redesignated here as 8 CFR 214.207(a)(5)), and adjudicators have required applicants claiming physical presence under paragraph (g)(1)(ii) or (iii) to also demonstrate their continuing physical presence.

Response: DHS declines to remove the language at new 8 CFR 214.207(a)(2) and (3), as these provisions are important ways applicants can establish their physical presence. DHS acknowledges there has been confusion surrounding these provisions. To establish physical presence under new 8 CFR 214.207(a)(2), an individual must demonstrate that law enforcement assisted in liberating them from their trafficking situation. To satisfy physical presence under new 8 CFR 214.207(a)(3), an individual must demonstrate that law enforcement became actively involved in detecting, investigating, or prosecuting the acts of trafficking. To establish physical presence under new 8 CFR 214.207(a)(5), regardless of where the trafficking occurred, an individual must establish that they have been allowed entry into the United States for the purpose of participating in the detection, investigation, prosecution, or judicial processes associated with an act or perpetrator of trafficking. DHS has retained these provisions as additional means by which an applicant can establish physical presence; however, as discussed above, DHS has updated these sections to clarify that physical presence can be satisfied if the LEA liberated the applicant from the trafficking situation or was involved in detecting, investigating, or prosecuting the acts of trafficking the case at any point prior to the application process.

4. Presumption of Physical Presence

Comment: Several commenters urged DHS to adopt a broader interpretation of ''physical presence on account of trafficking'' such that a presumption of physical presence could apply in various scenarios, including physical presence at the time of filing.

Response: DHS appreciates the commenters' concerns but declines to codify any generalized presumptions of physical presence in the regulations. The applicant bears the burden of establishing that they satisfy each eligibility criteria for T nonimmigrant status, including physical presence on account of trafficking at the time of filing and adjudication. Each application for T nonimmigrant status will be evaluated on its own merits. Although DHS declines to formally codify any presumptions of physical presence, DHS has clarified how physical presence may be satisfied, consistent with many of the commenters' requests. For example, the regulations have expanded the evidence applicants may submit to establish physical presence or overcome the effect of a prior departure. DHS notes that generally, where the applicant provides evidence that they are receiving services in the United States as a trafficking victim or pursuing civil, administrative, or criminal remedies because of the trafficking, this will be considered favorably in the physical presence assessment. Because DHS cannot enumerate all circumstances under which an applicant may satisfy physical presence, DHS declines to codify any presumption.

5. Continuing Presence and Nexus to Trafficking

Comment: Many commenters suggested revising 8 CFR 214.11(g)(1)(iv) (redesignated here as 8 CFR 214.207(a)(4)) to refer to ''current presence'' rather than ''continuing presence.'' One commenter stated that DHS ignores, discounts, or improperly analyzes the impacts of trafficking victimization in analyzing continuing presence. The commenter recommended DHS provide a non-exhaustive list of factors that USCIS will consider in determining whether an applicant has demonstrated continuing presence.

Response: DHS agrees that the ''continuing presence'' terminology at 8 CFR 214.11(g)(1)(iv) has caused confusion for adjudicators and stakeholders. DHS has replaced the phrase with ''current presence.'' This change is intended to clarify that the focus of the evaluation is on the applicant's presence at the time of filing and adjudication, rather than their presence prior to that time. *See* new 8 CFR 214.207(a)(4). DHS has also revised the regulation to include a non-exhaustive list of factors USCIS will consider in analyzing the physical presence requirement, at redesignated 8 CFR 214.207(c) (discussed further below). These updates clarify expectations regarding timeline requirements and bring this provision into present tense.

Commenter: One commenter requested the rule clarify that for an applicant's continuing presence in the United States to be directly related to their original trafficking, it is sufficient that if the applicant were to depart the United States, they would suffer hardship as a result of circumstances caused by their trafficking, regardless of whether such hardship constitutes extreme hardship. The commenter also requested the rule clarify that whether the applicant's continuing presence in the United States is directly related to their original trafficking, and whether the applicant would suffer extreme hardship upon removal are separate requirements that may be supported by the same evidence.

Response: DHS declines to adopt this recommendation. Physical presence is a current assessment of an applicant's experience, whereas extreme hardship

[22] *See* U.S. Citizenship and Immigr. Servs., U.S. Dep't of Homeland Security, ''Volume 3, Humanitarian Protection and Parole, Part B, Victims of Trafficking, Chapter 2, Eligibility Requirements,'' *https://www.uscis.gov/policy-manual/volume-3-part-b-chapter-2* (stating that an individual may satisfy the physical presence requirement regardless of the time that has passed since liberation from the initial trafficking and filing the T visa application) (last updated Oct. 20, 2021).

[23] *See* new 8 CFR 214.207(c)(1)(i).

is a prospective assessment of hardship the applicant may face. Although DHS acknowledges that the same evidence may be presented to satisfy multiple eligibility requirements, an applicant must explain how the evidence satisfies each eligibility requirement. The applicant bears the burden of establishing each eligibility requirement and clearly explaining how the evidence presented addresses each eligibility criteria.

Comment: Another commenter stated that if DHS retains the requirement that certain victims demonstrate that their continuing presence is directly related to trafficking, the rule should provide explicit guidance as to what sort of nexus is and is not required to meet this test. Another commenter indicated that USCIS practice suggests that if a survivor becomes stable at any point after their trafficking victimization, they are no longer present in the United States on account of their trafficking. The commenter emphasized that progress in a victim's life does not negate the ongoing impact of the trafficking victimization.

Response: DHS has revised the regulations to include a more expansive list of scenarios that can establish physical presence on account of trafficking. DHS has also provided significant guidance for adjudicators in its Policy Manual on analyzing whether an applicant's ongoing presence is directly related to their trafficking.[24] The Policy Manual provides that if the applicant has repeatedly traveled outside the United States since the trafficking, and their departures are not the result of continued victimization; or the applicant lacks continued ties to the United States or has established an intent to abandon life in the United States; this may support a finding that their current presence is not directly connected to the original trafficking. On the other hand, developments in an applicant's life following the trafficking do not prevent an applicant from establishing ongoing presence on account of trafficking. An applicant may still demonstrate that their current presence in the United States is directly related to the initial victimization and should not be penalized for stabilizing themselves following their victimization.

USCIS will assess the specific impacts of trafficking on the applicant's life at the time of application. The applicant may not establish eligibility if the evidence of the ongoing impact of trauma on the applicant's life does not sufficiently establish the connection between the trafficking and the applicant's presence in the United States at the time of filing.

6. Effect of Departure or Removal

Comment: Commenters asked DHS to eliminate the ''departure from the United States'' language at 8 CFR 214.11(g)(2) (redesignated here as 8 CFR 214.207(b)). Commenters indicated that the departure language prevents trafficking victims from obtaining benefits simply by virtue of their removal, even if they have a pending T application. They requested that DHS update the final rule to clarify that if an individual was in the United States on account of trafficking when they filed the application, subsequent departure or removal should not bar relief.

Response: DHS appreciates the concerns the commenters have raised but declines to eliminate the language describing the effect of departure or removal on physical presence. Instead, DHS has codified additional scenarios by which victims who have departed the United States following their victimization and subsequently re-entered may establish physical presence (including returning to the United States to pursue remedies against their trafficker or returning to seek treatment or services related to victimization they cannot obtain elsewhere). *See* new 8 CFR 214.207(b)(4) and (5). In addition, although DHS appreciates the sensitivities and unique impact removal has on applicants for T nonimmigrant status, T visa applicants must demonstrate physical presence in the United States pursuant to the statute.

Comment: Other commenters suggested that the rule should identify scenarios that may demonstrate that a victim's reentry to the United States is the ''result of continued victimization'' under § 214.11(g)(2)(i) (new 8 CFR 214.207(b)(1)) and would satisfy the physical presence requirement. The commenters proposed the following scenarios be included in the regulations: reentry into the United States (1) due to current fear of the traffickers in the victim's home country or last place of residence; (2) to seek treatment for victimization from trafficking which cannot be provided in the victim's home country or last place of residence; or (3) to pursue civil and criminal remedies against the traffickers in the victim's home country or last place of residence.

Response: DHS agrees with the second and third suggestions and has updated the regulations accordingly, such that both suggestions are encompassed in the new language at 214.207(b)(3)–(5). DHS declines to adopt the first suggestion, as a reentry to the United States due to current fear of the traffickers in the victim's home country or last country of residence would already fall under the ''continued victimization'' scenario articulated in 8 CFR 214.11(g)(2) (redesignated 8 CFR 214.207(b)).

Comment: One commenter requested that if DHS did not remove the departure language from the regulation, it should substantially alter the language found in 8 CFR 214.11(g)(2) (redesignated 8 CFR 214.207(b)), such that the regulation: acknowledges the possibility that a trafficker may have played a role in the survivor's departure from the United States; clarifies that a new incident of trafficking or new attempted incident of trafficking is not required; makes explicit that reentry related to fear of retaliation or re-victimization by the traffickers allows an applicant to meet this requirement; and clarifies that applicants may meet this requirement if, after their return to the United States, regardless of the exact motivation of the reentry, they are actively cooperating with an investigation or prosecution of trafficking.

Response: DHS has clarified how an applicant may establish physical presence after departure from and reentry to the United States by adding additional scenarios that can allow an applicant who has departed and returned to establish physical presence at 8 CFR 214.207(b)(4) and (5). These new provisions aim to provide clarity and reduce barriers for victims. Under new 8 CFR 214.207(b)(4), an applicant may establish physical presence after departure if their current presence in the United States ''is on account of their past or current participation in investigative or judicial processes associated with an act or perpetrator of trafficking, regardless of where such trafficking occurred.'' An applicant may satisfy this provision ''regardless of the length of time that has passed between their participation in an investigative or judicial process associated with an act or perpetrator of trafficking'' and the filing of their application for T nonimmigrant status. *See* new 8 CFR 214.207(b)(4). These new provisions allow individuals who have participated in investigative or judicial processes to establish physical presence following a prior departure, regardless of their manner of entry or where such trafficking occurred. Under new 8 CFR 214.207(b)(5), an applicant may establish physical presence following a

[24] *See* U.S. Citizenship and Immigr. Servs., U.S. Dep't of Homeland Security, ''Volume 3, Humanitarian Protection and Parole, Part B, Victims of Trafficking, Chapter 2, Eligibility Requirements,'' *https://www.uscis.gov/policy-manual/volume-3-part-b-chapter-2* (last updated Oct. 20, 2021).

previous departure if they returned to the United States and received treatment or services related to their victimization that cannot be provided in their home country or last place of residence. These additions support the dual purpose of the T visa, acknowledge there may be various reasons an individual may depart the United States, are consistent with a victim-centered approach to combatting trafficking, and do not require an individual to be revictimized to establish physical presence following a departure.

7. Trafficking That Occurs Outside the United States, and Traveling Outside the United States Following Victimization

Comment: Various commenters wrote that DHS interprets the physical presence requirement too narrowly for victims whose trafficking occurred outside the United States or who traveled outside of the United States after suffering trafficking. They stated that trafficking victims may be present in the United States on account of trafficking in various situations, including those in which they were trafficked in a neighboring country that failed to protect them before fleeing to the United States for protection. Some commenters stated that Congress did not specifically require that the trafficking occur in the United States or have violated U.S. law to qualify for the T visa. One commenter wrote that presence in the United States at the time of filing the application for T nonimmigrant status should be sufficient to meet the requirement, regardless of where the trafficking occurred or the circumstances of the applicant's reentry. Commentors also encouraged DHS to ensure definitions and interpretations acknowledge the global nature of trafficking, such as international child pornography rings and international sex trafficking rings, often with perpetrators based in the United States even if the trafficking occurred abroad.

Response: First, DHS acknowledges that trafficking may have a global nature and include a nexus to the United States even if the trafficking occurred abroad; however, DHS declines to interpret the TVPA to encompass trafficking situations in which a trafficking victim seeks protection in the United States for a trafficking situation that occurred fully outside U.S. borders and for which there is no nexus to the United States—either through presence at a United States port of entry on account of the trafficking or cooperation with U.S. law enforcement.

Congress created T nonimmigrant status with a dual purpose: to protect victims of a severe form of trafficking in persons and to encourage and facilitate assistance to U.S. law enforcement to prosecute and combat human trafficking. *See generally,* TVPA section 102, 22 U.S.C. 7101. Congress provided an incentive for victims of a severe form of trafficking in persons to report their victimization by providing for an immigration benefit contingent upon complying with reasonable requests for assistance to LEAs. *Id.;* new 8 CFR 214.202(c). If DHS adopted the commenters' suggested interpretation of the physical presence requirement, victims who were trafficked anywhere in the world could seek T nonimmigrant status in the United States, although a U.S. law enforcement agency would not necessarily have jurisdiction to investigate or prosecute the trafficking. This result would not be consistent with the dual purposes for which Congress created T nonimmigrant status.

DHS appreciates the difficult circumstances facing victims trafficked outside of the United States, particularly when an applicant is unable to find protection elsewhere; however, DHS does not believe that Congress intended to offer protection in the form of T nonimmigrant status in the United States to victims who suffer trafficking in other countries, who flee to the United States for protection, and whose trafficking has no nexus to the United States. DHS acknowledges, however, there may be situations in which trafficking could have occurred abroad that would make an applicant eligible for T nonimmigrant status; as indicated in the Policy Manual, applicants whose trafficking ended outside of the United States may be able to satisfy physical presence if they can demonstrate that they are now in the United States or at a port of entry on account of trafficking or were allowed valid entry into the United States to participate in a trafficking-related investigation or a prosecution or other judicial process. Cases where trafficking occurred abroad require an individualized and nuanced consideration. Consistent with this interpretation, DHS has amended 8 CFR 214.11(g)(1)(v) (redesignated 8 CFR 214.207(a)(5)) to indicate that an applicant may be deemed physically present under this provision regardless of where such trafficking occurred. *See* new 8 CFR 214.207(a)(5)(i). DHS has consolidated the language at 8 CFR 214.11(g)(3) at new 8 CFR 214.207(a)(5)(ii) and (b)(3) to instruct applicants how they may demonstrate physical presence, by showing documentation of valid entry into the United States for purposes of an investigative or judicial process associated with an act or perpetrator of trafficking.

Comment: Another commenter requested that DHS address situations where trafficking occurred abroad, but the applicant can satisfy physical presence because the trafficking is directly the result of U.S. immigration policy.

Response: DHS emphasizes that applicants who are physically present in the United States or at a port of entry on account of trafficking can demonstrate eligibility for T nonimmigrant status even if the trafficking occurred abroad; however, the requirement that an applicant be physically present in the United States or at a port of entry is a statutory requirement that cannot be waived. Eligibility may be established where there exists a nexus between the trafficking and presence in the United States.

8. Opportunity To Depart

Comment: Commenters also requested DHS strike the reference to the ''applicant's ability to leave the United States'' at 8 CFR 214.11(g)(4) because such evidence is unnecessary, and DHS had already removed the requirement for an applicant to prove they had no ''opportunity to depart'' the United States. Another commenter indicated that DHS imposes a de facto ''opportunity to depart'' requirement.

Response: DHS agrees that striking the ''ability to leave'' language is consistent with the prior removal of the ''opportunity to depart'' language and has revised the regulation accordingly. DHS clarifies that an applicant need not show they had no opportunity to depart the United States to establish physical presence.

9. Presence for Participation in Investigative or Judicial Process

Comment: Commenters stated that DHS incorrectly interprets the language in 8 CFR 214.11(g)(3), redesignated as § 214.207(a)(5)(ii) and (b)(3) to require a victim's entry through lawful means. *See* 81 FR 92274. The commenters claim the statute does not indicate that only lawful reentries or those arranged by the government can be used to demonstrate physical presence. The commenters noted that the regulations are not structured to include non-criminal processes, and it is likely that LEAs will not be involved in such proceedings, making it unlikely that a victim would be able to enter the United States through lawful means. The commenters

also stated that it would be unlikely for a victim to have a visa authorized for the purpose of pursuing civil remedies.

Response: DHS maintains that the current interpretation requiring a lawful entry to establish physical presence based on ''having been allowed entry into the United States for participation in investigative or judicial processes associated with an act or a perpetrator of trafficking,'' remains the best legal reading of the statutory language added by TVPRA 2008, as explained in detail in the 2016 IFR preamble. Where the regulatory provisions focus on the purpose of the entry, for example at 8 CFR 214.11(g)(2)(iii) (new 8 CFR 214.207(b)(3)), the statutory authority comes from the ''allowed entry'' language found in section 101(a)(15)(T)(i)(II) of the INA, 8 U.S.C. 1101(a)(15)(T)(i)(II), which includes physical presence on account of an individual ''having been allowed entry.'' DHS therefore is retaining the provisions as drafted, striking 8 CFR 214.11(g)(3), and moving the language to new 8 CFR 214.207(a)(5)(ii) and (b)(3). However, having been allowed entry to participate in investigative or judicial processes is just one example of how an individual can establish they are physically present on account of trafficking, and DHS acknowledges that the requirement of a lawful reentry in 8 CFR 214.11(g)(3) has had unintentional limitations, such that victims of trafficking who departed the United States and reentered unlawfully, but are present in order to participate in an investigative or judicial process associated with the trafficking, were unable to establish eligibility due to their manner of reentry. DHS believes it is consistent with Congressional intent to recognize that such victims may be able to establish that they are physically present on account of trafficking, regardless of the manner of reentry or the time that has passed between cooperation and filing of the T visa application. Accordingly, DHS has added new 8 CFR 214.207(b)(4), which focuses on the reason for the victim's current presence rather than the purpose or means of their entry. DHS maintains that ''allowed entry'' as used in section 101(a)(15)(T)(i)(II) of the INA, 8 U.S.C. 1101(a)(15)(T)(i)(II), signifies a ''lawful entry'' for purposes of initial entry and reentry after departure.

Comment: Another commenter requested that DHS revise the language in 8 CFR 214.11(g)(3) (consolidated into 8 CFR 214.207(a)(5)(ii) and (b)(3)) to include civil or administrative investigations, prosecutions, or judicial processes associated with acts or perpetrators of trafficking.

Response: DHS declines to make this edit, as the new language at 8 CFR 214.207(b)(5) encompasses these processes. ''Investigative or judicial processes'' covers all the suggested language from the commenter, and includes criminal, civil, administrative, or other investigations, prosecutions, or judicial processes.

10. Evidence To Establish Physical Presence

Comment: One commenter requested that in determining whether trafficking survivors are present on account of trafficking, DHS should consider the ability or inability of survivors to access legal and social services after escaping a trafficker.

Response: DHS emphasizes that adjudicators consider all evidence presented, including the applicant's ability to access services following victimization. DHS has made several clarifications and amendments to redesignated 8 CFR 214.207(c) to address this concern; however, DHS cannot specifically agree to such a broad request to acknowledge consideration of an applicant's inability to access services if this information is not presented via evidence relevant to a particular case.

Commenter: Another commenter proposed significant revisions to 8 CFR 214.11(g)(4) (redesignated as 8 CFR 214.207(c)). The commenter stated that Requests for Evidence appear to require mental health diagnoses, which places survivors in rural areas at great disadvantage; and current emphasis on law enforcement evidence reinforces that evidence from law enforcement is considered primary evidence and encourages misinterpretation that there is a statute of limitations to file for a T visa.

Response: DHS has updated the evidentiary requirements for how applicants may establish that they are physically present in the United States on account of trafficking in redesignated 8 CFR 214.207(c). The amended section codifies a non-exhaustive list of evidence with the intent of providing clarity to stakeholders and adjudicators around evidentiary expectations. DHS acknowledges that the prior regulation may have inadvertently created confusion surrounding what types of evidence are preferred, rather than underscoring that any credible evidence will be considered in determining whether an applicant has established physical presence in the United States on account of trafficking. Although the list at 8 CFR 214.207(c) has been significantly expanded, DHS again emphasizes that there is no preferred or required type of evidence, and victims may be more likely to have access to certain types of evidence.

K. Compliance With Any Reasonable Request for Assistance

1. Requirement To Comply With Reasonable Request

Comment: One commenter requested DHS rephrase, reconsider, or remove the requirement that an applicant for a T visa cooperate with law enforcement, particularly because of safety considerations for relatives abroad and continued victimization. The commenter also stated that LEAs deport individuals who refuse to cooperate.

Response: DHS declines to adopt this recommendation. Although DHS is sympathetic to these concerns, the statute requires compliance with a reasonable request for assistance in order to be eligible to receive T nonimmigrant status. DHS notes that there is a trauma exception and an age exemption to this eligibility requirement to account for circumstances that may impact an applicant's ability to comply with reasonable requests for assistance. In addition, as discussed above, DHS endeavors not to remove trafficking victims and applicants for T nonimmigrant status outside of exigent circumstances.[25] Moreover, as discussed further below, the statute and regulations provide eligibility for T nonimmigrant status to family members facing a present danger of retaliation as a result of the principal T nonimmigrant's escape from the severe form of trafficking or cooperation with law enforcement. *See* 8 CFR 214.211; INA sec. 101(a)(15)(T)(ii)(III), 8 U.S.C. 1101(a)(15)(T)(ii)(III).

2. Incompetence and Incapacity

Comment: Commenters requested DHS expand the exceptions for compliance with a reasonable request for assistance, including lack of capacity/competency found in the U visa regulations. The commenters proposed including the same exception for individuals lacking capacity or competency even if it is not linked to the trafficking because it often prevents

[25] The White House, ''The National Action Plan to Combat Human Trafficking,'' (2021) *https://www.whitehouse.gov/wp-content/uploads/2021/12/National-Action-Plan-to-Combat-Human-Trafficking.pdf* (National Action Plan); U.S. Dep't of Homeland Security, ''Department of Homeland Security Strategy to Combat Human Trafficking, the Importation of Goods Produced with Forced Labor, and Child Sexual Exploitation'' (Jan. 2020), *https://www.dhs.gov/sites/default/files/publications/20_0115_plcy_human-trafficking-forced-labor-child-exploit-strategy.pdf* (DHS Strategy); ''ICE Directive 11005.3,'' *https://www.ice.gov/doclib/news/releases/2021/11005.3.pdf.*

victims from complying with reasonable requests from law enforcement.

Response: DHS appreciates and shares these concerns about individuals who lack capacity or competency; however, the age exemption and trauma exception are both statutory. There is no statutory authority for an incapacity or incompetence exemption or exception. Instead, DHS has included consideration of an individual's capacity, competency, or lack thereof as factors to be considered when determining whether a request was reasonable. Moreover, the existing age exemption and trauma exception cover incapacity or incompetence due to age or trauma suffered. The existing exemption and exception, coupled with DHS's addition of capacity/competency as a factor to consider will have the same intended effect as a specific exception for incapacity and incompetency.

3. Minimum Contact With Law Enforcement

To meet the requirement that an applicant comply with reasonable LEA requests for assistance, 8 CFR 214.11(h)(1) (redesignated 8 CFR 214.208(b)) mandates that an applicant, at a minimum, has contacted an LEA regarding an act of a severe form of trafficking in persons, unless an exemption or exception applies.

Comment: One commenter requested DHS clarify that an applicant under 18 years of age who reports the trafficking to the National Human Trafficking Hotline or Office of Trafficking in Persons meets the requirement that the person report to LEAs and comply with reasonable requests, including if they make an anonymous report.

Response: DHS emphasizes that applicants who are under the age of 18 at the time of victimization are, by statute, exempt from the requirement to cooperate with any reasonable requests for assistance from law enforcement. Additionally, reports to the National Human Trafficking Hotline or the Office of Trafficking in Persons would generally satisfy the reporting requirement, if the person making the report requested or provided permission for the report to be referred to law enforcement; however, anonymous reports generally do not satisfy the requirement, as they do not meet the required evidentiary standard of proof.

Comment: Some commenters supported DHS' removal of regulatory provisions describing how to obtain an LEA declaration when the victim has not had contact with an LEA. *See* 81 FR 92276. Commenters stated that adjudicators apply inconsistent standards as to what type of contact with an LEA is sufficient. They wrote that some applicants have documented in their T visa applications that they reported to law enforcement, but received no LEA response, and then received RFEs requesting additional documentation of law enforcement contact including a Supplement B or proof of Continued Presence. The commenters recommended that DHS amend 8 CFR 214.11(h)(1) (redesignated 8 CFR 214.208(b)) to provide that a single contact with law enforcement by telephone or electronic means documented by the applicant is sufficient to meet the eligibility requirement. They also recommended that in this same section, DHS repeat aspects of the definition of an LEA to speed responses to RFEs, clarify the minimum amount of LEA contact required, and clarify that it is not necessary that law enforcement respond to the contact. Commenters also requested DHS explicitly clarify in the regulations that participation in civil, family, juvenile, criminal, administrative or any type of court proceedings involving human trafficking or where the victim reveals facts of the trafficking to the court meets the ''contact with an LEA'' requirement.

Response: DHS agrees to adopt this recommendation regarding clarifying what constitutes minimum conduct and has revised the regulation to state that a single contact through telephonic, electronic, or other means may suffice. The means of contact can vary depending on the agency and the facts of the case. Applicants may document whether the LEA responded, and the type of response received. DHS encourages applicants to document all interactions they have had with law enforcement. DHS also clarified that the LEA to which the applicant reports must have jurisdiction over the reported crime. DHS emphasizes that there is no requirement that an individual provide a Supplement B or evidence of a Continued Presence grant, that an investigation or prosecution has been initiated, or that law enforcement respond to the applicant. While an investigation or prosecution is not necessary, the LEA's response to the report of trafficking is helpful to understand LEA involvement in the criminal case and determine whether the applicant meets the requirement to comply with any reasonable LEA requests. DHS does not consider it necessary to repeat the definition of an LEA or to specify every type of contact or the context of that contact that would suffice, given that redesignated 8 CFR 214.201 (defining an LEA) clearly specifies the types of agencies that qualify as LEAs.

4. Determining the Reasonableness of a Request

Comment: Multiple commenters suggested eliminating language in 8 CFR 214.11(a) (redesignated here as 8 CFR 214.201) and 8 CFR 214.11(h)(2) (redesignated as 8 CFR 214.208(c)) referencing the presence of an attorney. The commenters stated that the presence of an attorney should not be evaluated as a factor in whether an LEA request was reasonable and doing so may lead to victims with an attorney being held to higher standards in complying with LEA requests than those without an attorney present. The commenters wrote that the presence of an attorney does not make the law enforcement request more or less reasonable.

Response: DHS declines to adopt this recommendation. Whether an attorney was present during an LEA request is just one of the potentially many factors that DHS considers in examining the totality of the circumstances. Applicants may feel pressured to comply with an LEA request in the absence of an attorney, so DHS believes that it is appropriate to include it as a relevant factor. Furthermore, including an attorney's presence as a factor does not create a higher standard for victims who have attorneys present when requests are made, nor does it put such victims at a relative disadvantage. The presence or absence of an attorney generally will not be dispositive, but is a relevant factor in determining the reasonableness of a request, and will be analyzed on a case-by-case basis.

Comment: Several commenters requested that a ''qualified interpreter'' be added into 8 CFR 214.11(h)(2) (redesignated as 8 CFR 214.208(c)), as language access during LEA interactions is critical to victim protections and is legally required by the Civil Rights Act.

Response: DHS agrees that language access during such interaction is important for victims and has updated the language at new 8 CFR 214.208(c)(11) accordingly.

Comment: Commenters requested DHS add additional factors in determining the reasonableness of a request, including: the circumstances in which a request was made, the ability and health of an applicant, and the nature of trauma suffered. Commenters stated it was critical to understand the context in which requests are made of victims, as well as the circumstances of the victim themselves. The commenters also requested striking ''severe'' from

''severe trauma'' at 8 CFR 214.11(h)(2) (redesignated as § 214.208(c)) because all trauma should be considered.

Response: DHS generally agrees with these comments and has amended the list of factors to consider, by adding the victim's capacity, competency, or lack thereof; removing ''severity'' of trauma; adding ''qualified'' to interpreters; adding the ''health'' of the victim; and adding ''any other relevant circumstances surrounding the request.'' *See* new 8 CFR 214.208(c). DHS believes that these clarifying changes will improve determinations of the applicant's compliance with a reasonable LEA request.

5. Trauma Exception

Comment: Several commenters expressed support for provisions clarifying the types of supporting evidence that applicants can submit to establish that they meet the trauma exception from the general eligibility requirement of compliance with any reasonable LEA request for assistance in 8 CFR 214.11(h)(4)(i) (redesignated here as 8 CFR 214.208(e)(1)). Commenters suggested DHS consider the circumstances of the victim while they were being victimized and the surrounding circumstances, which may have exacerbated the trauma. They also recommended including additional examples of types of evidence that could be submitted to establish that an applicant meets the trauma exception.

Response: DHS has revised the regulations to include additional examples of evidence that may be submitted to establish the applicant qualifies for the trauma exception, to benefit adjudicators and applicants, give applicants additional information, and allow for consistency in adjudications. The updated provision clarifies that an applicant's statement should explain the circumstances surrounding the trauma and includes additional types of credible evidence that may be submitted. *See* 8 CFR 214.208(e)(1).

Comment: One commenter recommended DHS define what constitutes physical or psychological trauma to help applicants determine what evidence to submit when claiming the exception.

Response: DHS declines to include a definition of trauma in the regulatory text, as it could have the unintended effect of restricting access to benefits for victims.

Comment: One commenter stated that requiring an applicant to prove trauma to qualify for the exception risks re-traumatization, and that implicit in the definition of trafficking is some element of trauma. The commenter stated that requiring survivors to retell their experiences could hinder healing, and this could be mitigated by mandating a signed attestation to the psychological trauma from a qualified individual. The commenter stated that not requiring an applicant's affidavit would reduce the risk of re-traumatization.

Response: DHS declines to adopt this recommendation. DHS is sympathetic to the risks of re-traumatization for survivors of trafficking, but the trauma exception is statutory. The personal statement is and will continue to be initial required evidence because it is one of the most important sources of information for adjudicators in determining whether an individual meets the eligibility requirements for T nonimmigrant status. The personal statement also allows an applicant to provide credible evidence of their experiences in their own words, without requiring them to provide other evidence that may be more difficult to obtain. In addition, adjudicators consider the impact of trauma and victimization when evaluating the personal statement.[26] DHS declines to mandate a signed attestation from a medical or other qualified professional, as this would be inconsistent with the ''any credible evidence'' standard and would create a limitation on types of evidence that may be submitted under this standard.

6. DHS Contact With Law Enforcement

Comment: Several commenters requested that DHS amend 8 CFR 214.11(h)(4)(i) (redesignated here as 8 CFR 214.208(e)(1)) to provide that, in cases where an applicant has invoked the trauma exception and is unable to comply with reasonable LEA requests, USCIS will only contact an LEA if the applicant has already had initial contact. These commenters stated that maintaining this provision might discourage applicants who fear that USCIS' discretion to contact an LEA could potentially endanger applicants or their family members. Multiple commenters also requested clarification to ensure adjudicators understand that applicants who qualify for the exception are not required to have any contact with any LEA.

Response: DHS appreciates the sensitivities of applicants who are seeking an exception due to trauma and acknowledges that individuals who qualify for the trauma exception are not required to have had contact with any LEA. However, DHS feels it is important to retain the authority to contact law enforcement agencies for any information that may be necessary to adjudicate an application, in certain limited circumstances, even where an applicant has not already contacted an LEA. This is especially true for T nonimmigrant status, which requires cooperation with law enforcement unless the trauma exception or age exemption applies. *See* 8 CFR 214.208. DHS has stricken the reference to contacting law enforcement in relation to the trauma exception and has created a new section at 8 CFR 214.208(f) indicating that USCIS reserves the authority and discretion to contact an LEA involved in a case where an applicant previously contacted an LEA or when otherwise permitted by law. *See, e.g.,* 8 U.S.C. 1367.

7. Age Exemption

Comment: Several commenters commended DHS for updating its regulations to reflect the statutory provision that minors under 18 years of age are not required to comply with any reasonable law enforcement requests. *See* INA sec. 101(a)(15)(T)(i)(III). Multiple commenters requested that DHS clarify its interpretation of the exemption by amending 8 CFR 214.11(h)(4)(ii) (redesignated here as 8 CFR 214.208(e)(2)) to specify that the relevant age for determining whether this exemption is met is the age at the time of victimization, not the age at the time of application. Commenters stated this change is important because child trafficking victims in particular suffer long-term trauma that may limit their ability to cooperate with law enforcement and to confide in their attorneys. Additionally, commenters noted that attorneys may not identify applicants who suffered trafficking as a minor until after they have turned 18. One commenter requested that DHS consider increasing the age for the minor exemption. Another commenter stated there should be no requirement to comply with reasonable requests for assistance from law enforcement regardless of age, considering that brains are not fully developed until the age of 25. One commenter requested DHS clarify that any credible evidence related to a minor's age be included. The commenter indicated they work with many children who do not have access to birth certificates, passports, or certified medical opinions; whose documents have been withheld by their legal guardians; or do not know their

[26] U.S. Citizenship and Immigr. Servs., U.S. Dep't of Homeland Security ''Volume 3, Humanitarian Protection and Parole, Part B, Victims of Trafficking, Chapter 3, Documentation and Evidence for Principal Applicants,'' *https://www.uscis.gov/policy-manual/volume-3-part-b-chapter-3* (last updated Oct. 20, 2021).

own birthdates or exactly where they were born.

Response: DHS agrees that suffering human trafficking as a child can be particularly traumatizing and has significant and negative impacts on development. DHS has revised the regulation to clarify that the exemption for minors applies based on the age of the applicant at the time of victimization. An applicant is exempt from the requirement to comply with reasonable law enforcement requests if the applicant was under 18 years of age at the time at least one of the acts of trafficking occurred. This is consistent with longstanding DHS policy and practice. DHS declines to increase the age for the minor exemption above age 18, as this exemption is provided in the statute. Moreover, DHS declines to remove the requirement to comply with reasonable requests for assistance, as it is a statutory requirement, and individuals who were under the age of 18 at the time of at least one of the acts of trafficking or may not be able to comply with reasonable requests for assistance due to trauma qualify for an exemption or exception.

DHS also acknowledges that minors may have difficulty obtaining certain types of evidence to establish their age and has revised the regulation to emphasize that any other credible evidence regarding age will be considered.

L. Extreme Hardship

Comment: One commenter requested DHS remove the extreme hardship requirement altogether. Another commenter wrote that the standard for ''unusual and severe harm'' in 8 CFR 214.11(i) (redesignated here as 8 CFR 214.209) for purposes of evaluating whether an applicant would suffer extreme hardship if removed from the United States is unnecessarily narrow and should include considerations of hardship inflicted on individuals other than the applicant. The commenter also recommended that DHS revise this section to take greater account of economic detriment and financial harm as factors in assessing hardship, particularly when those factors create a risk of re-victimization. The commenter requested DHS add language to 8 CFR 204.11(i) (redesignated here as 8 CFR 214.209) ''indicating that current or economic detriment may be considered as one factor in assessing hardship, particularly when it creates a risk of re-victimization.'' Another commenter supported the broad list of factors that should be considered, but also requested to include financial and support issues, and encouraged DHS to provide a greater list of possible, but not exhaustive factors to be considered.

Response: DHS declines to fully adopt these recommendations. DHS cannot remove the extreme hardship eligibility requirement, as it is required by statute. *See* INA sec. 101(a)(15)(T)(i)(IV), 8 U.S.C. 1101(a)(15)(T)(i)(IV) (''the alien would suffer extreme hardship involving unusual and severe harm upon removal''). The statute is clear that the extreme hardship eligibility requirement refers to hardship that the applicant would suffer and does not include hardship to anyone other than the applicant as a factor. *See* INA sec. 101(a)(15)(T), 8 U.S.C. 1101(a)(15)(T). Accordingly, USCIS will not consider hardship to family members unless the evidence demonstrates specific harms that the applicant will suffer upon removal as a result of hardship to a family member. DHS has amended redesignated 8 CFR 214.209(c)(2) to provide this clarification.

DHS has revised 8 CFR 214.209 to include economic harm as an extreme hardship factor. Economic harm has always been considered a factor; the prior regulation indicated that economic detriment alone could not be the sole basis for a finding of extreme hardship involving unusual and severe harm. Although the revised regulations do not bar economic hardship as the sole basis for such a finding, it must rise to the level of extreme hardship involving unusual and severe harm, and thus, generally, economic hardship alone may not suffice. However, adjudicators will consider the totality of the circumstances and all relevant factors in making an extreme hardship determination. Each case will require an analysis based on the specific facts and circumstances present.

Comment: One commenter requested that DHS clarify whether the hardship must be directly related to trafficking and that it does not need to rise to the level of extreme hardship.

Response: As discussed above, DHS has not removed the reference to extreme hardship in the regulation. DHS clarifies that an applicant's hardship does not need to be directly related to their trafficking. *See* 8 CFR 214.209.

M. Family Members Facing a Present Danger of Retaliation

The regulations at 8 CFR 214.11(k) (redesignated here as 8 CFR 214.211) implement section 101(a)(15)(T)(ii)(III) of the INA, 8 U.S.C. 1101(a)(15)(T)(ii)(III), to provide that T nonimmigrant status may be available for a parent, unmarried sibling under the age of 18, or the adult or minor child of a derivative of the principal facing a present danger of retaliation as a result of the T–1 nonimmigrant's escape from the severe form of trafficking or cooperation with law enforcement. One commenter expressed support for allowing principal applicants under 21 years of age to apply for derivative T nonimmigrant status for unmarried siblings under 18 years and parents as eligible derivative family members.

Comment: Commenters requested that DHS mandate an expedited adjudication process for these applications, which would protect family members at risk and encourage victims of trafficking to report their victimization. Some commenters recommended a specific 30-day timeline.

Response: DHS shares the commenters' concerns about family members at risk; however, it declines to impose processing deadlines on itself given staffing resources and the case-by-case review required in adjudicating T visa applications. DHS notes that there is already a process in place to request expedited processing based on urgent humanitarian reasons. Guidance for requesting expedited processing can be found on the USCIS website.[27]

Comment: Commenters also wrote that section 101(a)(15)(T)(ii)(III) of the INA, 8 U.S.C. 1101(a)(15)(T)(ii)(III), does not provide an opportunity to request T nonimmigrant status for a principal's adult children who face a present danger of retaliation. Some commenters indicated they understood that DHS had limited ability to address this statutory gap, while others stated that DHS could construe the statute more broadly to include these adult children but did not provide legal support for this assertion.

Response: DHS acknowledges that the statute omits a principal's adult children who face a present danger of retaliation. However, the statutory language is not ambiguous on this point and a change in the law to include a principal's adult children would be necessary to include adult children of a T–1 nonimmigrant as eligible family members. INA sec. 101(a)(15)(T)(ii)(III), 8 U.S.C. 1101(a)(15)(T)(ii)(III).

Comment: Commenters wrote that family members at risk of retaliation from traffickers have difficulty securing evidence listed in 8 CFR 214.11(k)(6) (redesignated here as 8 CFR 214.211(f)) to prove a present danger of retaliation. They requested that DHS indicate that a victim's statement describing the present danger of retaliation alone would be sufficient or, at a minimum,

[27] U.S. Citizenship and Immigr. Servs., U.S. Dep't of Homeland Security, ''How to Make an Expedite Request,'' *https://www.uscis.gov/forms/filing-guidance/how-to-make-an-expedite-request* (last updated Oct. 20, 2022).

clarify that police reports filed in the home country and affidavits from witnesses in the home country would meet the evidentiary standard. Several commenters requested that DHS consider any credible evidence of the danger of retaliation.

Response: DHS appreciates the difficulties that trafficking victims and their family members may have in obtaining evidence. For this reason, the rule is clear that applicants may submit any credible evidence related to all the eligibility requirements for both principal applicants and derivative applicants. *See, e.g.,* 8 CFR 214.204(c) and (l). The standard also applies specifically to the evidentiary standard for proving that an eligible family member faces a present danger of retaliation. *See* 8 CFR 214.211(a)(3). In cases where the LEA has not investigated the trafficking, USCIS will evaluate any credible evidence demonstrating derivatives' present danger of retaliation. The types of evidence listed at 8 CFR 214.211(f) are non-exhaustive examples, and the inclusion of ''and/or'' at the end of the list before the inclusion of ''any credible evidence'' clarifies that USCIS will consider any credible evidence.

An applicant's personal statement alone could be sufficient to establish a present danger of retaliation, in accordance with the ''any credible evidence'' standard. *See* new 8 CFR 214.211(f). DHS has not specifically revised the rule to state that a statement describing the present danger of retaliation alone would be sufficient, as this is already permitted by the ''any credible evidence'' standard, and referencing one particular piece of evidence in the regulatory text could unintentionally discourage applicants from submitting additional relevant, credible evidence that would assist in the adjudication. DHS encourages applicants to submit additional credible evidence whenever possible to provide USCIS adjudicators with as complete an understanding of the facts of the case as possible.

The ''any credible evidence'' standard also encompasses evidence originating from a family member's home country; however, DHS has clarified that evidence may be from the United States or any country in which an eligible family member faces retaliation at new 8 CFR 214.211(f).

Comment: One commenter requested DHS revise the T–6 regulation to eliminate the policy of requiring that a derivative beneficiary of a T–1 nonimmigrant have already secured T nonimmigrant status before their adult or minor children facing present danger of retaliation become eligible for T–6 status. They stated that DHS's interpretation of ''derivative beneficiary'' is overly narrow, that the interpretation that the term means someone who has ''derived status'' and ''benefited'' from the qualifying relationship has no basis, and that it is inconsistent with DHS's own use of the term ''beneficiary'' elsewhere.

Response: DHS appreciates the commenter's concerns; however, it maintains that its interpretation as presented in the 2014 Policy Memorandum [28] regarding T derivatives (T Derivative Memo) is the correct legal reading of the statute. The commenter's contention that a ''derivative beneficiary'' may include someone who merely ''stands to benefit,'' but has not, at minimum, sought such a benefit, lacks statutory support. DHS maintains that the phrase ''adult or minor children of a derivative beneficiary'' plainly requires the T–6 family member to establish their eligibility through their relationship to the derivative beneficiary of the principal. A plain language reading of ''derivative beneficiary'' is someone who has *derived* a *benefit;* that is, an individual who has derived their nonimmigrant status as a family member, as defined at section 101(a)(15)(T)(ii) of the INA, 8 U.S.C. 1101(a)(15)(T)(ii), and who has benefited from the qualifying relationship to the principal. As noted in the T Derivative Memo, this means that a ''derivative beneficiary'' is a family member described in section 101(a)(15)(T)(ii)(I) and (II) of the INA, 8 U.S.C. 1101(a)(15)(T)(ii)(I) and (II), who has been granted derivative T nonimmigrant status. Accordingly, a ''derivative beneficiary'' must have been granted T–2, T–3, T–4, or T–5 nonimmigrant status through the principal in order for the derivative beneficiary's adult or minor child to be eligible for T–6 nonimmigrant status. This conclusion is further supported by the requirement under section 101(a)(15)(T)(ii) of the INA, 8 U.S.C. 1101(a)(15)(T)(ii) that any derivatives be ''accompanying, or following to join'' the principal T–1 applicant.

As noted in the T Derivative Memo, Congress created the T–6 classification through a relationship to a derivative, instead of directly to a principal, as it is in other immigration benefits. Therefore, establishing a qualifying relationship between the T–6 family member and their parent is insufficient to derive eligibility as a T–6, if the T–6's parent never held T nonimmigrant status as a T derivative beneficiary. To be eligible for T–6 classification, the adult or minor child must establish the qualifying relationship to their parent who actually derived T nonimmigrant status through the principal beneficiary. Accordingly, DHS declines to make any changes in response to this comment.

N. Marriage of Principal After Principal Files Application for T Nonimmigrant Status

The regulation at redesignated 8 CFR 214.211(g)(4) states that if an applicant marries after filing the application for T–1 nonimmigrant status, USCIS will not consider the spouse eligible for derivative T–2 nonimmigrant status.

Comment: Several commenters wrote that this limitation on eligible derivatives relies on an unnecessarily narrow interpretation of section 101(a)(15)(T)(ii) of the INA, 8 U.S.C. 1101(a)(15)(T)(ii), by requiring that a spousal relationship exist at the time of filing. They suggested that the spouse from a marriage that occurs after the principal applicant applies for T–1 nonimmigrant status should be able to be considered as a T–2 derivative spouse.

Response: The U.S. Court of Appeals for the Ninth Circuit, in *Medina Tovar* v. *Zuchowski,* held that the regulatory requirement at 8 CFR 214.14(f)(4) that a spousal relationship must exist at the time a Petition for U Nonimmigrant Status is filed for the spouse to be eligible for classification as a derivative U–2 nonimmigrant was invalid.[29] As a matter of policy, DHS applies this decision nationwide to spousal and stepparent relationships arising in adjudications of derivative U nonimmigrant status petitions, as well as derivative T nonimmigrant status applications.[30] Accordingly, DHS has amended the regulations in the final rule to adopt the holding in *Medina Tovar* for T nonimmigrant adjudications and has stricken the following language: ''If a T–1 marries subsequent to filing the application for T–1 status, USCIS will not consider the spouse eligible as a T–2 eligible family member.'' DHS has

[28] U.S. Citizenship and Immigr. Servs., U.S. Dep't of Homeland Security, ''New T Nonimmigrant Derivative Category and T and U Nonimmigrant Adjustment of Status for Applicants from the Commonwealth of the Northern Mariana Islands'' (2014), *https://www.uscis.gov/sites/default/files/document/memos/Interim_PM-602-0107.pdf* (T Derivative Memo).

[29] *Medina Tovar* v. *Zuchowski,* 982 F.3d 631 (9th Cir. 2020).

[30] U.S. Citizenship and Immigr. Servs., U.S. Dep't of Homeland Security, ''Volume 3, Humanitarian Protection and Parole, Part B, Victims of Trafficking, Chapter 4, Family Members, Section D, Family Relationship at the Time of Filing,'' *https://www.uscis.gov/policy-manual/volume-3-part-b-chapter-4* (last updated Oct. 20, 2021).

added language that principal applicants who marry while their Application for T Nonimmigrant Status is pending may file an Application for Family Member of T–1 Recipient on behalf of their spouse, even if the relationship did not exist at the time they filed their principal application. *See* new 8 CFR 214.211(e). DHS has also included language allowing for a principal applicant to apply for a stepparent or stepchild if the qualifying relationship was created after they filed their principal application but before it was approved. Finally, DHS has clarified that it will evaluate whether the marriage creating the qualifying spousal relationship or stepchild and stepparent relationship exists at the time of adjudication of the principal's application and thereafter.

Comment: One commenter requested that principal applicants should be permitted to apply for derivative T status for the parent of the principal's derivative children, as many individuals may not formalize their committed relationships through marriage.

Response: Although DHS sympathizes with these situations, the family relationships giving rise to derivative T nonimmigrant status eligibility are set forth at section 101(a)(15)(T)(ii) of the INA, 8 U.S.C. 1101(a)(15)(T)(ii). Thus, DHS declines to add a new standard for derivative benefits for a committed relationship in the T visa context.

O. Relationship and Age-Out Protections

DHS has amended new 8 CFR 214.211(e)(1) to state that if the principal applicant establishes that they have become a parent of a child after filing, the child will be deemed an eligible family member. This new language replaces ''had a child'' because it is more inclusive and accurate, and mirrors similar regulations in the U visa context.

DHS has also amended new 8 CFR 214.211(e)(3) to state that the age-out protections apply to a child who may turn 21 during the pendency of the principal's application for T nonimmigrant status. The prior text erroneously referred to age-out protections for children of principals who were 21 years of age or older.

P. Travel Abroad

Comment: Commenters encouraged DHS to provide advance parole for T nonimmigrants in recognition of the fact that victims' families may remain abroad. They wrote that victims would feel safer and be able to return to the United States without immigration consequences.

Response: DHS notes that T nonimmigrants are already permitted to apply for advance parole, as clarified in both the Form I–914 and Form I–131 form instructions and Policy Manual. Applications for advance parole are evaluated on a case-by-case basis pursuant to section 212(d)(5) of the INA, 8 U.S.C. 1182(d)(5). In addition, DHS has clarified that a noncitizen granted T–1 nonimmigrant status or an eligible family member must apply for advance parole to return to the United States after travel abroad. The T nonimmigrant must comply with advance parole requirements to maintain T nonimmigrant status upon return to the United States and remain eligible to adjust status under section 245(l) of the INA, 8 U.S.C. 1255(l). 8 CFR 245.23(j). *See* new 8 CFR 214.204(p), 214.211(i)(4).

Q. Extension of Status

DHS provides in this rule that a derivative T nonimmigrant may file for extension of status independently, if the T–1 nonimmigrant remains in status, or the T–1 nonimmigrant may file for an extension of their own status and request that the extension be applied to their derivative family members. This codifies the current process for derivatives to seek extensions of status. *See* new 8 CFR 214.212(b). In administering the T nonimmigrant program, USCIS found, and stakeholders expressed, that there was a lack of clarity with the extension of status process for T nonimmigrants. USCIS issued a Policy Memorandum in 2016 to clarify requirements for extension of status for T and U nonimmigrants (T/U Extension Memo).[31] DHS is codifying some of the policies in the T/U Extension Memo at new 8 CFR 214.212(f). First, this rule provides that USCIS may approve an extension of status for principal applicants based on exceptional circumstances. Second, when an approved eligible family member is awaiting initial issuance of a T visa by an embassy or a consulate and the principal's T–1 nonimmigrant status will soon expire, USCIS may approve an extension of status for a principal applicant based on exceptional circumstances. *See* new 8 CFR 214.212(f).

Finally, DHS has clarified in the evidence section for extension of status that it will consider affidavits from individuals with direct knowledge of or familiarity with the applicant's circumstances, rather than affidavits of ''witnesses.'' *See* new 8 CFR 214.212(g)(2)(v).

R. Revocation Procedures

DHS has clarified the existing practice that an automatic revocation cannot be appealed. *See* new 8 CFR 214.213(a). DHS has also clarified at § 214.213(c) that if an applicant appeals a (non-automatic) revocation, the decision will not become final until the appeal is decided. *See* 8 CFR 103.3. DHS has revised the language at new 8 CFR 214.213(b)(1) which previously referenced errors that affected the ''outcome'' and now refers to errors that led to an ''approval'' of a case.

Comment: Some commenters expressed concern that 8 CFR 214.11(m) (redesignated here as 8 CFR 214.213)) eliminates a step in the process of revocation, stating that under the prior rule at 8 CFR 214.11(s)(2), a notice of intent to revoke (NOIR) would initiate a 30-day window for the applicant to submit a rebuttal that a district director would then consider as evidence. They proposed that the rule include this prior process and provide individuals with an opportunity of rebuttal.

Response: The removal of this language in the interim rule does not reflect a change in USCIS' revocation procedures. T nonimmigrants who are issued a NOIR are provided 30 days to respond with evidence to rebut the grounds stated for revocation in the notice. These grounds and the deadline to respond are stated in all NOIRs. USCIS will consider all evidence presented in deciding whether to revoke the approved application. The reference to the district director in the 2002 interim rule is outdated, as district offices are no longer involved in revoking T nonimmigrant status. DHS has codified the current procedures for NOIRs, including the time period during which an individual may submit rebuttal evidence at 8 CFR 214.213(c).

S. Waivers of Inadmissibility

DHS has the authority to waive grounds of inadmissibility on a discretionary basis under section 212(d)(3)(A)(ii) or (d)(13) of the INA, 8 U.S.C. 1182(d)(3)(A)(ii), (d)(13).

Comment: Commenters requested that DHS clarify in the regulation that immigration judges have jurisdiction over waiver applications, referencing court decisions in the U visa context.

Response: DHS declines to adopt this recommendation. In the 2002 interim rule, DOJ delegated T-related waiver authority exclusively to the Immigration

[31] U.S. Citizenship and Immigr. Servs., U.S. Dep't of Homeland Security, ''Extension of Status for T and U Nonimmigrants (Corrected and Reissued)'' (2016), *https://www.uscis.gov/sites/default/files/document/memos/2016-1004-T-U-Extension-PM-602-0032-2.pdf* (T/U Extension Memo).

and Naturalization Service (INS), and INS's adjudicative authority transferred to USCIS with the Homeland Security Act.[32]

Comment: In cases involving violent or dangerous crimes, 8 CFR 212.16 specifies that USCIS will only exercise favorable discretion toward the applicant in extraordinary circumstances unless the criminal activities were caused by or were incident to the victimization. *See* 8 CFR 212.16(b)(3). Several commenters wrote that this provision is too stringent in its application. They stated that this language is not statutorily required, that victims of trafficking often have unfavorable criminal histories that are not directly tied to their victimization but are related to their vulnerability that led to their exploitation, and that this provision could have a chilling effect on victims coming forward to report crimes.

Other commenters encouraged DHS to require consideration of the effects and circumstances of the trafficking as they relate to criminal issues. They suggested DHS determine whether the crime occurred before the trafficking situation or is related to the trafficking, including trauma or vulnerabilities in the wake of trafficking. They requested DHS focus not on the seriousness or number of crimes and instead focus on a victim-centered approach using a balancing test.

Response: DHS declines these edits, while recognizing nuances in evaluating an applicant's criminal history and the potential for unique factors related to victimization. DHS believes that 8 CFR 212.16 appropriately informs the exercise of discretion and is fundamental to maintaining the integrity of the T nonimmigrant status program and the ability to adjudicate T visa applications on a case-by-case basis. DHS has broad waiver authority to waive most grounds of inadmissibility under section 212(d)(3)(A)(ii) and (d)(13) of the INA, 8 U.S.C. 1182(d)(3)(A)(ii), (d)(13) (if in the national interest for section 212(a)(1) of the INA, 8 U.S.C. 1182(a)(1), or if in the national interest and caused by or incident to the victimization for most other provisions of subsection 212(a) of the INA, 8 U.S.C. 1182(a) inadmissibility grounds). DHS reserves the ability to evaluate inadmissibility grounds in each individual case to ensure that the waiver is in the national interest and considers a broad variety of factors in doing so. Moreover, DHS already considers all positive and negative factors in the exercise of discretion.

T. Adjustment of Status

DHS has made several changes to the adjustment of status regulations for T nonimmigrants. DHS has stricken from 8 CFR 245.23(a)(3) the requirement that an applicant accrue 4 years in T–1 nonimmigrant status and file a complete application prior to April 13, 2009, as all such applications have been adjudicated.

In addition, DHS has removed the word ''first'' before ''date of lawful admission'' in 8 CFR 245.23(a)(4) to clarify the agency's interpretation of re-accrual of physical presence following a break in presence. This edit clarifies an outstanding legal and policy concern in the program and eliminates barriers for victims of trafficking. The statutes and regulations permit T nonimmigrants to restart the clock after a break in continuous physical presence after the first admission as a T nonimmigrant (including, but not limited to, restarting after a subsequent admission as a T nonimmigrant, or restarting after returning with advance parole after a break in continuous physical presence). This interpretation treats T nonimmigrant adjustment of status applicants and U nonimmigrant adjustment of status applicants the same regarding the requirements for continuous physical presence.

Comment: Commenters encouraged DHS to take a broader approach to adjustment of status eligibility, including allowing derivative family members to adjust independently of the T–1 nonimmigrant, and to evaluate each application on its own merits. One commenter recommended incorporating the policies outlined in the T/U Extension Memo, because it allowed derivatives to adjust independently of principals.

Response: Section 245(l) of the INA, 8 U.S.C. 1255(l), provides that if a T–1 nonimmigrant has been continuously physically present for three years since admission as a T–1 nonimmigrant (or during the investigation or prosecution of trafficking which is complete); establishes good moral character; and has complied with any reasonable request for assistance in the trafficking investigation or prosecution, would suffer extreme hardship involving unusual and severe harm upon removal, or was under age 18 at the time of victimization, the Secretary may adjust the status of the T–1 nonimmigrant and any person admitted under section 101(a)(15)(T)(ii) of the INA, 8 U.S.C. 1101(a)(15)(T)(ii). Thus, a precondition for a derivative T nonimmigrant to adjust status under section 245(l) of the INA, 8 U.S.C. 1255(l) is that the T–1 nonimmigrant has met the above specified requirements (continuous physical presence, good moral character, etc.). For all practical purposes, a derivative T nonimmigrant generally cannot demonstrate that the T–1 nonimmigrant meets the requirements for adjustment of status in the absence of USCIS adjudicating an application for adjustment of status from the T–1 nonimmigrant themself. Therefore, DHS declines to adopt the commenter's recommendation to permit T derivatives to adjust independent of the T–1 principal.

DHS also notes that the T/U Extension Memo says derivative family members with T nonimmigrant status do not lose their status when the T–1 nonimmigrant adjusts status, allowing the derivative to adjust status later. DHS has codified this longstanding policy at 8 CFR 245.23(b)(5).

Comment: Commenters also requested changes to 8 CFR 245.23(a)(6) such that it includes an exemption for trafficking victims under the age of 18 at the time of victimization, to be consistent with the statute at 8 U.S.C. 1255(l)(1)(C).

Response: DHS agrees that Congress intended to exempt trafficking victims who were under the age of 18 at the time of their victimization from being required to contact law enforcement. This exemption should apply at the adjustment of status stage; accordingly, DHS has made this change to the regulation as a technical edit. Similarly, DHS has added reference to the trauma exception, consistent with the statute and congressional intent. *See* new 8 CFR 245.23(a)(7)(iii) and (iv).

Comment: Other commenters requested changes be made to the minimum 3-year continuous physical presence requirement because it punishes trafficking victims by forcing them to wait, and conditions early adjustment eligibility on things outside the victim's control, such as the conclusion of the investigation or prosecution.

Response: DHS is sympathetic to the difficulties victims may face in waiting to adjust status; however, the continuous physical presence period is statutory and cannot be changed by regulation.

Comment: Commenters also requested that DHS implement a process by which principal applicants who obtain lawful permanent residence and subsequently marry may file the equivalent of a Form I–929, Petition for Qualifying Family Member of a U–1 Nonimmigrant on behalf of eligible family members.

[32] 6 U.S.C. 271(b).

Response: DHS is sympathetic to the concerns raised in these comments but declines to adopt a process for certain relatives to apply to adjust status if they have never held T nonimmigrant status. Commenters noted the ability of U–1 nonimmigrants to file for spouses they subsequently marry after receiving U nonimmigrant status; U–1 nonimmigrants are able to do so under 8 U.S.C. 1255(m)(3); however, there is no equivalent statutory basis to create such a process in the T visa context under 8 U.S.C. 1255(l)(1).

U. Applicants and T Nonimmigrants in Removal Proceedings or With Removal Orders

Commenter: One commenter requested DHS acknowledge that trafficking survivors often escape trafficking through arrest or contact with Immigration and Customs Enforcement (ICE), who may later prosecute them without investigating whether they have been trafficked. The commenter requested that special protections be extended to survivors placed in removal proceedings and detention, to ensure survivors have access to due process in requesting a T visa.

Response: DHS acknowledges that many survivors may escape their trafficking through encounters with ICE. Understanding the concern that trafficking victims may require additional protection, DHS has made several changes to the regulation (discussed below) to further its victim-centered approach. In addition, DHS has made significant accomplishments of Priority Actions within the Department of Homeland Security Strategy to Combat Human Trafficking, the Importation of Goods Produced with Forced Labor, and Child Sexual Exploitation (DHS Strategy). For example, in October 2020, DHS launched the Center for Countering Human Trafficking (CCHT), a DHS-wide effort comprising 16 supporting offices and components, led by U.S. Immigration and Customs Enforcement (ICE) Homeland Security Investigations (HSI). The CCHT is the first unified, intercomponent coordination center for countering human trafficking and the importation of goods produced with forced labor. In October 2021, the Secretary directed DHS components to incorporate a victim-centered approach into all policies, programs, and activities governing DHS interactions with victims of crime. Finally, in August 2021, ICE issued Directive 11005.3: Using a Victim-Centered Approach with Noncitizen Crime Victims, which sets forth ICE policy regarding civil immigration enforcement actions involving noncitizen crime victims, including victims of trafficking and Continued Presence recipients.[33] This Directive emphasizes the duty to protect and assist noncitizen crime victims.

Comment: Another commenter requested that in cases where applicants can make a credible showing that they were placed in removal proceedings through retaliatory actions of their trafficker or due to their trafficking, DHS should automatically join in a motion to administratively close or to terminate the removal proceeding for the pendency of the T nonimmigrant application, including through any appeals, and overcoming any applicable time and numerical limitations.

Response: DHS declines to adopt this recommendation. DHS is cognizant that individuals may be placed in removal proceedings because of their trafficking experience and implements a victim-centered approach for all individuals it encounters. DHS believes that the following changes (listed in the subsequent seven numbered paragraphs) made to the regulation will address many of the commenter's concerns.

1. Principal Applicants, T–1 Nonimmigrants, and Derivative Family Members

Comment: Commenters indicated that their clients have faced unnecessary hurdles and additional trauma when seeking to reopen and terminate a prior removal order due to opposition by ICE. Commenters also stated that ICE ''rarely'' joins applicants' motions to administratively close, continue, or terminate proceedings. They emphasized that removal from the United States can render a victim ineligible for a T visa and vulnerable to re-trafficking or retaliation from the trafficker. The commenters suggested that the regulations be amended to mandate ICE's participation in joint motions to reopen upon a grant of T–1 or T derivative nonimmigrant status in these circumstances, or at the respondent's request, ICE should agree to a motion to administratively close, terminate or continue proceedings (if proceedings are ongoing).

Response: DHS values the need to conserve government resources and maintain coordination across the department; however, DHS declines to codify limitations on ICE's ability to make case-by-case determinations. In line with the victim-centered approach, we have revised the regulation to provide that ICE will maintain a policy regarding the exercise of discretion toward all applicants for T nonimmigrant status, and all T nonimmigrants. *See* new 8 CFR 214.214(b). To that end, DHS has also revised the regulation at new 8 CFR 214.204(b)(1)(ii), 214.205(e), and 214.211(b)(2)(ii) to state that ICE may exercise prosecutorial discretion as appropriate.

Comment: Other commenters stated that if DHS disagreed with mandating ICE to join such motions, DHS should add permissive language to this effect, making clear that the language set forth at 8 CFR 214.11(d)(1)(ii) and (k)(2)(i) (redesignated as 8 CFR 214.204(b)(2) and 214.211(b)(2)) applies both to T–1 nonimmigrants as well as T derivatives in pending removal proceedings. Other commenters also requested the regulation address derivative family members in removal proceedings.

Response: DHS agrees with the commenter's suggestion, and as described above, has amended the regulation to state that ICE may exercise prosecutorial discretion, including in cases of T derivatives or eligible family members. *See* new 8 CFR 214.211(b)(2)(ii).

2. Immigration Judges

Comment: Several commenters requested DHS add language to the regulation specifically stating that an immigration judge may terminate removal proceedings once T nonimmigrant status is granted. They requested DHS add language clarifying that an immigration judge can administratively close removal proceedings while USCIS adjudicates an application for T nonimmigrant status.

Response: This rule amends DHS regulations only and is not a joint Department of Justice (DOJ) rule. Accordingly, comments related to the authority of an immigration judge to terminate or administratively close removal proceedings are outside the scope of this rule, which cannot bind DOJ.

Comment: Commenters also suggested that the regulation direct immigration judges to terminate or administratively close proceedings for all T nonimmigrant status applicants and recipients on their own accord without a motion or request from the parties.

Response: DHS declines to adopt this recommendation. This rule amends DHS regulations only and is not a joint Department of Justice (DOJ) rule. Thus, DHS cannot bind DOJ in this rule.

3. Automatic Stays of Removal

Comment: One commenter urged DHS to automatically stay removals of

[33] ''ICE Directive 11005.3,'' *https://www.ice.gov/doclib/news/releases/2021/11005.3.pdf.*

applicants whose applications are deemed to be properly filed. They request in the alternative that DHS expedite bona fide determinations for applicants with final orders of removal. Other commenters requested that DHS issue a stay of removal to applicants with pending T visa applications until a bona fide determination is made.

One commenter stated that if an application is found to be bona fide, DHS should extend an administrative stay of a final order until a final decision is made on the application for T nonimmigrant status.

Response: DHS declines to adopt these recommendations. DHS acknowledges the commenters' concerns regarding the removal of applicants with pending T visa applications. As a matter of policy, DHS generally will not remove applicants with pending T nonimmigrant status applications; however, there may be situations where it is prudent for DHS to execute removal orders prior to adjudication, and DHS does not intend to limit DHS discretion in this manner. DHS feels that the regulation's language at 8 CFR 214.204(b)(2)(i) and (ii) is sufficient to address these commenter's concerns by providing that, once granted, a stay of removal will remain in effect until a final decision is made on the application for T nonimmigrant status.

4. Unrepresented Applicants

Comment: One commenter requested that in cases where an applicant is unrepresented in proceedings, DHS should be mandated to move for termination, dismissal, administrative closure, or a continuance. The commenter stated that actively pursuing removal cases against survivors of trafficking is inconsistent with ICE's goal of prioritizing limited resources.

Response: DHS declines to adopt these recommendations. Generally, relief from removal has been historically requested by the noncitizen and is not initiated by DHS. DHS does not wish to limit ICE's discretion by mandating specific actions, as each case will present different circumstances. However, DHS agrees that prioritizing the removal of trafficking survivors is generally inconsistent with the victim-centered approach to which DHS adheres.

5. Detained Applicants

Comment: Commenters requested DHS be required to release a detained applicant once a bona fide determination has been made. Some commenters requested that DHS add a provision to the regulation requiring ICE to seek expedited processing for all detained T visa applicants (principals and derivatives). They also stated that ICE should be required to check DHS systems for VAWA confidentiality flags that indicate a pending or approved T, U, or VAWA application or petition for every detainee within 24 hours of detention. Finally, they state the regulation should specify how quickly ICE should make this request and how long USCIS should generally take to respond to the expedite request.

Response: DHS declines to adopt this recommendation. DHS appreciates the commenter's concerns. Existing USCIS and ICE processes already flag protected records via secure methods for information sharing, including through the USCIS Central Index System, which, among other things, includes flags for individuals whose records are protected under 8 U.S.C. 1367.

In addition, there is already a process in place to request expedited processing based on urgent humanitarian reasons, which can be found on the USCIS website.[34] ICE also will request expedited adjudication when necessary and appropriate, including when noncitizens are detained so adjudication of applications for T nonimmigrant status is prioritized. ICE then exercises discretion to defer decisions on enforcement action in compliance with their directives and processes.[35] Finally, although DHS understands the commenter's concerns about detained T applicants, it declines to impose processing deadlines on itself given resource needs and shifting priorities.

6. Reinstatement of Removal

Comment: One commenter requested DHS create a presumption that reinstatement of removal would not occur in cases of T, U, and VAWA eligible victims, to avoid victims being removed from the United States.

Response: DHS declines to adopt this recommendation. This comment is partially out of scope, as DHS can make no changes to VAWA or U regulations in this rule because we made no changes to those programs in the interim rule. In addition, relief from removal has been historically requested by the noncitizen and is not initiated by DHS. Operationally, it would take many resources and considerable infrastructure to create a process in which DHS could actively seek out noncitizens with pending T applications, and who have a prior removal order, just to ensure a reinstatement would not be issued. Furthermore, DHS declines to limit ICE's discretion in this manner, but emphasizes that ICE uses a victim-centered approach in which all relevant circumstances are considered.

7. Issuances of Notices To Appear (NTAs)

Comment: Commenters suggest codifying DHS statements from the 2016 Interim Final Rule preamble language regarding not issuing NTAs to individuals with pending applications for T nonimmigrant status.

Response: DHS agrees to adopt this suggestion and has introduced a new provision at 8 CFR 214.204(b)(3) clarifying that USCIS does not have a policy to refer applicants for T nonimmigrant status for removal proceedings absent serious aggravating circumstances, such as the existence of an egregious criminal history, a threat to national security, or where the applicant is complicit in trafficking. Issuing NTAs to survivors of trafficking outside of these circumstances undermines both the humanitarian and law enforcement purposes of the statute. The new provision at 8 CFR 214.204(b)(3) is consistent with several of the Priority Actions outlined in the White House's 2021 National Action Plan to Combat Human Trafficking[36] as well as several objectives laid out in the DHS Strategy.[37]

V. Notification to ICE of Potential Trafficking Victims

8 CFR 214.11(o) (redesignated here as 8 CFR 214.215) addresses the duty of USCIS employees who encounter potential victims of trafficking to consult with the appropriate ICE officials to initiate law enforcement investigation and assistance to victims.

Comment: Commenters requested that DHS reconsider whether USCIS employees should be making referrals to consult with ICE officials. They wrote

[34] U.S. Citizenship and Immigr. Servs., U.S. Dep't of Homeland Security, ''How to Make an Expedite Request,'' *https://www.uscis.gov/forms/filing-guidance/how-to-make-an-expedite-request* (last updated Oct. 20, 2022).

[35] *See* ''ICE Directive 11005.3,'' *https://www.ice.gov/doclib/news/releases/2021/11005.3.pdf.*

[36] ''National Action Plan,'' *https://www.whitehouse.gov/wp-content/uploads/2021/12/National-Action-Plan-to-Combat-Human-Trafficking.pdf.* In particular, this aligns with ''Priority Action 2.2.2: Provide human trafficking victims protection from removal'' and ''Priority Action 2.3.2: Provide immigration protections to ensure eligible victims are not removed.''

[37] ''DHS Strategy,'' *https://www.dhs.gov/sites/default/files/publications/20_0115_plcy_human-trafficking-forced-labor-child-exploit-strategy.pdf.* Specifically, the new regulation is consistent with the priority actions ''Develop Victim-Centered Policies and Procedures for DHS Personnel'' and ''Improve Coordination of Immigration Options for Victims of Human Trafficking.''

that interaction with ICE may put trafficking survivors at risk for criminal liability and potential deportation and that these interactions may harm applicants eligible for the trauma exception or who do not feel comfortable cooperating with LEAs. Commenters suggested instead that USCIS employees should advise potential victims of their possible immigration remedies and provide a referral to the National Human Trafficking Hotline. Some commenters suggested that such a referral would defeat the purpose of the confidentiality protections at 8 U.S.C. 1367. They wrote that USCIS should be especially cautious of such consultations when the potential victim is represented by an attorney or receiving services from a social services agency and recommended that DHS revise the provision to require USCIS to consider such information when consulting with ICE officials.

Response: DHS appreciates concerns about the protection of vulnerable applicants and the potential consequences of LEA intervention, including concerns that represented individuals and those receiving social services may have made an informed decision with regard to reporting to law enforcement in light of the trauma exception; however, referrals to ICE's Homeland Security Investigations (HSI) are important given the role they play in combating criminal organizations that commit human rights violations, including human trafficking. HSI is victim-oriented, has extensive experience handling trafficking cases with sensitivity, and employs victim assistance specialists that work directly with individuals who have experienced trafficking. Sharing information between USCIS and ICE under these circumstances is permitted under 8 U.S.C. 1367 because the referral is within DHS for legitimate Department purposes, including coordination on Continued Presence and expedite requests. Nevertheless, in consideration of these comments, DHS has revised 8 CFR 214.215 to state that USCIS ''may'' consult, rather than ''should'' consult with ICE.

USCIS exercises caution whenever it shares information protected under 8 U.S.C. 1367 with ICE HSI, and evaluates all relevant circumstances in deciding whether to share such information, including whether there is a legitimate Department purpose for sharing. ICE HSI is equally bound by the confidentiality protections of 8 U.S.C. 1367(a)(2), including whether a person is represented by an attorney or accredited representative.

W. Fees

Comment: Commenters stated that T visa applicants incur significant fees in filing related forms and that access to fee waivers is crucial. Some commenters noted that detained trafficking survivors do not have funds to pay filing fees or provide documentation of their financial circumstances. They asked DHS to simplify and streamline the fee waiver request process and consider ''any credible evidence'' in adjudicating fee waiver requests. Other commenters requested that DHS extend the fee exemption to all ancillary applications related to the application for T nonimmigrant status to include motions and appeals. A few commenters noted that DHS has eliminated many of the fees associated with applying for T nonimmigrant status in recognition of the challenges victims of a severe form of trafficking in persons and their family members may face in bearing these costs. Commenters asked that DHS extend the fee exemptions to applications for employment authorization filed by eligible family members in 8 CFR 214.11(k)(10) (redesignated here as 8 CFR 214.211(i)(3)). They proposed that, at a minimum, the rule clarify that family members seeking employment authorization can submit fee waiver requests instead of associated fees. Other commenters requested DHS require that all fee waiver requests be processed within 30 days of receipt.

Response: DHS recognizes the challenges faced by trafficking victims and their family members, including the costs of submitting applications associated with T nonimmigrant status. DHS appreciates the importance of the fee waiver process and takes note of the commenters' concerns. On January 31, 2024, USCIS published a Final Rule (Fee Rule) to adjust certain immigration and naturalization benefit request fees.[38] That rule codified 8 CFR 106.3(b)(2) which exempts persons seeking or granted T nonimmigrant status from the fees for several different USCIS forms. As a result, T nonimmigrants, T nonimmigrant applicants, and their derivatives will generally pay no USCIS fees until they apply for naturalization, at which time they may request a fee waiver or a reduced fee.

Comment: Commenters also requested a presumption in favor of granting fee waivers submitted in association with a T visa application or if the applicant is detained by DHS, in the absence of specific and exceptional circumstances.

Response: Persons seeking or granted T nonimmigrant status are exempt from paying fees for all related forms through adjustment of status. 8 CFR 106.3(b)(2). As a result, T nonimmigrants, T nonimmigrant applicants, and their derivatives will not be required to request a fee waiver until they file Form N–400, Application for Naturalization.[39]

X. Restrictions on Use and Disclosure of Information Relating to T Nonimmigrant Status

Comment: Commenters expressed support for DHS including the reference at 8 CFR 214.11(p) (redesignated as 8 CFR 214.216) in confidentiality provisions and exceptions that specifically apply to human trafficking survivors under 8 U.S.C. 1367(a)(2) and (b). One commenter acknowledged DHS's rationale for not including the entire list of exceptions to the restrictions included in 8 U.S.C. 1367(b) but requested that DHS add language to the provision that would highlight the exceptions on disclosure for law enforcement or national security purposes. The commenter wrote that including these specific examples would help victims make an informed decision of whether to apply for T nonimmigrant status.

Response: DHS recognizes the importance of ensuring that applicants are fully informed of the consequences of applying for immigration benefits. Nevertheless, DHS may share the information with other Federal, State, and local government agencies and other authorized organizations. *See* 5 U.S.C. 552a. DHS regulations already discuss the reasons an applicant's information may be released. *See* 6 CFR part 5, subpart B. In addition, the Form I–914, Application for T Nonimmigrant Status, Instructions clearly state that the information provided may also be made available as appropriate for law enforcement purposes or in the interest of national security as permitted by 8 U.S.C. 1367. Therefore, DHS made no changes in the final rule in response to this comment.

Comment: One commenter requested DHS add to the regulation that upon denial of an application, USCIS will inform an applicant that their privacy protections are void per 8 U.S.C. 1367 and will state the parties with whom the applicant's information may be shared.

Response: DHS declines to adopt this recommendation because protections

[38] *U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements,* 89 FR 6194 (Jan. 31, 2024).

[39] DHS published multiple new fee exemptions for T nonimmigrants as part of a comprehensive adjustment to all USCIS fees. *See, e.g.,* 89 FR 6392.

under 8 U.S.C. 1367(a)(2) only end when ''the application for relief is denied and all opportunities for appeal of the denial have been exhausted.'' 8 U.S.C. 1367(a)(2). Therefore, including such a notification in the denial notice would be premature.

Y. Public Comment and Responses on Statutory and Regulatory Requirements

Comment: Some commenters cited statistics on the number and demographics of trafficked victims within the United States. One commenter cited a survey entitled, ''YES Project; Youth Experiences Survey: Exploring the Sex Trafficking Experiences of Arizona's Homeless and Runaway Young Adults,'' conducted by Arizona State University (ASU) School of Social Work in 2014. The results of the survey found that 25 percent of the 246 homeless youth who were surveyed reported being victims of trafficking. Additionally, the commenter cited that the average age of entry to sex trafficking is 14 years old. Another commenter provided data on the total number of human trafficking victims (20.9 million people) as published in a U.S. News and World Reports opinion editorial.

Response: DHS appreciates the commenters' responses and has reviewed the cited data provided by commenters. Although DHS recognizes that the cited data supports the goals of this rule, DHS cannot confirm or deny the data with reliable accuracy and, therefore, does not use it in its analysis. The sampling frame of the YES Project survey included 246 homeless youth who received services from three Arizona-based young adult serving organizations.[40] Because the survey sampled only a small number of homeless youth and a small number of Arizona youth-based programs, DHS did not feel it was appropriate to make any general conclusions from such data.

Z. Biometrics

Comment: One commenter encouraged USCIS to accept biometrics taken by ICE rather than require a detained applicant to submit their biometrics at a USCIS Application Support Center.

Response: DHS appreciates the commenter's goal of increasing efficiency. USCIS is examining whether it has the legal authority and technical capability to submit to the Federal Bureau of Investigation biometrics collected by a criminal justice agency or from a non-criminal justice agency when the biometrics were collected for a different purpose from USCIS' purpose of use. DHS will continue to explore the feasibility of permitting USCIS to use biometrics collected by ICE for adjudication of applications for T nonimmigrant status from detained individuals, but declines to codify any changes at this time.

AA. Trafficking Screening, Training, and Guidance

1. Screening

Comment: One commenter requested that the regulation require DHS to conduct screening for trafficking victims by all levels of DHS, at each stage of the immigration process; require ICE to screen all detained individuals and provide release on bond or parole for anyone identified as a trafficking victim; and require OPLA attorneys to screen for trafficking both before issuing NTAs as well as for each case they prosecute. The commenter also stated that if an NTA has already been issued, the regulation should require that the ICE attorney immediately notify the court and opposing counsel (or, in absence of counsel, the Respondent), request a continuance or administrative closure, and refer the victim for trafficking support services and investigation.

Response: DHS appreciates the commenter's recommendation regarding screening efforts to protect victims of trafficking. In response to the White House National Action Plan to Combat Human Trafficking, there is a government-wide effort to update screening forms and protocols for all Federal officials who have the potential to encounter a human trafficking victim in the course of their regular duties that do not otherwise pertain to human trafficking. In support of this priority action, DHS co-chairs the interagency working group to document promising practices and identify opportunities to strengthen current efforts to screen for victims of human trafficking.[41] DHS declines to impose anything further via regulation at this time, as DHS believes these actions address the commenter's concerns.

2. Training

Comment: Several commenters requested DHS provide additional resources, support, and training to LEAs to help them understanding the nuances of trafficking. Specifically, they stated that LEAs should be trained to recognize the co-existence of trafficking and domestic violence. The commenters encouraged DHS to release a Law Enforcement Declaration Guide. They also suggested that DOJ's Office on Violence Against Women (OVW) should provide training, not DHS.

Response: DHS is committed to providing training and support to certifying officials and stakeholders on trafficking and the T visa program. As discussed extensively above, DHS acknowledges that domestic violence and trafficking may coexist, and has provided significant guidance in the Policy Manual to reflect this.

On October 20, 2021, USCIS published the first ever standalone T Visa Law Enforcement Resource Guide for certifying officials,[42] which clarifies the role and responsibility of certifying agencies in the T visa program, provides certifying officials with best practices for approaching the T visa certification process, and emphasizes that completing the declaration is consistent with a victim-centered approach. In addition, OVW provides leadership in developing the national capacity to ''reduce violence against women and administer justice for and strengthen services to victims of domestic violence, dating violence, sexual assault, and stalking.'' [43] OVW also supports the provision of training and technical assistance to assist service providers and the anti-trafficking field in ensuring successful for survivors of trafficking.[44]

As DHS is responsible for adjudicating T visas, and encounters trafficking victims in various ways, it is imperative DHS continues to train certifying officials and others about trafficking and the T visa.

3. Guidance

Comment: Several commenters requested DHS issue policy guidance to LEAs on referring potential victims to local nongovernmental organizations for assistance to identify, support, and protect trafficking victims.

Response: DHS already works with local governments and NGOs to assist

[40] Dominique Roe-Sepowitz, and Kristen Bracy, ''YES Project; Youth Experiences Survey: Exploring the Sex Trafficking Experiences of Arizona's Homeless and Runaway Young Adults.'' Office of Sex Trafficking Intervention Research (2014): ASU School of Social Work, *http://www.trustaz.org/downloads/rr-stir-youth-experiences-survey-report-nov-2014.pdf.* (Nov. 2014).

[41] ''DHS Strategy,'' *https://www.dhs.gov/sites/default/files/publications/20_0115_plcy_human-trafficking-forced-labor-child-exploit-strategy.pdf.*

[42] U.S. Citizenship and Immigr. Servs., U.S. Dep't of Homeland Security, ''T Visa Law Enforcement Resource Guide'' (2021), *https://www.uscis.gov/sites/default/files/document/guides/T-Visa-Law-Enforcement-Resource-Guide.pdf.*

[43] Office on Violence Against Women, U.S. Dep't of Justice, *https://www.justice.gov/ovw* (last visited Apr. 4, 2023).

[44] *See, e.g.,* Office on Violence Against Women, U.S. Dep't of Justice, ''OVW Fiscal Year 2022 Training and Technical Assistance Initiative Solicitation'' (2022), *https://www.justice.gov/ovw/page/file/1484676/download.*

trafficking victims and it is not necessary to address those efforts and guidance in this rule. DHS will consider this comment in future policy-making efforts.

BB. Miscellaneous Comments

1. Cases Involving Multiple Victims

Comment: One commenter requested DHS recognize the complexity and special nature of cases of groups of trafficking victims in an active and ongoing law enforcement investigation. Specifically, the commenter requested DHS create a mechanism to identify cases with multiple victims and to coordinate a streamlined evaluation of these victims' applications.

Response: DHS declines to adopt this recommendation, as each applicant is required to meet their own individual burden of proof, and each case is evaluated based on the evidence presented in that specific application. USCIS adjudicates each case on its own merits and declines to create processes to handle cases as a group. DHS thinks a group application process would be particularly difficult to administer considering the confidentiality protections each member of the group would have as required by 8 U.S.C. 1367.

2. Social Security Cards

Comment: Another commenter requested that DHS revise the Form I–914 and Form I–914, Supplement A, Application for Family Member of T–1 Recipient, to include a checkbox for applicants to indicate they wish to receive a Social Security card, similar to the checkbox for applicants to indicate they wish to receive an Employment Authorization Document (EAD). The commenter stated that it would allow trafficking survivors to obtain their Social Security cards in a more streamlined manner, and this would allow individuals to more easily access important services needed for emotional and financial stability.

Response: DHS acknowledges the concerns of the commenter regarding delays in victims obtaining benefits and appreciates there are significant benefits and efficiencies that could be achieved through this change; however, DHS declines to adopt this recommendation in this final rule. The Social Security Administration (SSA) issues Social Security cards, whereas USCIS issues EADs. Implementing this suggestion would require specific coordination with SSA, as well as updating USCIS systems. At this time, DHS does not have the required infrastructure or resources to adopt this recommendation. Moreover, rulemaking would not be required to implement this recommendation when the capabilities are in place. Therefore, DHS will keep this suggestion under consideration for possible, future form revision efforts and interagency coordination.

3. Victim-Blaming

Comment: One commenter stated that USCIS routinely blames the victim and says in RFE and denial notices that individuals who knowingly undertook the dangerous journey to the United States should have expected to experience forced labor or rape. The commenter wrote that blaming the victim should not be allowed by regulation and this language should be prohibited from RFEs.

Response: DHS appreciates the commenter's concern and has taken these comments into consideration. DHS has implemented a victim-centered approach, which is evident in the language of the regulation. Moreover, adjudicators are specifically trained to write RFEs in a manner that does not revictimize applicants. Officers regularly receive supervisory guidance. USCIS conducts ongoing training to adjudicators, and routinely evaluates trends that may require additional training or recalibration of procedures. As part of this rulemaking, USCIS is also updating related policy guidance on issuance of RFEs and the victim-centered approach. However, DHS declines to adopt the recommendation of including specific language in the regulation about what should be included in RFEs. General guidelines on the contents of official correspondence are more appropriately suited for policy guidance, and DHS feels that prohibiting specific language could unnecessarily restrict discretion to address case-specific circumstances.

4. Processing Times

Comment: One commenter stated that the new regulations should indicate that any case pending for more than 90 days should be considered to be outside an acceptable processing time, to allow attorneys to sue USCIS more easily when it unnecessarily delays adjudication of T visas. The commenter wrote that survivors need status and adjudication quickly.

Response: DHS understands and is sympathetic to the commenter's concern about survivors receiving status as quickly as possible and their frustrations with processing times but declines to implement an ''acceptable processing time'' due to various factors, including USCIS resource constraints. Each case presents a different set of facts that require highly technical analysis, and processing times may differ between cases. Some cases, due to circumstances outside of DHS's control, may not be able to be adjudicated within such a prescribed timeframe. DHS also notes the new BFD provisions address this concern, as their goal is to help stabilize bona fide applicants faster.

5. Motions To Reopen and Reconsider

Comment: One commenter stated that there is a lack of clarity in the regulations as to whether a Motion to Reopen and Reconsider filed by a T visa principal extends to their derivatives' applications. The commenter stated that their clients who were derivatives received NTAs related to denied T visa applications, although the associated T principal applicant had submitted a timely Motion to Reopen and Reconsider. This would indicate that a separate Motion to Reopen and Reconsider should be filed for each individual derivative application, despite the fact that this would be duplicative, and the T–1 application is the decisive factor in the adjudication of the derivative applications. The commenter recommended revising the regulation to state that a denial would not become final for the applicant or their derivatives until the administrative appeal is decided.

Response: DHS declines to adopt this recommendation. Each denied application, Forms I–914 and I–914A, requires a separately filed Form I–290B, Notice of Appeal or Motion as a Form I–290B cannot be filed for multiple receipts or filings. DHS emphasizes that in cases where an appeal of a T–1 application denial has been filed, the case is considered to remain administratively pending until a decision on appeal is made. If an applicant files an appeal for a denied Form I–914A, then that application would also be considered administratively pending until a final decision is rendered by the Administrative Appeals Office (AAO). A decision on appeal is then considered to be administratively final even if a subsequent motion is filed. 8 CFR 214.11(d)(10) (redesignated as 8 CFR 214.204(q)). In this case, an administratively final decision occurs when the AAO issues a decision affirming the denial of the Form I–914. The filing of an appeal of the Form I–914 denial would affect its own administratively pending status and not automatically place any denied Form I–914As in a pending status.

6. HHS Notification

Comment: Other commenters requested that USCIS notify HHS of any applicant on the waiting list.

Response: DHS declines to adopt this recommendation. Such inter-agency communications are generally not appropriate to be mandated in the Code of Federal Regulations. In addition, given the confidentiality protections and sensitive nature of T applications, DHS wishes to avoid mandating any communications that are not required by statute.

7. Program Integrity

Comment: One commenter expressed concern about oversight in the T visa program. They expressed concern that victims could cause harm to themselves and American society. The commenter wondered about vetting and expressed concern about exploitation of loopholes. The commenter also stated that Americans should be receiving the same type of or superior benefits first.

Response: DHS acknowledges the commenter's concerns; however, DHS implements the T visa program as authorized by Congress. Adjudicators evaluate each application on its own merits. DHS remains committed to the fair and just adjudication of all immigration benefit requests. At the same time, DHS vets all immigration benefit requests to ensure they are granted only to those who have established eligibility. This requires DHS to ensure that applicants do not obtain benefits for which they are not eligible under the law.

8. Annual Cap

Commenter: One commenter stated that the annual cap on T visas is inconsistent with Congress' intent when creating T nonimmigrant status relief. They stated DHS should provide comprehensive data about T visa application trends, and other information as necessary, to support any Congressional efforts to eliminate the T visa cap.

Response: DHS provides comprehensive data on the characteristics of T visa applications, and regularly posts quarterly updates on the number of applications received, approved, denied, and pending by fiscal year.[45] In addition, DHS is responsive to Congressional and stakeholder inquiries on T visa filing trends, including questions and concerns about the cap.

9. Continued Presence Adjudication

Comment: Another commenter encouraged DHS to ensure Continued Presence (CP) benefits are not arbitrarily adjudicated or delayed. They suggested DHS create regulations on CP that: direct DHS to grant CP within 60 days of receiving a credible report of human trafficking; detail a uniform, fair, and timely process for granting or denying CP, with a focus on providing the maximum protections envisioned by Congress; and to the extent possible under legislation, allow DHS to receive CP requests from any law enforcement agency.

Response: DHS appreciates the commenter's concerns but declines to address them in this rulemaking effort, particularly because CP was not included in the IFR. The CCHT, which processes all requests for CP, implements a victim-centered approach. DHS declines to impose a deadline on adjudicating CP, given shifting priorities and resource allocations. CP may already be requested by any LEA with the authority to investigate or prosecute human trafficking, including local law enforcement.[46]

10. Comment Period

Comment: One commenter requested that DHS and other agencies allow 60 days for comment on proposed regulations. The commenter also requested that DHS establish a regular schedule for updating regulations when statutory changes are made in order to reflect legislative changes.

Response: DHS generally publishes proposed rules for 60 days of public comments as provided in section 6.(a)(1) of Executive Order 12866, Regulatory Planning and Review, unless exigent circumstances justify a 30-day comment period as permitted by 5 U.S.C. 553. DHS also published regulations as soon as practicable after new legislation is passed that requires a change in the applicable regulations. This comment requires no change to the final rule.

CC. Out of Scope Comments

Several comments were submitted that did not relate to the substance of the Final Rule. One commenter provided a list of general criticisms of USCIS in general and its administration of the T nonimmigrant program as follows:

- USCIS generally ignores expedite requests.
- USCIS regularly dismisses labor trafficking, particularly of men, as ''mere exploitation'' without defining what the difference between that and trafficking may be.
- USCIS uses boilerplate RFEs and denial letters that are victim blaming and dismissive of the survivor's experience.
- USCIS denial notices have stated that less weight would be given where an individual initiated therapy after issuance of an RFE, even though USCIS made it very difficult for a person to be able to pay for therapy, by refusing to review prima facie/bona fides and issue a determination that could help the person access services. The commenter wrote that this blames the victim for something outside their control.

Response: DHS acknowledges the commenter's feedback but notes that their suggestions are not about and do not affect the substantive content of this rulemaking. DHS makes no changes to the final rule in response to these comments.

IV. Statutory and Regulatory Requirements

A. Executive Orders 12866, 13563, and 14094

Executive Orders 12866 (Regulatory Planning and Review), as amended by Executive Order 14094 (Modernizing Regulatory Review), and 13563 (Improving Regulation and Regulatory Review) direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying costs and benefits, reducing costs, harmonizing rules, and promoting flexibility.

The Office of Management and Budget (OMB) has designated this rule a ''significant regulatory action'' as defined under section 3(f) of E.O. 12866, as amended by Executive Order 14094, but it is not significant under section 3(f)(1) because its annual effects on the economy do not exceed $200 million in

[45] *See* U.S. Citizenship and Immig. Servs., U.S. Dep't of Homeland Security, ''Characteristics of T Nonimmigrant Status (T Visa) Applicants Fact Sheet'' (2022), *https://www.uscis.gov/sites/default/files/document/fact-sheets/Characteristics_of_T_Nonimmigrant_Status_TVisa_Applicants_FactSheet.pdf;* U.S. Citizenship and Immigr. Servs., U.S. Dep't of Homeland Security, ''Characteristics of T Nonimmigrant Status (T Visa) Applicants Fact Sheet'' (2023), *https://www.uscis.gov/sites/default/files/document/fact-sheets/Characteristics_of_T_Nonimmigrant_Status_TVisa_Applicants_FactSheet_FY08_FY22.pdf;* U.S. Citizenship and Immigr. Servs., U.S. Dep't of Homeland Security, ''Immigration and Citizenship Data,'' *https://www.uscis.gov/tools/reports-and-studies/immigration-and-citizenship-data* (last visited Feb. 15, 2023).

[46] *See* Center for Countering Human Trafficking, U.S. Dep't of Homeland Security, ''Continued Presence Resource Guide'' (2023), *https://www.ice.gov/doclib/human-trafficking/ccht/continuedPresenceToolkit.pdf.*

any year of the analysis. Accordingly, OMB has reviewed this rule.

1. Summary

As discussed further in the preamble, this final rule adopts the changes from the 2016 interim rule with some modifications. The rationale for the 2016 interim rule and the reasoning provided in the preamble to the 2016 interim rule remain valid with respect to these regulatory amendments, therefore, DHS adopts such reasoning to support this final rule. In response to the public comments received on the 2016 interim rule, DHS has modified some provisions for the final rule. DHS has also made some technical changes in the final rule.

This final rule clarifies some definitions and amends provisions regarding bona fide determinations (BFD) to implement a new process. This final rule also clarifies evidentiary requirements for hardship, codifies the evidentiary standard, and codifies the standard of proof that applies to the adjudication of an application for T nonimmigrant status. DHS also made technical changes to the organization and terminology of 8 CFR part 214.

For the 10-year period of analysis of the rule using the post-IFR baseline of the rule, DHS estimates the annualized costs of this rule will be $807,314 annualized at 3- and 7 percent. Table 1 provides a more detailed summary of the final rule provisions and their impacts.

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Table 1. Summary of Provisions and Impacts of the Final Rule Using the Post-IFR Baseline			
Final Rule Provisions	Description of Change to Provision	Estimated Costs of Provisions	Estimated Benefits of Provisions
• Bona Fide Determination (BFD) Process Modifications.	• The new streamlined process will include case review and background checks. • Once an individual whose application has been deemed bona fide files a Form I-765, Application for Employment Authorization, DHS will consider whether the applicant warrants a favorable exercise of discretion and will be granted deferred action and a BFD employment authorization document.	Quantitative: Applicants - • None. • DHS estimates the additional cost for completing and filing Form I-765 will be $807,314 annually. DHS/USCIS - • None. Qualitative: Applicants – • None. DHS/USCIS – • DHS may incur additional costs due to the time to review evidence; however, DHS cannot estimate how many applications would take any additional time.	Quantitative: Applicants - • None. DHS/USCIS - • None. Qualitative: Applicants – • The primary benefits of this provision to applicants are the opportunity to receive work authorization sooner and the ability to receive forbearance from removal (deferred action) while the T visa application is pending. Likewise, applicants with a final order of removal will receive a stay of removal more quickly. DHS/USCIS – • The benefit of this provision is that it prioritizes efficient T visa BFD review, protects the integrity of the BFD review by requiring review of initial required evidence and assessment of routine background checks.
• Clarifications to eligibility requirements.	• DHS is also clarifying the eligibility requirements that apply to the adjudication of an application for a T visa.	Quantitative: Applicants - • None. DHS/USCIS - • None. Qualitative: Applicants – Based on the additional clarifications regarding eligibility requirements for T	Quantitative: Applicants - • None. DHS/USCIS - • None. Qualitative: Applicants – • None. DHS/USCIS –

		nonimmigrant status, USCIS estimates that there will be a reduction in Requests for Evidence (RFEs). This reduction will save the applicant time and will allow for their application to be adjudicated earlier. DHS/USCIS – • None.	• USCIS estimates that there will be a reduction in RFEs, because applicants will be aware of the evidentiary requirements from the outset, resulting in a decrease in time per adjudication.
• Technical Changes, Clarifying Definitions, and other Qualitative Impacts in this Final Rule.	• This rule moves the regulations for T nonimmigrant status to a separate subpart of 8 CFR part 214 to reduce the length and density of part 214, while making it easier to locate specific provisions. • In addition to the re-numbering and re-designating of paragraphs, the rule has reorganized and modified some sections to improve readability, such as in new sections.	Quantitative: Applicants - • None. DHS/USCIS - • None. Qualitative: Applicants – • None. DHS/USCIS – • None.	Quantitative: Applicants - • None. DHS/USCIS - • None. Qualitative: Applicants – • The benefit of these changes is to make the application process clearer for T visa applicants. DHS/USCIS – • None.

In addition to the impacts summarized above, and as required by OMB Circular A–4, Table 2 presents the prepared accounting statement showing the costs and benefits to each individual affected by this final rule using the post-IFR baseline.[47]

[47] Office of Mgmt. & Budget, Exec. Office of the President, ''OMB Circular A–4'' (2003), *https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/circulars/A4/a-4.pdf.*

Table 2. OMB A-4 Accounting Statement ($ millions, FY 2021) **Time Period: FY 2023 through FY 2032** Post-IFR Baseline				
Category	**Primary Estimate**	**Minimum Estimate**	**Maximum Estimate**	**Source Citation**
BENEFITS				
Monetized Benefits	N/A			Regulatory Impact Analysis ("RIA")
Annualized quantified, but unmonetized, benefits	N/A			RIA
Unquantified Benefits	This rule will allow certain T visa applicants the opportunity to receive work authorization sooner and to receive forbearance from removal (deferred action) while their T visa applications are pending. This rule prioritizes efficient T visa BFD review and protects the integrity of the BFD review by requiring review of initial required evidence and assessment of routine background checks.			RIA
COSTS				
Annualized monetized costs (7%)	**$0.81**	N/A	N/A	RIA
Annualized monetized costs (3%)	**$0.81**	N/A	N/A	
Annualized quantified, but unmonetized, costs	N/A			
Qualitative (unquantified) costs	USCIS estimates that there will be a reduction in RFEs. This reduction will save the applicant time and will allow USCIS to adjudicate their applications earlier. The reduction in RFEs will also save USCIS adjudicators time because they will more frequently have all required information at the outset of adjudication. This will allow USCIS to adjudicate applications more efficiently. These are all seen as unquantified cost savings. DHS may incur additional costs due to the time to review evidence from the new streamlined process; however, DHS cannot estimate how many applications would take additional time.			RIA
TRANSFERS				
Annualized monetized transfers (7%)	**N/A**	N/A	N/A	
Annualized monetized transfers (3%)	**N/A**	N/A	N/A	
From whom to whom?	From the fee-paying populations to Form I-914 applicants.			
Miscellaneous Analyses/Category	***Effects***			***Source Citation***
Effects on State, local, or tribal governments	None			RIA
Effects on small businesses	None			RIA
Effects on wages	None			None
Effects on growth	None			None

In addition to the impacts summarized above, and as required by OMB Circular A–4, table 3 presents the prepared accounting statement showing the costs and benefits to each individual affected by this final rule using the pre-IFR baseline.[48]

[48] Office of Mgmt. & Budget, Exec. Office of the President, ''OMB Circular A–4'' (2003), *https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/circulars/A4/a-4.pdf.*

Table 3. OMB A-4 Accounting Statement ($ millions, FY 2021) **Time Period: FY 2017 through FY 2032,** Pre-IFR Baseline				
Category	**Primary Estimate**	**Minimum Estimate**	**Maximum Estimate**	**Source Citation**
BENEFITS				
Monetized Benefits	N/A	Regulatory Impact Analysis ("RIA")		
Annualized quantified, but unmonetized, benefits	N/A	RIA		
Unquantified Benefits	Provided clarity and consistency in DHS practice with DHS regulations will lead to a qualitative benefit providing transparency to both the victims of trafficking and USCIS adjudicators. Provided a broader definition of an eligible family member and may increase the number of eligible family members. Provided a benefit by acknowledging the significance of an applicant's maturity in understanding the importance of participating with an LEA. Victims who are likely to become a public charge are able to apply for T nonimmigrant status and receive the benefits associated with that status. Provided T nonimmigrants status for an additional year with the possibility of extension. Provided a broader definition of physical presence on account of trafficking and may increase the number of eligible applicants. Provided a qualitative benefit by removing an age-out restriction, allowing a principal applicant parent to apply for a child as a derivative beneficiary, even if the child reaches age 21 while the principal's T-1 application is pending. Provided a qualitative benefit by enabling the health and well-being of a minor victimized by trafficking. These victims also obtain federally funded benefits and services.	RIA		
COSTS				
Annualized monetized costs (7%)	N/A	RIA		
Annualized monetized costs (3%)	N/A			
Annualized quantified, but unmonetized, costs	N/A			
Qualitative (unquantified) costs	N/A	RIA		
TRANSFERS				
Annualized monetized transfers (7%)	N/A	RIA		
Annualized monetized transfers (3%)	N/A			

From whom to whom?		
Miscellaneous Analyses/Category	***Effects***	***Source Citation***
Effects on State, local, or tribal governments	None	RIA
Effects on small businesses	None	RIA
Effects on wages	None	None
Effects on growth	None	None

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2. Background and Population

As stated in the 2016 interim final rule, Congress created T nonimmigrant status in the Trafficking Victims Protection Act (TVPA) of 2000. T nonimmigrant status is available to victims of a severe form of trafficking in persons who comply with any reasonable request for assistance from law enforcement agencies (LEAs) in investigating or prosecuting the perpetrators of these crimes and who meet other requirements. T nonimmigrant status provides temporary immigration benefits (nonimmigrant status and employment authorization) and the ability to adjust to lawful permanent resident status, provided that established criteria are met, and a favorable exercise of discretion is warranted. Additionally, if a victim of a severe form of trafficking in persons obtains T nonimmigrant status, then certain eligible family members may also obtain T nonimmigrant status.[49]

Table 4 provides the number of T nonimmigrant application receipts, approvals, and denials for principals and derivative family members for FY 2017 through FY 2022. Although the maximum annual number of T nonimmigrant visas that may be granted is 5,000 for T–1 principal applicants per fiscal year[50] Table 4 shows that based on a 6-year annual average, DHS receives 2,889 Form I–914 applications (both Form I–914 and I–914 Supplement A) per year.

Table 4. USCIS Processing Statistics for Form I-914[1] and Form I-914 Supplement A FY 2017 through FY 2022.

	VICTIMS (T-1), Form I-914			**FAMILY OF VICTIMS (T-2 through T-6), Form I-914A**			**Form I-914 and Form I-914A TOTALS**		
FY	**Receipts**	**Approved**	**Denied**	**Receipts**	**Approved**	**Denied**	**Receipts**	**Approved**	**Denied**
2017	1,141	672	226	1,118	690	115	2,259	1,362	348
2018	1,666	580	310	1,313	698	261	2,979	1,278	571
2019	1,302	495	390	1,029	464	236	2,331	959	626
2020	1,207	1,041	798	992	1,013	526	2,199	2,054	1,324
2021	1,596	826	564	1,033	623	379	2,629	1,449	943
2022	3,070	1,715	389	1,865	1,319	247	4,935	3,034	636
6-year Total	**9,982**	**5,329**	**2,677**	**7,350**	**4,807**	**1,764**	**17,332**	**10,136**	**4,448**
6-year Annual Average	**1,664**	**888**	**446**	**1,225**	**801**	**294**	**2,889**	**1,689**	**741**

Notes:

[1]Approved and denied volumes may not add up to the receipts in a given fiscal year because the processing and final adjudication decision for T nonimmigrant status applications may overlap fiscal years, due to backlogs. USCIS records indicate that processing an application for T nonimmigrant status requires an estimated 6 to 9 months. Data source for the table: Performance Analysis System (PAS), USCIS Office of Performance and Quality (OPQ), Data Analysis and Reporting Branch (DARB), March 2023& USCIS Analysis.

Table 5 shows the number of receipts received with and without Form G–28, FY 2017 through FY 2022. Based on a 6-year annual average, DHS estimates the annual average receipts to be 2,909 and the annual average number of Form G–28 receipts to be 2,673. Based on these figures, DHS estimates that 92 percent of Form I–914 receipts are filed by applicants represented by an attorney or accredited representative. The data in table 4 and table 5 differ due to the dates the data were pulled and the different systems from which they were pulled. Both data sources are accurate; however, they use different criteria/assumptions to extract the results from USCIS sources. Estimates in table 4 are based

[49] The current T nonimmigrant categories are T–1 (principal applicant), T–2 (spouse), T–3 (child), T–4 (parent), T–5 (unmarried sibling under 18 years of age); and T–6 (adult or minor child of a principal's derivative beneficiary).

[50] There is no statutory cap for grants of derivative T nonimmigrant status or visas.

on vintage data while results in table 5 continue to fluctuate in real-time, sometimes even in prior fiscal years, as updates are made in the administrative data.

Table 5. Total Form I-914 and Form I-914 Supplement A Receipts with and without Form G-28, FY 2017 through FY 2022.

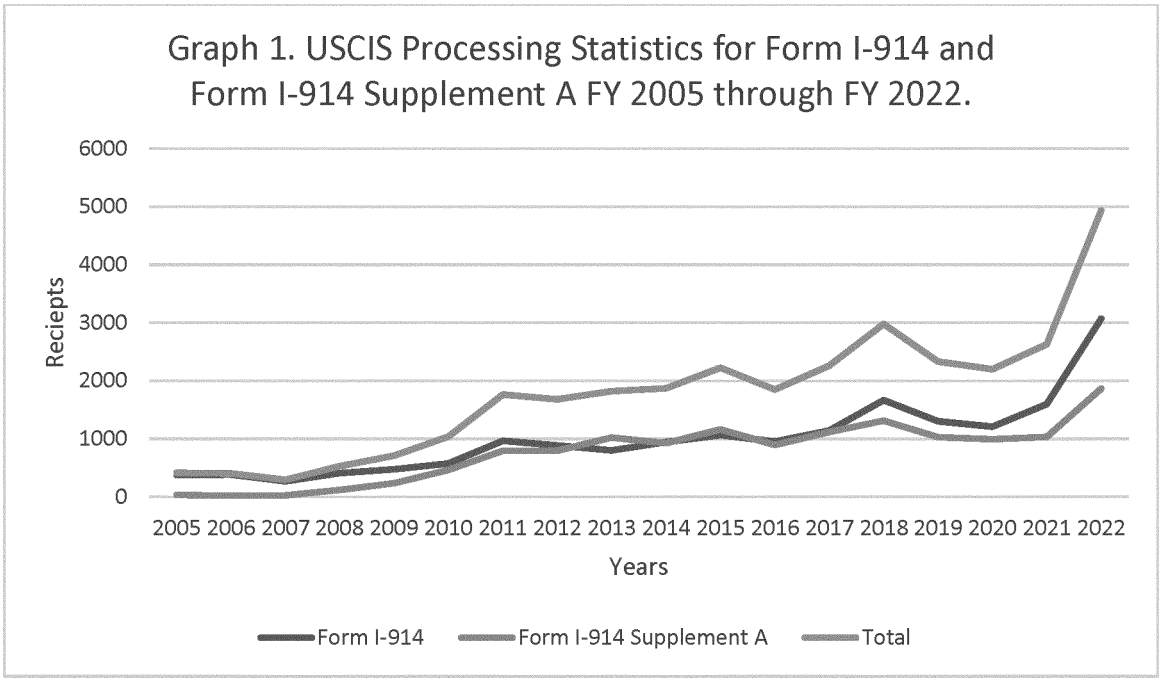
FY	Form G-28 Receipts Received without a Form I-914 and Form I-914 Supplement A	Form G-28 Receipts Received with a Form I-914 and Form I-914 Supplement A	Total Form I-914 and Form I-914 Supplement A Receipts	Percentage of Forms I-914 and Form I-914 Supplement A filed with Form G-28
2017	191	2,128	2,319	92%
2018	415	2,516	2,931	86%
2019	164	2,101	2,265	93%
2020	135	2,010	2,145	94%
2021	166	2,617	2,783	94%
2022	343	4,667	5,010	93%
6-year Total	**1,414**	**16,039**	**17,453**	**92%**
6-year Annual Average	**236**	**2,673**	**2,909**	**92%**

Source: USCIS, Office of Policy and Strategy (OP&S), Policy Research Division (PRD), Claims 3 database. May 31, 2023 & USCIS Analysis.

DHS acknowledges that there was a significant increase in receipts in FY 2022 as shown in table 4 and table 5. While there was a sharp increase in this single year, DHS could not build a forecast solely based on the increase during a single year. This analysis uses a 6-year annual average as an estimate to calculate the total costs of this rule.

As Graph 1 shows, since FY 2005 there has been a gradual increase in receipts until FY 2022. On October 20, 2021, USCIS added comprehensive policy guidance on T visas to its Policy Manual.[51] The goal of the Policy Manual Update was to provide consolidated guidance as to how USCIS approaches T visa adjudication and interprets eligibility criteria. The Policy Manual offers more comprehensive guidance than previous USCIS policy sources and provides interpretation and examples of previously undefined terms and concepts. This will hopefully assist practitioners better identify trafficking survivors who are eligible for a T visa. This could be one possible reason that there were increased receipts in FY 2022.

[51] U.S. Citizenship and Immigr. Servs., U.S. Dep't of Homeland Security, PA–2021–22 Policy Alert, ''T Nonimmigrant Status for Victims of Severe Forms of Trafficking in Persons'' (Oct. 20, 2021), *https://www.uscis.gov/sites/default/files/document/policy-manual-updates/20211020-VictimsOfTrafficking.pdf.*



3. Updates to the Economic Analysis Since the 2016 Interim Rule, Pre-IFR Baseline

In this final rule, DHS has updated several definitions to provide clarity and ensure consistency with the Trafficking Victims Protection Act (TVPA) of 2000. DHS has amended provisions regarding bona fide determinations (BFD), which reflect a modified process. This process will now allow applicants for T nonimmigrant status to file a Form I–765, Application for Employment Authorization, concurrently with their Form I–914.

DHS also codified the evidentiary standard and standard of proof that apply to the adjudication of a T visa application. For T nonimmigrants, this rule retains the standard that applicants may submit any credible evidence relating to their T visa applications for USCIS to consider. This is presented as a qualitative benefit to both USCIS and T nonimmigrant applicants.

The pre-IFR baseline is shown below with zero costs to the government or to the applicants. Because the pre-IFR baseline is identical to the post-IFR baseline, consistent with table 7, it is not useful to do a complete pre-IFR baseline and the analysis will focus on the post-IFR baseline.

Congress created the T nonimmigrant status in the TVPA of 2000. The TVPA provides various means to combat trafficking in persons, including tools for LEAs to effectively investigate and prosecute perpetrators of trafficking in persons. The TVPA also provides protection to victims of trafficking through immigration relief and access to Federal public benefits. DHS published an interim final rule on January 31, 2002, implementing the T nonimmigrant status and the provisions put forth by the TVPA 2000.[52] The 2002 interim final rule established the eligibility criteria, application process, evidentiary standards, and benefits associated with obtaining T nonimmigrant status.

T nonimmigrant status is available to eligible victims of severe forms of trafficking in persons who comply with any reasonable request for assistance from LEAs in investigating and prosecuting the perpetrators of these crimes or otherwise meet the statutory criteria. T nonimmigrant status provides temporary immigration benefits (nonimmigrant status and employment authorization) and a pathway to permanent resident status, provided that established criteria are met. Additionally, if a victim obtains T nonimmigrant status, certain eligible family members may also apply to obtain T nonimmigrant status.[53]

[52] *See* 67 FR 4784.

[53] The current T nonimmigrant categories are: T–1 (principal applicant), T–2 (spouse), T–3 (child), T–4 (parent), and T–5 (unmarried sibling under 18 years of age). The interim rule created a new T nonimmigrant category, T–6 (adult or minor child of a principal's derivative).

Table 6. USCIS Processing Statistics for Form I-914[1] and Form I-914 Supplement A FY 2005 through FY 2016.

	VICTIMS (T-1), Form I-914			FAMILY OF VICTIMS (T-2 through T-6), Form I-914 Supplement A			Form I-914 and Form I-914 Supplement A TOTALS		
FY	Receipts	Approved	Denied	Receipts	Approved	Denied	Receipts	Approved	Denied
2005	379	113	321	34	73	21	413	186	342
2006	384	212	127	19	95	45	403	307	172
2007	269	287	106	24	257	64	293	544	170
2008	408	243	78	118	228	40	526	471	118
2009	475	313	77	235	273	54	710	586	131
2010	574	447	138	463	349	105	1,037	796	243
2011	967	557	223	795	722	137	1,762	1,279	360
2012	885	674	194	795	758	117	1,680	1,432	311
2013	799	848	104	1,021	975	91	1,820	1,823	195
2014	944	613	153	925	788	105	1,869	1,401	258
2015	1,062	610	294	1,162	694	192	2,224	1,304	486
2016	953	750	194	895	986	163	1,848	1,736	357

Notes: Approved and denied volumes may not add up to the receipts in a given fiscal year because the processing and final decision for T nonimmigrant status applications may overlap fiscal years. USCIS records indicate that processing an application for T nonimmigrant status requires an estimated 6 to 9 months. Data for T-6 applications has been collected since January 2014 and is included in FY 2014 – FY 2016.

Data source for the table: Performance Analysis System (PAS), USCIS Office of Performance and Quality (OPQ), Data Analysis and Reporting Branch (DARB).

Table 6 provides the number of T nonimmigrant application receipts, approvals, and denials for principal victims and derivative family members for FY2005 through FY2016. The maximum annual number of T nonimmigrant visas that may be granted is 5,000 for T–1 principal applicants per fiscal year.

From the publication of the interim final rule in 2002 through 2016, Congress passed various statutes amending the original TVPA 2000. These include: the Trafficking Victims Protection Reauthorization Act of 2003 (TVPRA 2003), the Violence Against Women and Department of Justice Reauthorization Act of 2005 (VAWA 2005), the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA 2008), and the Violence Against Women Reauthorization Act of 2013 (VAWA 2013). After the passage of each of the statutes, as noted in section I.A.1 of this preamble, USCIS issued policy and guidance memoranda to both implement the provisions of the Acts and to ensure compliance with the legal requirements of the Acts.[54]

The 2016 interim final rule codified DHS policy and guidance from these statutes into the Code of Federal Regulations (CFR). The statutory changes from TVPRA 2003, TVPRA 2008, and VAWA 2005 are reflected in table 7, below. Codifying existing USCIS policy and guidance ensures that the regulations are consistent with the applicable legislation, and that the general public has access to these policies through the CFR without locating and reviewing multiple policy memoranda. DHS provides the impact of these provisions in table 7 assuming a pre-IFR baseline per OMB Circular A–4 requirements.

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[54] See U.S. Citizenship and Immigr. Servs., U.S. Dep't of Homeland Security, ''Trafficking Victims Protection Reauthorization Act of 2003,'' (2004); *see also* U.S. Citizenship and Immigr. Servs., U.S. Dep't of Homeland Security, ''William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008: Changes to T and U Nonimmigrant Status and Adjustment of Status Provisions; Revisions to AFM Chapters 23.5 and 39 (AFM Update AD10–38)'' (2010), *https://www.uscis.gov/sites/default/files/document/memos/William-Wilberforce-TVPRAct-of-2008-July-212010.pdf;* U.S. Citizenship and Immigr. Servs., U.S. Dep't of Homeland Security, ''Extension of Status for T and U Nonimmigrants; Revisions to Adjudicator's Field Manual (AFM) Chapter 39.1(g)(3) and Chapter 39.2(g)(3) (AFM Update AD11–28)'' (2011), *https://www.uscis.gov/sites/default/files/document/memos/exten.status-tandu-nonimmigrants.pdf;* U.S. Citizenship and Immigr. Servs., U.S. Dep't of Homeland Security, ''New T Nonimmigrant Derivative Category and T and U Nonimmigrant Adjustment of Status for Applicants from the Commonwealth of the Northern Mariana Islands'' (2015), *https://www.uscis.gov/sites/default/files/document/memos/2015-0415-TNonimmigrant-TVPRA.pdf.*

Table 7. Summary of Impacts to the Regulated Population of TVPRA 2003, TVPRA 2008 and VAWA 2005 Statutory Changes Codified by this Interim Rule

Provision	Current policy	Expected cost of the interim rule	Expected benefit of the interim rule	Actual Outcome of Changes
Expanding the definition and discussion of LEA (added by VAWA 2005)	LEA includes State and local law enforcement agencies	None	Provides clarity and consistency in DHS practice with DHS regulations will lead to a qualitative benefit providing transparency to both the victims of trafficking and USCIS adjudicators.	There were no costs associated with this change. This provision provided clarity to the victims and adjudicators.
Removing the requirement that eligible family members must face extreme hardship if the family member is not admitted to the United States or was removed from the United States (removed by VAWA 2005)	Family members may be eligible for T nonimmigrant status without having to show extreme hardship	No additional costs, other than the opportunity cost of time to file Form I-914 Supplement A. However, DHS reiterates that this is a voluntary provision	Provides a broader definition of an eligible family member and may increase the number of eligible family members.	There were no costs associated with this change. This provision provided increased the number of eligible family members.
Raising the age at which the applicant must comply with any reasonable request by an LEA for assistance in an investigation or prosecution of acts of trafficking in persons (added by TVPRA 2003)	The provision increased the minimum age requirement from 15 years to 18 years of age	None	Provides a benefit by acknowledging the significance of an applicant's maturity in understanding the importance of participating with an LEA.	There were no costs associated with this change.

Exempting T nonimmigrant applicants from the public charge ground of inadmissibility (added by TVPRA 2003)	DHS may grant T nonimmigrant status to applicants even if they are likely to become a public charge	No additional costs, other than the opportunity cost of time to file Form I-914 and if necessary, Supplement B	Victims who are likely to become a public charge are able to apply for T nonimmigrant status and receive the benefits associated with that status.	There were no costs associated with this change. This provision allowed victims who were likely to become a public charge
Exemptions to an applicant's requirement, to comply with any reasonable request by an LEA (added by TVPRA 2008)	Applicants are exempt from the requirement to comply with any reasonable request by an LEA in cases where the applicant is unable to comply, due to physical or psychological trauma	None	Provides a benefit by acknowledging the significance of an applicant's mental capacity in understanding the importance of participating with an LEA.	There were no costs associated with this change.
Limiting duration of T nonimmigrant status but providing extensions for LEA need, for exceptional circumstances, and for the pendency of an application for adjustment of status (VAWA 2005 and TVPRA 2008)	Extends the duration of T nonimmigrant status from 3 years to 4 years, but limits the status to 4 years unless an applicant can qualify for an extension	None	Provides T nonimmigrants status for an additional year with the possibility of extension.	There were no costs associated with this change.
Expanding the regulatory definition of physical presence on account of trafficking (added by TVPRA 2008)	DHS will consider victims as having met the physical presence requirement if they were allowed entry into the United States for participation in investigative or judicial processes associated with an act or perpetrator trafficking for purposes of eligibility for T nonimmigrant classification	None	Provides a broader definition of physical presence on account of trafficking and may increase the number of eligible applicants.	There were no costs associated with this change. This provision allowed more applicants to be eligible.

Allowing principal applicants under 21 years of age to apply for derivative T nonimmigrant status for unmarried siblings under 18 years and parents as eligible derivative family members (added by TVPRA 2003)	Unmarried siblings under 18 years of age and parents of the principal applicant may now be eligible for T nonimmigrant status under the T-4 and T-5 derivative category, if the principal applicant is under age 21	No additional costs, other than the opportunity cost of time to file Form I-914 Supplement A on behalf of the principal's unmarried siblings under 18 years of age and parents	Provides a broader definition of eligible family member and may increase the number of eligible family members.	There were no costs associated with this change. This provision allowed more family members to be eligible.
Providing age-out protection for child principal applicants to apply for eligible family members (added by TVPRA 2003)	A principal applicant who was under 21 years of age at the time of filing the Form I-914 can file Form I-914 Supplement A on behalf of eligible family members, including parents and unmarried siblings under age 18, even if the principal alien turns 21 years of age before the principal T-1 application is adjudicated	None	Provides a qualitative benefit by removing an age-out restriction, allowing principal applicants to apply for parents and unmarried siblings under age 18, even if the principal applicant turns 21 years of age before the T-1 application is adjudicated.	There were no costs associated with this change. This provision allowed more applicants to be eligible.
Providing age-out protection for child derivatives (added by TVPRA 2003)	An unmarried child of the principal who was under age 21 on the date the principal applied for T-1 nonimmigrant status may continue to qualify as an eligible family member, even if he or she reaches age 21 while the T-1 application is pending	None	Provides a qualitative benefit by removing an age-out restriction, allowing a principal applicant parent to apply for a child as a derivative beneficiary, even if the child reaches age 21 while the principal's T-1 application is pending.	There were no costs associated with this change. This provision allowed more applicants to be eligible.

Allowing principal applicants of any age to apply for derivative T nonimmigrant status for unmarried siblings under 18 years of age and parents as eligible family members if the family member faces a present danger of retaliation as a result of the principal applicant's escape from a severe form of trafficking or cooperation with law enforcement (added by TVPRA 2008)	Allows any principal applicant, regardless of age, to apply for derivative T nonimmigrant status for parents or unmarried siblings under 18 years of age if they face a present danger of retaliation	No additional costs, other than the opportunity cost of time to file Form I-914 Supplement A, on behalf of the derivative's unmarried siblings under 18 years of age and parents	If eligible, unmarried siblings under 18 years of age and parents of principal applicants may qualify for T-4 and T-5 nonimmigrant status and obtain the immigration benefits that accompany that status. In addition, LEAs may benefit if more victims come forward to report trafficking crimes.	There were no costs associated with this change. This provision allowed more applicants to be eligible.
Care and custody of unaccompanied children with the HHS (added by TVPRA 2008)	Federal agencies must notify HHS upon apprehension or discovery of an unaccompanied child or any claim or suspicion that an individual in custody is under 18 years of age. Minors are eligible to receive federally funded benefits and services as soon as they are identified by HHS as a possible victim of trafficking	DHS may have some additional administrative costs associated with informing HHS of unaccompanied children. As a result, HHS may have some additional costs in providing benefits and services to the affected minors	Provides a qualitative benefit by enabling the health and well-being of a minor victimized by trafficking. These victims also obtain federally funded benefits and services.	There were no costs recorded with this change.

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In calculating the additional costs of the increased time burden to Form I–765, DHS uses updated wage and fiscal year data. Wages were updated according to the occupational data released by the Bureau of Labor Statistics (BLS). The 2016 interim rule used 2015 BLS data, and now more current data is available from 2022. The 2016 interim rule used fiscal year filing data from FY 2005 through FY 2015, and DHS has updated this analysis by using filing data from FY 2017 through FY 2022.

DHS is increasing the time burden for Form I–765 by 4 minutes from 4 hours and 30 minutes (4.5 hours) per response to 4 hours and 34 minutes (4.56 hours) to reflect the current Form I–765 estimated time burden. DHS is clarifying the Form I–765 instructions, increasing the time burden of the form, which includes the time for reviewing instructions, gathering the required documentation, and completing and submitting the request.

4. Costs, and Benefits of the Final Rule

(a) Bona Fide Determination Process

Although an extensive BFD process was codified in the 2016 IFR, such a process has not been consistently implemented in the last decade outside of litigation cases due to resource constraints. After this rule takes effect, on a routine basis USCIS will review an applicant's filing for completeness and conduct background checks to determine if the application is bona fide. If an applicant has not already filed a Form I–765, they will be notified that they may do so. Adjudicators will then consider whether an applicant warrants deferred action as a matter of discretion. This process will benefit the applicants with bona fide filings, as they will be invited to apply for an EAD when they receive their bona fide determination letter. Applicants may also choose to apply for an EAD at the same time they submit their Form I–914. USCIS plans to implement a process concurrently with this rule (*see* new 8 CFR 214.205 on the Bona Fide Determination Process) taking effect under which future applicants may file Form I–765 at the same time as their Form I–914. This will benefit the applicants because they will be more likely to apply for an EAD simultaneously and therefore be eligible to work sooner than they would have previously. This concurrent Form I–765 policy could be paused if, in the future, USCIS is able to process Form I–914 from intake to approval within a time frame that obviates the need for employment while the application is being adjudicated.

USCIS estimates that 100 percent of applicants will file Form I–765 concurrently with their Form I–914, so they may receive employment authorization quickly if USCIS determines that their T visa application is bona fide, that they warrant a favorable exercise of discretion to be granted deferred action, and that they warrant a discretionary grant of employment authorization, rather than waiting for USCIS to make a bona fide determination and inviting them to submit a Form I–765. DHS does not expect material impacts to the U.S. labor market from this final rule. DHS believes these impacts would accrue as benefits to the T visa applicants who apply for an EAD and their families.

Table 8 shows that the average adjudication timeframe from FY 2017 through 2022 was around 458 days from the time an applicant submits their T visa application, to the time they receive a final decision. The goal of this rule is that all applicants will apply for their BFD-based EAD at the same time they apply for their T visa. This will allow the applicants with bona fide filings to begin working earlier than they would have previously. DHS uses the 6-year annual average because it typically takes 1.25 years [55] for an adjudicative decision.[56]

Table 8. Average Number of Days for Form I-914 Application to Notice of Decision of Approval or Denial, FY 2017 through FY 2022.

FY	Form I-914	Form I-914A	Average
2017	430	457	444
2018	625	615	620
2019	547	498	523
2020	359	309	334
2021	486	514	500
2022	303	347	325
6-year Total	**2,750**	**2,740**	**2,746**
6-year Annual Average	**458**	**457**	**458**

Source: USCIS, Office of Policy and Strategy (OP&S), Policy Research Division (PRD), Claims 3 database. June 07, 2023 & USCIS Analysis.

This new process would not add a large cost to the government because the process has been in place since 2002, when USCIS began adjudicating Form I–914. However, this change could add additional time to review cases. DHS cannot estimate how many additional applications would take additional time to review. DHS anticipates any particular case requiring additional time should not take more than an additional 15 to 30 minutes. This additional time will be a cost to USCIS.

As a part of the BFD process, if the statutory cap prevents further grants of T–1 nonimmigrant status, all BFD recipients will be placed on a waiting list. USCIS is unable to determine if, when, or for what duration T visa approvals will grow to exceed the annual statutory cap, but recent volumes depicted in Chart 1 suggest this occurrence is possible in the future. Past growth in the number of T visa approvals alone is not indicative of continued growth. While DOJ's Bureau of Justice Statistics collects data and reports statistics on human trafficking, they do not forecast trends.[57] Consequently, DHS cannot predict the contribution of growing T visa awareness to future volumes. The placement of individuals on the waiting list results in nominal cost to USCIS, as BFD recipients are simply moved to the waiting list once the cap is reached. In addition, applicants with a favorable BFD may be considered for deferred action and may request employment authorization based on a grant of deferred action. This change will benefit

[55] Calculation: 458 days/365 days in a year = 1.25 years.

[56] This analysis also assumes that the adjudication timeframe for Form I–914 will continue to require several months for the foreseeable future and thus not remove the incentive for simultaneous filing of Form I–765 that the faster EAD provides.

[57] *See* Bureau of Justice Statistics, U.S. Dep't of Justice, ''Human Trafficking Data Collection Activities, 2022,'' *https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/htdca22.pdf* (last visited Sept. 27, 2023).

applicants because if they are unable to be approved for a T visa they may now receive deferred action and have the possibility to request employment authorization, allowing them to stay and lawfully work in the United States.

(b) Additional Time Burden for Form I–765

The revised BFD process allows T visa applicants the opportunity to apply for their BFD EAD concurrently with their T visa application. Under the revised BFD process, USCIS will review an applicant's file for completeness and complete background checks to determine if the applicant is bona fide. If an applicant has not already filed a Form I–765, they will be invited to do so. T visa applicants did not previously file Form I–765 for employment authorization incident to T nonimmigrant status. DHS estimates that all T–1 visa applicants will now apply for a BFD-based EAD with their T visa application. Although T–1 visa applicants pay no fee to file Form I–765, DHS estimates the current public reporting time burden is 4 hours and 30 minutes (4.5 hours) for paper submissions, which includes the time for reviewing instructions, gathering the required documentation and information, completing the application, preparing statements, attaching necessary documentation, and submitting the application.[58] DHS acknowledges that T visa applicants filing Form I–765 may elect to acquire legal representation.

Table 9 shows the total receipts received for Form I–914 for FY 2017 through FY 2022. The table also shows the number of Form I–914 receipts filed with an attorney or accredited representative using Form G–28. The number of Form G–28 submissions allows USCIS to estimate the number of Forms I–765 that are filed by an attorney or accredited representative and thus estimate the opportunity costs of time for an applicant, attorney, or accredited representative to file each form. Based on a 6-year annual average, DHS estimates the annual average receipts of Form I–765 to be 2,909, with 92 percent of applications filed by an attorney.

Table 9. Total Form I-914 and Form I-914 Supplement A Receipts with and without Form G-28, FY 2017 through FY 2022.

FY	Form G-28 Receipts Received without a Form I-914 and Form I-914 Supplement A	Form G-28 Receipts Received with a Form I-914 and Form I-914 Supplement A	Total Form I-914 and Form I-914 Supplement A Receipts	Percentage of Forms I-914 and Form I-914 Supplement A filed with Form G-28
2017	191	2,128	2,319	92%
2018	415	2,516	2,931	86%
2019	164	2,101	2,265	93%
2020	135	2,010	2,145	94%
2021	166	2,617	2,783	94%
2022	343	4,667	5,010	93%
6-year Total	**1,414**	**16,039**	**17,453**	**92%**
6-year Annual Average	**236**	**2,673**	**2,909**	**92%**

Source: USCIS, Office of Policy and Strategy (OP&S), Policy Research Division (PRD), Claims 3 database. June 07, 2023 & USCIS Analysis.

Table 10 shows the total receipts received for Form I–914 for FY 2017 through FY 2022 for only the T–1 classification. The table also shows the number of Form I–914 receipts filed with an attorney or accredited representative using Form G–28. The number of Form G–28 submissions allows USCIS to estimate the number of Form I–765 that are filed by an attorney or accredited representative and thus estimate the opportunity costs of time for an applicant, attorney, or accredited representative to file each form. Based on a 6-year annual average, DHS estimates the annual average receipts of Form I–765 to be 1,664, with 92 percent of applications filed by an attorney.

[58] *See* U.S. Citizenship and Immigr. Servs., U.S. Dep't of Homeland Security, Instructions for Application for T Nonimmigrant Status (Form I–914), OMB No. 1615–0020 (expires Dec. 31, 2023) *https://www.uscis.gov/sites/default/files/document/forms/i-914instr.pdf* (time burden estimate in the Paperwork Reduction Act section).

Table 10. Total Form I-914, T-1 Receipts with and without Form G-28, FY 2017 through FY 2022.				
FY	**Form G-28 Receipts Received without a Form I-914**	**Form G-28 Receipts Received with a Form I-914**	**Total Form I-914 Receipts**	**Percentage of Forms I-914 filed with Form G-28**
2017	75	1,102	1,177	94%
2018	295	1,319	1,614	82%
2019	73	1,178	1,251	94%
2020	64	1,082	1,146	94%
2021	93	1,609	1,702	95%
2022	218	2,877	3,095	93%
6-year Total	**818**	**9,167**	**9,985**	**92%**
6-year Annual Average	**136**	**1,528**	**1,664**	**92%**
Source: USCIS, Office of Policy and Strategy (OP&S), Policy Research Division (PRD), Claims 3 database. June 07, 2023& USCIS Analysis.				

In order to estimate the opportunity costs of time for completing and filing Form I–765, DHS assumes that an applicant will use an attorney or accredited representative to prepare Form I–765s or will prepare Form I–765 themselves. DHS estimates the opportunity cost of time for attorneys or accredited representatives using an average hourly wage rate of $78.74 for lawyers to estimate the opportunity cost of the time for preparing and submitting Form I–765.[59]

However, average hourly wage rates do not account for worker benefits such as paid leave, insurance, and retirement. DHS accounts for worker benefits when estimating the opportunity cost of time by calculating a benefits-to-wage multiplier using a Department of Labor (DOL), Bureau of Labor Statistics (BLS) report detailing average compensation for all civilian workers in major occupational groups and industries. DHS estimates the benefits-to-wage multiplier is 1.45.[60] DHS calculates the average total rate of compensation as 114.17 [61] per hour for a lawyer.

To estimate the new opportunity costs of time, USCIS uses an average total rate of compensation based on the effective minimum wage. DHS assumes that T visa applicants have limited work experience/education and would therefore have lower wages. The Federal minimum wage is currently $7.25 per hour,[62] but many states have implemented higher minimum wage rates.[63] However, the Federal Government does not track a nationwide population-weighted minimum wage estimate. Individuals in the population of interest for an analysis could be located anywhere within the United States and may be subject to a range of minimum wage rates depending on the state or city in which they live.

For this final rule, DHS uses the most recent wage data from DOL, BLS National Occupational Employment and Wage Estimates. More specifically, we use the 10th percentile hourly wage estimate for all occupations as a reasonable proxy for the effective minimum wage when estimating the opportunity cost of time for individuals in populations of interest who are likely to earn an entry-level wage.[64] We also use the 10th percentile hourly wage estimate for individuals who are unemployed, or for individuals who cannot, or choose not to, participate in the labor market as these individuals incur opportunity costs, assign valuation in deciding how to allocate their time, or both.

Due to the wide variety of unpaid activities an individual could pursue, such as childcare, housework, or other activities without paid compensation, it is difficult to estimate the value of that time. Even when an individual is not working for wages, their time has value. In addition, using a percentile of the hourly wage estimate for all occupations allows DHS the flexibility to adjust its estimates, when necessary, depending on the population(s) of interest for regulatory impact analyses. Moreover, BLS estimates account for changes in wages across the United States labor market, which includes any future changes to state minimum wage rates. DHS will continue to evaluate the most appropriate wage assumptions for the populations of interest in its regulatory impact analyses.

The 10th percentile hourly wage estimate for all occupations is currently $13.14, not accounting for worker benefits. DHS accounts for worker benefits when estimating the opportunity cost of time by calculating a benefits-to-wage multiplier. The benefits-to-wage multiplier is calculated using the most recent BLS report detailing average total employee compensation for all civilian U.S. workers.[65] DHS estimates the benefits-to-wage multiplier to be 1.45, which incorporates employee wages and salaries and the full cost of benefits,

[59] *See* Bureau of Labor Stat., U.S. Dep't of Labor, ''Occupational Employment Statistics, May 2022, Lawyers,'' *https://www.bls.gov/oes/2022/may/oes231011.htm* (last visited May. 11, 2023).

[60] The benefits-to-wage multiplier is calculated as follows: (Total Employee Compensation per hour)/(Wages and Salaries per hour) ($42.48 Total Employee Compensation per hour)/($29.32 Wages and Salaries per hour) = 1.44884 = 1.45 (rounded). *See* Bureau of Labor Stat., U.S. Dep't of Labor, Economic News Release, ''Employer Costs for Employee Compensation—December 2022,'' ''Table 1. Employer Costs for Employee Compensation by ownership [Dec. 2022],'' *https://www.bls.gov/news.release/archives/ecec_03172023.htm* (last updated Mar. 17, 2023). The Employer Costs for Employee Compensation measures the average cost to employers for wages and salaries and benefits per employee hour worked.

[61] Calculation: $78.74 * 1.45 = $114.17 total wage rate for lawyer.

[62] *See* U.S. Dep't of Labor, ''Minimum Wage,'' *https://www.dol.gov/general/topic/wages/minimumwage* (last visited May 17, 2023).

[63] *See* U.S. Dep't of Labor, ''State Minimum Wage Laws,'' *https://www.dol.gov/agencies/whd/minimum-wage/state* (last visited May 17, 2023).

[64] *See* Bureau of Labor Stat., U.S. Dep't of Labor, ''Occupational Employment Statistics,'' *https://www.bls.gov/oes/2022/may/oes_nat.htm#00-0000* (last visited May 15, 2023). The 10th, 25th, 75th and 90th percentile wages are available in the downloadable XLS file link.

[65] *See* Bureau of Labor Stat., U.S. Dep't of Labor, Economic News Release, ''Employer Costs for Employee Compensation—December 2022,'' ''Table 1. Employer costs for employer compensation by ownership,'' *https://www.bls.gov/news.release/archives/ecec_03172023.pdf* (last updated Mar. 17, 2023).

such as paid leave, insurance, and retirement.[66] Therefore, using the benefits-to-wage multiplier, DHS calculates the total rate of compensation for individuals as $19.05 per hour for this final rule, where the 10th percentile hourly wage estimate is $13.14 per hour and the average benefits are $5.91 per hour.[67]

DHS uses the historical Form G–28 filings of 92 percent by attorneys or accredited representatives accompanying T visa applications as a proxy for how many may accompany Form I–765 applications. The remaining 8 percent [68] of T visa applications are filed without a Form G–28. DHS estimates that a maximum of 1,528 applications annually would be filed with a Form G–28 and 136 applications would be filed by the applicant.

To estimate the opportunity cost of time to file Form I–765, DHS applies the newly estimated time burden 4 hours and 34 minutes (4.56 hours) for to the newly eligible population and compensation rate of who may file the form. Therefore, for those newly eligible, as shown in table 11, DHS estimates the total annual opportunity cost of time to applicants completing and filing Form I–765 applications are estimated to be $795,500 for lawyers and estimates the cost to be $11,814 for applicants who submit their own application. DHS estimates the total additional cost for completing and filing Form I–765 are expected to be $807,314 annually.

Table 11. Average Annual Opportunity Costs of Time to Newly Eligible Form I-914 Applicants applying for Form I-765

	Affected Population	Time Burden to Complete Form I-765 (Hours)	Cost of Time (Hourly)	Annual Opportunity Cost
	A	B	C	D=(AxBxC)
Attorney- Paper Form	1,528	4.56	$114.17	**$795,500**
Applicant- Paper Form	136	4.56	$19.05	**$11,814**
Total	**1,664**			**$807,314**
Source: USCIS Analysis				

(c) Clarifying Eligibility Requirements To Reduce RFEs

DHS is codifying the evidentiary standard and standard of proof that apply to the adjudication of a T visa. For T nonimmigrants, this rule retains the standard that applicants may submit any credible evidence relating to their T applications for USCIS to consider. This expression in the evidentiary standard and standard of proof could affect the number of requests for evidence (RFE) that USCIS must send for Form I–914. DHS is also making clarifications to eligibility requirements. USCIS estimates that there will be a reduction in RFEs. Table 12 shows the total number of requests for evidence (RFE) for FY 2017 through FY 2022. Based on a 6-year annual average, DHS estimates the annual requests for information to be 1,107.

Table 12. Form I-914 Receipts with additional Requests for Evidence (RFEs), FY 2017 through FY 2022.

Reported Fiscal Year	Non-RFE Count	RFE Count	Total
2017	1,343	976	2,319
2018	1,330	1,601	2,931
2019	1,037	1,228	2,265
2020	1,128	1,017	2,145
2021	2,262	521	2,783
2022	3,709	1,301	5,010
6- year Total	**10,809**	**6,644**	**17,453**
6year Annual Average	**1,802**	**1,107**	**2,909**
Source: USCIS, Office of Policy and Strategy (OP&S), Policy Research Division (PRD)/ Data Analysis Branch, Claims 3 database. June 07, 2023 & USCIS Analysis.			

[66] The benefits-to-wage multiplier is calculated as follows: (Total Employee Compensation per hour)/(Wages and Salaries per hour) = $42.48/$29.32 = 1.45 (rounded). *See* Bureau of Labor Stat., U.S. Dep't of Labor, Economic News Release, ''Employer Costs for Employee Compensation—December 2022,'' ''Table 1. Employer costs for employer compensation by ownership,'' *https://www.bls.gov/news.release/archives/ecec_03172023.pdf* (last updated Mar. 17, 2023).

[67] The calculation of the benefits-weighted 10th percentile hourly wage estimate: $13.14 per hour * 1.45 benefits-to-wage multiplier = $19.053 = $19.05 (rounded) per hour.

[68] Calculation: 100 percent—92 percent filing with Form G–28 = 8 percent only filing Form I–914.

Based on the additional information expected to be provided with the initial Form I–914 filing USCIS estimates that there will be a reduction in RFEs. This change will also reduce the burden on applicants because they will be better aware of the evidentiary requirements from the outset, and they will not have to take the time to search for additional information subsequent to the submission of their application. DHS cannot estimate the amount of time each applicant takes to search for additional information. This would then allow the applicant to receive their employment authorization document earlier and allow them to work sooner. The reduction in RFEs will also save USCIS adjudicators time because they will not have to return to a particular application a second time once USCIS receives the additional required evidence. This change will make the overall process faster for applicants and USCIS.

(d) Technical Changes, Clarifying Definitions, and Other Qualitative Impacts in This Final Rules

The remaining changes in this final rule do not add quantifiable implications beyond those already discussed in the 2016 IFR. This rule moves the regulations for T nonimmigrant status to a separate subpart of 8 CFR part 214 to reduce the length and density of part 214, while making it easier to locate specific provisions. In addition to the renumbering and redesignating of paragraphs, the rule has reorganized and reworded some sections to improve readability, such as in new 8 CFR 214.204(d)(1) (discussing the law enforcement agency (LEA) declaration) and 8 CFR 214.208(e)(1) (discussing the trauma exception to the general requirement of compliance with any reasonable law enforcement requests for assistance).

The rule also divides overly long paragraphs into smaller provisions to improve the organization and understanding of the regulations. The reorganization of the rule does not impact the analysis provided in the 2016 IFR. DHS also added clarifying language to support current eligibility and application requirements in response to public comments. These changes are consistent with the Immigration and Nationality Act and the Trafficking Victims Protection Act. The primary benefit of these changes is to make it clearer and easier for T visa applicants to understand and apply for T nonimmigrant status.

DHS is also amending 8 CFR 214.11(k) (redesignated here as 8 CFR 214.211) implementing section 101(a)(15)(T)(ii)(III) of the INA, 8 U.S.C. 1101(a)(15)(T)(ii)(III), to clarify that, USCIS will evaluate any credible evidence demonstrating the derivative applicant's present danger of retaliation in cases where the LEA has not investigated the acts of trafficking after the applicant reported the crime. This revision benefits the applicant, because it provides greater clarity on the evidence USCIS will consider in determining their eligibility. The ''any credible evidence'' standard also encompasses evidence originating from a family member's home country; however, DHS has clarified that evidence may be from the United States or any country in which an eligible family member faces retaliation. 8 CFR 214.211(g). This flexibility is shown as an unquantified benefit the applicant to provide additional credible evidence in order to establish eligibility.

DHS has also clarified in the preamble that the ''continued victimization'' criteria referenced at 8 CFR 214.207(b)(1) does not require that the applicant is currently a ''victim of a severe form of trafficking in persons,'' but instead may include ongoing victimization that directly results from either ongoing or past trafficking. This will allow applicants who were victims of a severe form of trafficking in persons in the past, departed the United States, and reentered as a result of their continued victimization to establish that they meet the physical presence eligibility requirement without demonstrating that they are currently victims of a severe form of trafficking in persons. DHS cannot estimate how many victims may now be able to establish that they meet the physical presence eligibility requirement due to this change. This clarification benefits applicants who may be able to satisfy the physical presence requirement if their reentry into the United States was the result of continued victimization tied to ongoing or past trafficking.

(e) Alternatives Considered

Where possible, DHS has considered, and incorporated alternatives to maximize net benefits under the rule. For example, DHS considered multiple different elements and the operational considerations for implementing a BFD review. DHS considered conducting a fully electronic T visa BFD review with extremely limited background checks and conducting physical file review with limited background checks. However, DHS chose an approach that accommodated public comments, preserves a good faith review of the initial filing, removes barriers to the immigration process, and prioritizes efficient T visa BFD review. This protects the integrity of the BFD review by requiring review of initial required evidence and assessment of routine background checks.

5. Final Costs of the Final Rule

(a) Undiscounted Costs

Table 13 details the annual costs of this final rule. DHS estimates the annual additional cost for completing and filing Form I–765 are expected to be $807,314.

Table 13. Summary of Costs

Description	**Annual Cost**
Changes to BFD Process	$807,314
Source: USCIS Analysis	

(b) Discounted Costs

Table 14 shows the total cost over the 10-year implementation period of this final rule. DHS estimates the total annualized costs to be $807,314 discounted at 3 and 7 percent.

Table 14. Total Undiscounted and Discounted Costs of this Final Rule Using the Post-IFR Baseline.		
FY	Total Estimated Costs	
	$807,314 (Undiscounted)	
	Discounted at 3 percent	Discounted at 7 percent
2023	$783,800	$754,499
2024	$760,971	$705,139
2025	$738,807	$659,009
2026	$717,288	$615,896
2027	$696,396	$575,604
2028	$676,113	$537,947
2029	$656,420	$502,755
2030	$637,301	$469,864
2031	$618,739	$439,125
2032	$600,717	$410,398
10-year Total	**$6,886,552**	**$5,670,236**
Annualized Cost	**$807,314**	**$807,314**

B. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121, (Mar. 29, 1996), requires Federal agencies to consider the potential impact of regulations on small businesses, small governmental jurisdictions, and small organizations during the development of their rules. The term ''small entities'' comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, or governmental jurisdictions with populations of less than 50,000. This final rule does not mandate any actions or requirements for small entities. This final rule regulates individuals and individuals are not defined as a ''small entities'' by the RFA.[69] DHS did not receive any comments on small entities during the previous comment period. A regulatory flexibility analysis is not required when a rule is exempt from notice and comment rulemaking. The changes made in the interim rule were determined to not require advance notice and opportunity for public comment, because they are (1) required by various legislative revisions, (2) exempt as procedural under 5 U.S.C. 553(b)(A), (3) logical outgrowths of the 2002 interim rule, or (4) exempt from public comment under the ''good cause'' exception to notice-and-comment under 5 U.S.C. 553(b)(B). 81 FR 92288. Therefore, a regulatory flexibility analysis is not required for this rule. Nonetheless, USCIS examined the impact of this rule on small entities under the Regulatory Flexibility Act, 5 U.S.C. 601(6). The individual victims of trafficking and their derivative family members to whom this rules applies are not small entities as that term is defined in 5 U.S.C. 601(6).

C. Small Business Regulatory Enforcement Fairness Act of 1996 (Congressional Review Act)

This final rule is not a major rule as defined by section 804 of Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA). This final rule likely will not result in an annual effect on the economy of $100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

D. Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (UMRA) is intended, among other things, to curb the practice of imposing unfunded Federal mandates on State, local, and tribal governments. Title II of UMRA requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed rule, or final rule for which the agency published a proposed rule, that includes any Federal mandate that may result in a $100 million or more expenditure (adjusted annually for inflation) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector. This rule is exempt from the written statement requirement because DHS did not publish a notice of proposed rulemaking for this rule.

In addition, the inflation-adjusted value of $100 million in 1995 is approximately $192 million in 2022 based on the Consumer Price Index for All Urban Consumers (CPI–U).[70] This proposed rule does not contain a Federal mandate as the term is defined under UMRA.[71] The requirements of title II of UMRA, therefore, do not apply, and DHS has not prepared a statement under UMRA.

E. Congressional Review Act

The Office of Information and Regulatory Affairs has determined that this final rule is not a major rule, as defined by 5 U.S.C. 804, for purposes of congressional review of agency rulemaking pursuant to the Congressional Review Act, Public Law 104–121, sec. 251, 110 Stat. 868, 873 (codified at 5 U.S.C. 804). This rule will

[69] *See* Public Law 104–121, tit. II, 110 Stat. 847 (5 U.S.C. 601 note). A small business is defined as any independently owned and operated business not dominant in its field that qualifies as a small business per the Small Business Act. *See* 15 U.S.C. 632(a)(1).

[70] *See* Bureau of Labor Stat., U.S. Dep't of Labor, ''Historical Consumer Price Index for All Urban Consumers (CPI–U): U.S. city average, all items, by month,'' *www.bls.gov/cpi/tables/supplemental-files/historical-cpi-u-202212.pdf* (last visited Jan. 19, 2023). Calculation of inflation: (1) Calculate the average monthly CPI–U for the reference year (1995) and the current year (2022); (2) Subtract reference year CPI–U from current year CPI–U; (3) Divide the difference of the reference year CPI–U and current year CPI–U by the reference year CPI–U; (4) Multiply by 100 = [(Average monthly CPI–U for 2022—Average monthly CPI–U for 1995)/(Average monthly CPI–U for 1995)]*100 = [(292.655 − 152.383)/152.383]*100 = (140.272/152.383)*100 = 0.92052263*100 = 92.05 percent = 92 percent (rounded). Calculation of inflation-adjusted value: $100 million in 1995 dollars*1.92 = $192 million in 2022 dollars.

[71] The term ''Federal mandate'' means a Federal intergovernmental mandate or a Federal private sector mandate. *See* 2 U.S.C. 1502(1), 658(6).

not result in an annual effect on the economy of $100 million or more. DHS has complied with the reporting requirements of and has sent this final rule to Congress and to the Comptroller General as required by 5 U.S.C. 801(a)(1). While the Congressional Review Act requires a delay in the effective date of 30 days, this rule has a delayed effective date of 120 days, to provide DHS time to comply with the Paperwork Reduction Act as explained later in this preamble.

F. Executive Order 13132 (Federalism)

This final rule 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. DHS does not expect this rule would impose substantial direct compliance costs on State and local governments or preempt State law. As stated above, neither the proposed rule nor this final rule modifies the extent of State involvement set by statute.

G. Executive Order 12988 (Civil Justice Reform)

This final rule meets the applicable standards set forth in section 3(a) and (b)(2) of E.O. 12988.

H. Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments)

This final rule does not have ''tribal implications'' because it does not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. Accordingly, E.O. 13175, Consultation and Coordination with Indian Tribal Governments, requires no further agency action or analysis.

I. Family Assessment

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Pub. L. 105–277) requires Federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well-being. Agencies must assess whether the regulatory action: (1) impacts the stability or safety of the family, particularly in terms of marital commitment; (2) impacts the authority of parents in the education, nurture, and supervision of their children; (3) helps the family perform its functions; (4) affects disposable income or poverty of families and children; (5) financially impacts families, and whether those impacts are justified; (6) may be carried out by State or local government or by the family; and (7) establishes a policy concerning the relationship between the behavior and personal responsibility of youth and the norms of society. If the determination is affirmative, then the agency must prepare an impact assessment to address criteria specified in the law. As discussed in the interim final rule, DHS assessed this action in accordance with the criteria specified by section 654(c)(1). This final rule will continue to enhance family well-being by aligning the regulation more closely with the statute. This rule will also enhance family well-being by encouraging vulnerable individuals who have been victims of a severe form of trafficking in persons to report the criminal activity and by providing critical assistance and immigration benefits. Additionally, this regulation allows certain family members to obtain T nonimmigrant status once the principal applicant has received status.

J. National Environmental Policy Act

DHS analyzes actions to determine whether the National Environmental Policy Act (NEPA) applies to them and, if so, what degree of analysis is required. DHS Directive 023–01, Revision 01, ''Implementation of the National Environmental Policy Act,'' and DHS Instruction Manual 023–01–001–01, Revision 01, ''Implementation of the National Environmental Policy Act (NEPA)'' (Instruction Manual), establish the procedures DHS and its components use to comply with NEPA and the Council on Environmental Quality (CEQ) regulations for implementing NEPA codified at 40 CFR parts 1500 through 1508.

The CEQ regulations allow Federal agencies to establish, with CEQ review and concurrence, categories of actions (''categorical exclusions'') that experience has shown do not individually or cumulatively have a significant effect on the human environment and, therefore, do not require an Environmental Assessment or Environmental Impact Statement. 40 CFR 1501.4 and 1507.3(e)(2)(ii). The DHS categorical exclusions are listed in Appendix A of the Instruction Manual. For an action to be categorically excluded, it must satisfy each of the following three conditions: (1) the entire action clearly fits within one or more of the categorical exclusions; (2) the action is not a piece of a larger action; and (3) no extraordinary circumstances exist that demonstrate, or create the potential for, significant environmental impacts. Instruction Manual, section V.B(2)(a–c).

This action amends existing regulations governing requirements and procedures for victims of severe forms of trafficking in persons seeking T Nonimmigrant Status. The amended regulations codify and clarify eligibility criteria and will have no impact on the overall population of the United States and will not increase the number of immigrants allowed into the United States.

DHS analyzed the proposed amendments and has determined that this action clearly fits within categorical exclusion A3(a) in Appendix A of the Instruction Manual because the regulations being promulgated are of a strictly administrative or procedural nature. DHS has also determined that this action clearly fits within categorical exclusion A3(d) because it amends existing regulations without changing their environmental effect. This final rule is not part of a larger action and presents no extraordinary circumstances creating the potential for significant environmental effects. Therefore, this final rule is categorically excluded from further NEPA review.

K. Paperwork Reduction Act

Under the Paperwork Reduction Act (PRA) of 1995, as amended, 44 U.S.C. 3501–3521, all Departments are required to submit to OMB, for review and approval, any reporting requirements inherent in a rule. In this final rule, DHS is addressing the public comments received on the revised information collections in the interim rule and also amending the application requirements and procedures that the interim rule provided for individuals to receive T nonimmigrant status. Therefore, DHS is revising Form I–914, Form I–914, Supplement A, Form I–914, Supplement B, and Form I–765, as well as the associated form instructions to conform with the new regulations. These forms are information collections under the PRA.

When DHS published the 2016 interim rule, it revised Form I–914, Form I–914, Supplement A, Form I–914, Supplement B, and the associated form instructions (OMB Control Number 1615–0099). DHS published two versions of the forms and associated instructions for public comment, the first version on December 20, 2016, and the second version on January 20, 2017. *See* DHS Docket No. USCIS–2011–0010 at *www.regulations.gov.* Once OMB approved the forms and the rule became effective, DHS published a final version of the forms and associated instructions, which were dated February 27, 2017.

On December 2, 2021, OMB approved and USCIS issued a revised Form I–914,

Form I–914, Supplement A, Form I–914, Supplement B, with additional changes. The December 2, 2021, changes were independent of the interim rule that is being finalized by this rule, but the changes made in that revision may obviate or address some of the public comments on the information collection requirements for the interim rule. *See* DHS Docket No. USCIS–2006–0059. In this final rule, USCIS is requesting comments for 60 days on this information collection by July 1, 2024. When submitting comments on the information collection, your comments should address one or more of the following four points:

(1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate 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) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, such as permitting electronic submission of responses.

Table 15 Information Collections, below, lists the information collections that are part of this rulemaking.

Table 15. Information Collections

OMB Control No.	Form No.	Form Name	Type of PRA Action
1615-0099	I-914	Application for Derivative T Nonimmigrant Status, and Declaration for Trafficking Victim	Revision of a Currently Approved Collection
1615-0040	I-765	Application for Employment Authorization	Revision of a Currently Approved Collection
1615-0013	I-539	Application to Extend/Change Nonimmigrant Status	No material change/Non-substantive change to a currently approved collection
1615-0023	I-485	Application to Register Permanent Residence or Adjust Status	No material change/Non-substantive change to a currently approved collection

This final rule requires non-substantive edits to the forms listed above where the Type of PRA Action column states, ''No material change/ Non-substantive change to a currently approved collection.'' USCIS has submitted a Paperwork Reduction Act Change Worksheet, Form OMB 83–C, and amended information collection instruments to OMB for review and approval in accordance with the PRA.

USCIS Form I–914; Form I–914, Supplement A; Form I–914, Supplement B (OMB Control Number 1615–0099)

Overview of information collection:

(1) *Type of Information Collection:* Revision of a currently approved collection.

(2) *Title of Form/Collection:* Application for T Nonimmigrant Status, Application for Derivative T Nonimmigrant Status, and Declaration for Trafficking Victim.

(3) *Agency form number, if any, and the applicable component of DHS sponsoring the collection:* Form I–914, Form I–914, Supplement A, and Form I–914, Supplement B; USCIS.

(4) *Affected public who will be asked or required to respond:* Individuals or households. Form I–914 permits victims of a severe form of trafficking in persons and certain eligible family members to demonstrate that they qualify for temporary nonimmigrant status pursuant to the Victims of Trafficking and Violence Protection Act of 2000, and to receive temporary immigration benefits.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* Form I–914, 1,310 responses at 2.63 hours per response; Form I–914, Supplement A, 1,120 responses at 1.083 hours per response; Form I–914, Supplement B (section that officer completes), 459 responses at 3.58 hours per response; Form I–914, Supplement B (section that respondent completes), 459 responses at .25 hours per response.

Biometric processing 2,430 respondents requiring Biometric Processing at an estimated 1.17 hours per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 9,261 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated annual cost burden associated with this collection of information is $2,532,300.

USCIS Form I–765; I–765WS (OMB Control Number 1615–0040)

Overview of information collection:

(1) *Type of Information Collection:* Revision of a Currently Approved Collection.

(2) *Title of the Form/Collection:* Application for Employment Authorization; I–765 Worksheet.

(3) *Agency form number, if any, and the applicable component of the DHS sponsoring the collection:* I–765; I–765WS; USCIS.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Individuals or households. USCIS uses Form I–765 to collect information needed to determine if a noncitizen is eligible for an initial EAD, a new replacement EAD, or a subsequent EAD upon the expiration of a previous EAD under the same eligibility category. Noncitizens in many immigration statuses are required to possess an EAD as evidence of work authorization.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond:* The estimated total number of respondents for the information collection I–765 paper filing is 1,830,347 and the estimated hour burden per response is 4.56 hours; the estimated total number of respondents for the information collection I–765 online filing is 455,653 and the estimated hour burden per response is 4.00 hours; the estimated total number of respondents for the information collection I–765WS is 302,000 and the estimated hour burden per response is 0.5 hours; the estimated total number of respondents for the information collection biometrics submission is 302,535 and the estimated hour burden per response is 1.17 hours; the estimated total number of respondents for the information collection passport photos is 2,286,000 and the estimated hour burden per response is 0.5 hours.

(6) *An estimate of the total public burden (in hours) associated with the collection:* The total estimated annual hour burden associated with this collection is 11,816,960 hours.

(7) *An estimate of the total public burden (in cost) associated with the collection:* The estimated total annual cost burden associated with this collection of information is $400,895,820.

1. Comments on the Information Collection Changes to Form I–914 and Related Forms and Instructions Published With the 2016 Interim Rule

Comment: Two commenters on the 2016 interim rule also provided comments on the forms and associated instructions. One of the commenters had a general comment that applied to all the forms and instructions. The commenter wrote that although DHS published a table of changes for each of the forms, advocates and community members had not been able to review the actual forms and instructions with the final changes included. The commenter requested that the proposed forms and instructions with all planned changes be made available to the community and that DHS extend the comment period for the proposed forms to allow the community an opportunity to comment fully.

Response: DHS understands that the table of changes must be used in comparison with the previous versions of the form and instructions to determine the precise impact the changes have on the form and agrees that this comparison requires some effort. Nonetheless, the table of changes clearly indicated where the changes were being made or proposed to a sufficient extent to determine the effects on the form and the changes to the information collection burden.

Commenters also suggested specific revisions to the forms and associated instructions. DHS responds to those recommendations for each form, supplement, or instructions. Following this discussion, DHS explains the changes it is making on its own initiative for legal accuracy, consistency with the 2016 interim rule and the final rule, and enhanced clarity.

Form I–914

Comment: One commenter provided many recommendations to revise Form I–914. The commenter appears to have suggested edits to the version of Form I–914 labeled, ''Form I–914, Application for T Nonimmigrant Status 10.20.16'' published on December 20, 2016, with the 2016 interim rule. Thus, all the commenter's references to content of the form relate to that version. In discussing final changes all references are to the version of the forms published in connection with this final rule.

The commenter recommended that DHS amend the question on page 1, part B, ''General Information About You'' requesting applicants to choose whether their gender is male or female. The commenter suggested including a blank space in which applicants could write in their gender identity. The commenter wrote that an increasing number of its clients who are survivors of trafficking identify as lesbian, gay, bisexual, transgender, queer, and intersex (LGBTQI+) and may identify as non-binary or gender non-conforming. The commenter stated that these clients face heightened vulnerabilities to trafficking and requiring applicants to select from a binary answer option may deter them from representing their preferred gender expression and perpetuate their marginalization.

Response: DHS notes that components across the Department are reviewing forms to pursue more inclusive sex and gender markers that accommodate non-binary and transgender individuals.[72] This will improve DHS's ability to verify identity, as well as to expand access to accurate identity documents, thereby reducing the risk of future harm to LGBTQI+ persons. DHS is also reviewing policy guidance, training materials, and website content to ensure they provide accurate guidance and consistently use appropriate terminology. To support these Department-wide efforts, DHS will revise the forms to include a third gender option, ''Another Gender Identity.'' Including a third option on Form I–914, Form I–914, Supplement A, and Form I–914, Supplement B supports Executive Order 14012 (Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans) to promote inclusion and identify barriers that impede access to immigration benefits.

Comment: Regarding questions related to T nonimmigrant status eligibility requirements in part C (now designated part 3), the commenter suggested that the questions be reordered to match the order that the requirements appear in the statute to facilitate completing and adjudicating the form.

[72] ''Interagency Report on the Implementation of the Presidential Memorandum on Advancing the Human Rights of LGBTQI+ Persons Around the World,'' (2022) *https://www.state.gov/wp-content/uploads/2022/04/Interagency-Report-on-the-Implementation-of-the-Presidential-Memorandum-on-Advancing-the-Human-Rights-of-Lesbian-Gay-Bisexual-Transgender-Queer-and-Intersex-Persons-Around-the-World-2022.pdf.*

Response: DHS understands the commenter's stated rationale, but the commenter did not explain why reordering would make the form easier to complete. Neither adjudicators nor other stakeholders have reported any challenges with the ordering of the questions. DHS believes the suggested change is not essential enough to warrant the burden of reprogramming USCIS Form I–914 related computer systems.

Comment: On page 3, part C, ''Additional Information,'' (now titled ''Part 3. Additional Information About your Application'') the commenter recommended deleting the question regarding whether the applicant's most recent entry was on account of the trafficking that forms the basis for the applicant's claim and requests that the applicant explain the circumstances of their most recent arrival. The commenter stated that to qualify for T nonimmigrant status, an applicant need only show physical presence in the United States on account of trafficking, and there is no requirement an applicant's most recent entry be on account of trafficking.

Response: The commenter is correct with respect to the statutory eligibility requirements; however, including this question does not mean that an applicant must show their last entry was related to their trafficking. *See* INA sec. 101(a)(15)(T), 8 U.S.C. 1101(a)(15)(T). The question (now located at part 3, question 9) helps provide information to adjudicators about the general circumstances of the applicant's most recent arrival, whether related to the trafficking or not, and information regarding the applicant's immigration history. All this information assists adjudicators in understanding the full history and facts of an applicant's claim. Accordingly, DHS declines to delete the question.

Comment: The form at part D, ''Processing Information,'' question 1(a) (now part 4, question 1.A) asked whether the applicant has ever committed a crime or offense for which the applicant has not been arrested. The commenter suggested that DHS clarify the meaning of the question, noting that the question is broadly written and would include even minor criminal activity and behavior (such as jaywalking) that has no effect on the applicant's eligibility for T nonimmigrant status.

Response: DHS will maintain this question as it is useful for adjudicators in gathering relevant information related to determining admissibility and assessing the applicant's truthfulness. In addition, in DHS's experience, answers to the question have provided information relevant to the applicant's trafficking experiences.

Comment: The commenter requested that DHS revise part D ''Processing Information,'' question 3(a) (Now at part 4, question 2.A), regarding whether the applicant has engaged in prostitution or procurement of prostitution or intends to engage in prostitution or procurement of prostitution. The commenter stated that although the referenced conduct renders an applicant inadmissible under section 212(a)(2)(D) of the INA, 8 U.S.C. 1182(a)(2)(D), DHS should explicitly exclude acts of prostitution that occurred during trafficking and should clarify that this question does not apply to sex trafficking. The commenter also stated that this question causes confusion and anxiety for many of its clients who are victims of sex trafficking. The commenter suggested rephrasing the question to read: ''Have you engaged in prostitution that was not related to being a victim of trafficking?''

Response: DHS declines to make the specific suggested change. The question is appropriate as written because engaging in prostitution is a ground of inadmissibility, regardless of whether it is connected to the victimization. If the applicant has engaged in this conduct and the prostitution was connected to the trafficking, the applicant can request a waiver but must still answer the question so that USCIS can assess whether the inadmissibility ground applies in the first instance, and thus whether a waiver is needed. USCIS will examine all the evidence submitted and decide on a case-by-case basis whether to grant any waiver request.

Comment: The commenter requested that DHS revise part D, ''Processing Information,'' question 8, regarding whether the applicant has, ''during the period of March 23, 1933, to May 8, 1945, in association with either the Nazi Government of Germany or any organization or government associated or allied with the Nazi Government of Germany, ever ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, nationality, membership in a particular social group, or political opinion[.]'' The commenter suggested that DHS delete the question entirely or preface it with the question: ''Were you born before May 8, 1945?,'' followed by ''If no, proceed to the next question.'' The commenter stated that, given the temporal limits, this question applies to an extremely limited number of applicants, and the question as written is confusing and time-consuming to explain to applicants.

Response: DHS declines to make the suggested revision. DHS appreciates the suggestion and will take it under consideration for future revision efforts, but will retain the question as is, to collect information about specific conduct that constitutes a ground of inadmissibility under section 212(a)(3)(E) of the INA, 8 U.S.C. 1182(a)(3)(E).

Comment: The form at part D, ''Processing Information,'' question 8 (now part 4, question 8), asked whether the applicant has ever been present or nearby when a person was: ''(a) intentionally killed, tortured, beaten or injured?; (b) displaced or moved from their residence by force, compulsion, or duress?; or (c) in any way compelled or forced to engage in any kind of sexual contact or relations?.'' The commenter requested that DHS delete the question, and indicated that the question was vague, led to confusion among attorneys and applicants, and did not relate to any particular ground of inadmissibility in section 212(a) of the INA, 8 U.S.C. 1182(a).

Response: DHS declines to delete the question. Although it does not relate to a specific ground of inadmissibility, the question tends to yield information helpful to adjudicators in understanding the details of both the victimization and the applicant's conduct, which are relevant to the adjudication of the claim for T nonimmigrant status.

The following suggestions have already been resolved by revisions to the Form I–914 and are maintained in the version of the form published with this final rule:

- Page 2, part C, ''Additional Information,'' insert a question that allows an applicant to invoke the ''trauma exception'' for cooperation with law enforcement codified in section 101(a)(15)(T)(i)(III)(bb) of the INA, 8 U.S.C. 1101(a)(15)(T)(i)(III)(bb);
- Page 2, part C, ''Additional Information,'' delete the question related to whether the applicant is submitting an LEA declaration on Form I–914, Supplement B and if not, to explain why;
- Page 4, part D, ''Processing Information,'' delete question 2 on whether the applicant has ever received public assistance given that the 2016 interim rule indicates USCIS intends to remove this question on both Form I–914 and Form I–914, Supplement A; and
- Page 10, part H, ''Checklist'':
- Insert language in second box allowing applicants to indicate that they are asserting an exception to the compliance with reasonable law

enforcement requests requirement based on trauma;

- Delete checkbox indicating the applicant has included three photographs of the applicant; and
- Delete checkbox indicating the principal applicant has included three photographs of each family member for whom they are applying.
- DHS has deleted the checklist with the version of the Form I–914 and associated instructions published with this final rule because the instructions are sufficiently clear without the checklist, and it added unnecessary length to the forms. There is a checklist and other filing tips on the Form I–914 forms landing page.

Form I–914, Supplement A

DHS received suggestions from two commenters to revise Form I–914, Supplement A. One commenter proposed edits to the version of the supplemental form entitled, ''Form I–914A, Supplement A, Application for Family Member of T–1 Recipient 10.20.16'' published on December 20, 2016, with the 2016 interim rule. This commenter made several of the same suggestions it made on the Form I–914 in relation to the following questions, which DHS declines for the same reasons discussed above:

- Part E, ''Processing Information,'' delete the question asking whether the family member has committed any offense for which they have not been arrested;
- Part E, ''Processing Information,'' delete or simplify question 8 related to whether the family member has ever engaged in persecutory conduct between March 23, 1933, and May 8, 1945, in association with either the Nazi Government of Germany or any organization or government associated or allied with the Nazi Government of Germany;
- Part E, ''Processing Information,'' delete question 9 on whether the applicant has ever been present or nearby during certain conduct.

The commenter also made suggestions that have already been resolved by revisions to Form I–914, Supplement A, and remain resolved with the publication of the Form I–914, Supplement A published with this final rule:

- Page 1, part A (now part 1), ''Family Member Relationship to You,'' insert a box to include the T–6 derivative-of-derivative category; and
- Part E, ''Processing Information,'' delete the question about whether the family member has ever received public assistance.

The other commenter proposed edits to the version of the supplemental form entitled, ''(I–914A) Supplement A, Application for Family Member of T–1 Recipient 1.11.2017.''

Comment: The commenter recommended that on page 1, part B, DHS remove the new additional heading ''Part B. Family Member Relationship to Your Derivative'' and combine the additional checkboxes related to the T–6 derivative category with the existing ''Part A. Family Member Relationship to You.'' The commenter wrote that the new part B heading made it appear as though both parts A and B of Form I–914, Supplement A would need to be completed for all derivatives. The commenter wrote that combining the boxes in one heading would more clearly distinguish how the family member is related to the principal applicant.

Response: To address this concern, DHS has edited the form so that it is no longer divided into two parts with separate headings. The new form includes one part, labeled part 1, which has two items numbered 1 and 2, but do not contain further headings. DHS is removing the parenthetical ''(the derivative)'' in the title to previous part D (renumbered part 3), ''Information About Your Family Member'' consistent with the changes to new part 1. DHS amends the Form I–914 Instructions, as discussed in the next section, to provide further clarification on the questions in new part 1 and the form's references to family members.

Form I–914 Instructions

Commenters provided several comments on the Form I–914 Instructions. With respect to one of the commenters, it is not clear which version of the instructions its comments refer to, as some of the suggestions were already resolved by both versions of the form published in the docket with the 2016 interim rule. The other commenter's proposed edits relate to the version of the instructions entitled, ''(I–914) Instructions for Application for T Nonimmigrant Status 1.11.2017.'' In discussing both commenters' proposed edits, DHS will use references to the January 11, 2017, version.[73]

Comment: One commenter suggested adding the statutory citation of section 103 of the TVPA, as amended, 22 U.S.C. 7102, for the definition of ''a severe form of trafficking in persons'' when explaining that to qualify for T nonimmigrant status, an applicant must meet that definition at page 1, Point 1(A), ''Who May File This Form?''. The commenter explained that including the citation would easily refer applicants and advocates to review the statutory definition of ''a severe form of trafficking in persons.'' *See* 22 U.S.C. 7102. The commenter mentioned that the instructions to Form I–918, Petition for U Nonimmigrant Status, provide references to the relevant designation of qualifying crimes.

Response: DHS agrees that the term ''a severe form of trafficking in persons'' has a specific legal meaning and that applicants may not readily understand the term. DHS has added language at new page 1, ''What Is the Purpose of Form I–914?,'' to refer applicants to the language of the definition of ''a severe form of trafficking'' included in the section ''Evidence to Establish T Nonimmigrant Status,'' which derives from the language in TVPA section 103, the citation suggested by the commenter.[74] This approach will provide applicants with easy reference to the actual definition.

Comment: The commenter recommended changing the description of family members who may be eligible for T nonimmigrant status based on facing a danger of retaliation at page 2, Point 2(C)(3), ''Who May File This Form?'' and at page 4, part B, ''Completing Form I–914, Supplement A, Application for Family Member of T–1 Recipient.'' The commenter requested DHS use the term ''your sibling's children'' rather than the phrase ''niece or nephew,'' which could have a more expansive definition than the regulations have intended. The commenter also recommended using the term ''your parent's adult child'' rather than ''your sibling,'' explaining that the term sibling could include all siblings of a T–1 applicant, which it believed was a broader category than that of the adult or minor children of the parent.

Response: DHS disagrees with the commenter's reasoning. The terms suggested by the commenter would exclude some eligible family members who Congress intended to include in the statute. INA sec. 101(a)(15)(T)(ii)(III), 8 U.S.C. 1101(a)(15)(T)(ii)(III), provides that the ''adult or minor child'' of a

[73] Although it is not clear which version of the forms one commenter reviewed, the commenter's suggestions are consistent with the version dated January 11, 2017.

[74] The page numbers and section headings of the forms and instructions are provided in these comment responses to permit the commenter to find and review precisely how their comment was addressed. However, text may have shifted during final development and publication and DHS does not guarantee that the page numbers in the final version of the form will correspond to the page numbers cited here or as they existed on the forms when they were published for the interim rule or on January 10, 2018.

derivative of the principal who faces a present danger of retaliation may obtain derivative T nonimmigrant status. DHS interprets the term ''adult or minor child'' to encompass both the ''son or daughter'' and ''child'' immigration definitions; therefore, persons of any age and any marital status can be ''adult or minor children.'' *See* USCIS Policy Memorandum, *New T Nonimmigrant Derivative Category and T and U Nonimmigrant Adjustment of Status for Applicants from the Commonwealth of the Northern Mariana Islands* (Oct. 30, 2014).[75] Because the term ''child'' is a legal term of art defined as an unmarried person who is under the age of 21, *see* INA sec. 101(b)(1), 8 U.S.C. 1101(b)(1), using the phrase ''your parent's child'' would only include unmarried children under age 21 of the principal's derivative parents. The term ''your parent's child'' would not include the adult children of the principal's derivative parents, or the married children of any age of the principal's derivative parents. The phrase ''your sibling's children'' would be similarly restrictive.

However, as discussed above, to provide greater clarity on the family relationship of the category of adult or minor children who may be eligible for T nonimmigrant status based on facing a danger of retaliation, DHS has revised Form I–914, Supplement A (*see* new page 1, part 1, item 2) and the Form I–914 Instructions (*see* new page 4, ''Completing Form I–914, Supplement A, Application for Derivative T Nonimmigrant Status'').

Comment: The commenter suggested changes to page 2, ''General Instructions,'' part B, ''General Information About You,'' item 1, and page 5, part D, ''Information About Your Family Member (the derivative),'' item 1. Both sections explained that the questions requesting the applicant's or family member's name refer to the name as shown on the individual's ''birth certificate or legal name change document.'' The commenter requested DHS delete these explanations because some trafficking survivors do not have access to identity documents with the applicant's legal name, and such a requirement could create an evidentiary barrier for victims.

Response: It is important to maintain similar language as it provides clear instruction on the name that DHS is requesting. It is essential for DHS to know the name of the applicant or their family member as it appears on official identification documents so that DHS can conduct proper background checks and ensure there is no confusion about the identity of the person receiving the status, if approved. Neither this explanation nor the questions on the form indicate that evidence of a specific document is a requirement to obtaining status. Furthermore, the requirement does not in any way impact an applicant's evidentiary burden. However, DHS has changed the phrasing to ''birth certificate, passport, or other legal document'' to provide more clarity. *See* new part 4, ''Information About your Family Member,'' item 1.

Comment: Regarding the instruction at part D, ''Information About Your Family Member,'' item 3, the commenter opposed the collection of the family member's intended physical street address because the 2016 interim rule states that DHS is allowed to disclose an applicant's information to a law enforcement agency with the authority to detect, investigate, or prosecute severe forms of trafficking in persons. The commenter wrote that disclosing the applicant's physical street address could jeopardize the victim's safety and recommended adding language to clarify that an applicant should only provide this information if it was safe to do so and could instead provide an alternate safe mailing address.

Response: DHS declines to make the change. The request for the applicant's physical street address is distinct from the request for the applicant's mailing address used to provide official correspondence. DHS allows applicants to provide an alternative mailing address if they do not feel it is safe to receive mail at their residence as noted on previous editions of the form as well as at new page 5, part 4, item 4. This provision is to protect against perpetrators having access to USCIS correspondence with the applicant. DHS requests the applicant's physical street address for internal information purposes and consistent with requirements that individuals applying for visas register their presence. *See* INA secs. 221(b), 261, 265, 8 U.S.C. 1201(b), 1301, 1305. Furthermore, while DHS appreciates the commenter's concern that sharing address information with law enforcement agencies could jeopardize an applicant's safety, that authority exists for the purpose of promoting investigation and prosecution of traffickers, not to put victims of trafficking at risk.

Comment: The commenter made a general recommendation that DHS clarify on page 2, ''Completing Form I–914,'' part B, number 3, that an applicant's home address will not be used to contact an applicant if the applicant provides an address in the ''safe mailing address'' space on the Form I–914.

Response: DHS believes that the explanation of the safe mailing address is clear on this point. The language explains that if an applicant does not feel secure in receiving correspondence regarding their application at the applicant's home address, the applicant should provide a safe mailing address. DHS maintains this language in the Form I–914 Instructions. *See* new page 3, part 3, ''General Information About You,'' item 4, and new page 4, ''Completing Form I–914, Supplement A, Application for Derivative T Nonimmigrant Status,'' part 4, item 4, for instructions regarding the safe mailing address.

Comment: The commenter also requested that the instructions at page 3, ''Completing Form I–914,'' part B, number 6, include a clarification that the applicant's home telephone number will not be used to contact an applicant if they provide a telephone number in the ''safe daytime telephone number'' blank on the Form I–914.

Response: Again, DHS believes the explanation of the safe telephone number in the instruction at part 6 is clear and already explains that an applicant may include a safe daytime phone number if they wish. *See* new page 4, part 6, ''Applicant's Statement, Contact Information, Declaration, Certification, and Signature'' and new page 6, part 6, ''Applicant's Statement, Contact Information, Declaration, Certification, and Signature'' for instructions regarding the safe telephone number.

Comment: The other commenter requested DHS add an instruction to the section, ''General Instructions,'' that applicants represented by an attorney should include on the Notice of Entry of Appearance as Attorney or Accredited Representative (Form G–28) to be filed with Form I–914 that the attorney also represents the applicant with respect to the Form I–765. The commenter reported that attorneys have experienced difficulty communicating with USCIS regarding the status of Employment Authorization Documents (EADs) for approved T–1 nonimmigrants when the attorney has submitted a Form G–28 in connection with the Form I–914.

Response: DHS agrees with the commenter's recommendation. Because USCIS has codified a new, streamlined Bona Fide Determination process, DHS believes it would be helpful for

[75] ''T Derivative Memo,'' *https://www.uscis.gov/sites/default/files/document/memos/Interim_PM-602-0107.pdf.*

attorneys or representatives to include all forms covered by their representation on the Form G–28.

Comment: The commenter requested that in the ''Evidence to Establish T Nonimmigrant Status'' section of the Instructions, DHS delete the phrase ''You must demonstrate that you were brought to the United States'' and replace it with either ''You must demonstrate that you were a victim of a severe form of trafficking as defined by 22 U.S.C. 7102'' or with the full definition of the term ''a severe form of trafficking in persons.'' The other commenter also suggested adding the statutory reference for the definition of ''a severe form of trafficking in persons'' so applicants could easily review the statutory definition.

Response: DHS declines to include the statutory citation but, as recommended, already included the actual language of the definition from 22 U.S.C. 7102 in the revisions to the Form I–914 Instructions published on December 2, 2021, and February 27, 2017, in conjunction with the 2016 interim rule. To provide an even more complete definition, DHS also added further detail from the definition of sex trafficking included at 22 U.S.C. 7102. *See* new page 8, ''Evidence to Establish T Nonimmigrant Status,'' second items 1–2.

Comment: One commenter suggested adding language to the section ''Evidence of Cooperation with Reasonable Requests from Law Enforcement.'' The commenter recommended adding after the statement that USCIS makes the decision of whether the applicant meets the eligibility requirements for T nonimmigrant status: ''regardless of whether LEA chooses to investigate or prosecute the trafficking crime.'' The commenter wrote that the proposed language would further clarify that USCIS makes the final determination about whether an applicant is eligible for T nonimmigrant status and provide additional reassurance to law enforcement agencies that their declarations are not determinations of an individual's eligibility to obtain T nonimmigrant status.

Response: In DHS's view, the proposed language does not achieve the commenter's goal, and DHS believes the existing language is sufficient on this point; therefore, DHS declines to adopt this recommendation.

Comment: One of the commenters recommended deleting from the ''Evidence to Establish T Nonimmigrant Status'' section, language instructing applicants to describe their attempts to obtain a Form I–914, Supplement B if one was not included with their Form I–914. The commenter wrote that there is no requirement in statute or the 2016 interim rule regulations requiring this information and that this instruction is inconsistent with the 2016 interim rule's clarification that Form I–914, Supplement B Declarations will be given ''no special weight.''

Response: This suggestion was resolved by revisions to the Form I–914 Instructions published on February 27, 2017, in conjunction with the 2016 interim rule. To provide additional clarity, however, DHS is adding guidance to the Form I–914 Instructions at new page 8, ''Evidence of Cooperation with Reasonable Requests from Law Enforcement,'' that applicants are not required but may choose to provide evidence of their reasons for not submitting or attempting to obtain a Form I–914, Supplement B. In DHS's experience, if applicants choose to include this information, it can be helpful to adjudicators in understanding the full details of an applicant's claim and their engagement with law enforcement.

Comment: One commenter requested DHS update items 10–11, which directed applicants to discuss the harm or mistreatment they fear if removed from the United States and the reasons for the fear. The commenter stated that the factors detailed in 8 CFR 214.11(a) (redesignated here as 8 CFR 214.201) are broader than ''harm'' or ''mistreatment'' and that the current instructions fail to detail the types of extreme hardship involving unusual and severe harm contemplated by the 2016 interim rule.

Response: DHS acknowledges that this item's phrasing could be revised to ensure that applicants do not believe that USCIS only considers extreme hardship factors related to feared harm or mistreatment. Accordingly, DHS is revising the form to direct applicants to include information on the hardship that they believe they would suffer, including harm or mistreatment as examples. For conciseness, DHS has also combined items 10 and 11. DHS has also revised the other factors for consistency with the new regulatory text, discussed further below. *See* new page 9, ''Personal Statement,'' item 3.

The following suggestions were resolved by subsequent revisions to the Form I–914 Instructions:

- Page 1, ''Who May File this Form?,'' item 1(C), next to ''under the age of 18:'' insert the following text: ''or is asserting an exception due to physical or psychological trauma;''
- Page 1, ''Who May File this Form?,'' number 2, insert language to reflect T–6 classification;
- Page 1, ''Who May File This Form?,'' add language to the heading to clarify that principal applicants can file for their eligible family members at any time after the initial T–1 application has been filed and that the principal applicant need not be granted T–1 nonimmigrant status before they can file for their eligible family members;
- Page 7, ''Initial Evidence'' and throughout the form, delete references to a requirement to submit passport photos;
- Page 7, ''Evidence to Establish T Nonimmigrant Status,'' section 1, delete ''You must demonstrate that you were brought to the United States . . .'';
- Page 8, ''Evidence of Cooperation with Reasonable Requests from Law Enforcement,'' add language that if an applicant does not provide Form I–914, Supplement B, they must provide additional evidence, which can be in the form of a declaration to show victimization and attempted cooperation with law enforcement;
- Page 8, ''Personal Statement,'' delete item 2 that directed applicants to provide information on ''the purpose for which [they] were brought to the United States'';
- Page 8, ''Personal Statement,'' delete item 6 requesting information on the length of time the applicant was detained by the traffickers because there is no requirement that the victim be detained in order to qualify for T nonimmigrant status;
- Page 8, ''Personal Statement,'' delete item 9, instructing applicants to indicate why they were unable to leave the United States after being separated from the traffickers;
- Regarding the discussion of privacy in the instructions, add examples of the entities to which an applicant's information could be disclosed under 8 U.S.C. 1367;
- Throughout the instructions, delete distinctions between primary and secondary evidence, consistent with 2016 interim rule's elimination of this distinction; and
- Throughout the instructions, insert language to include the T–6 classification.

Form I–914, Supplement B

One commenter provided suggested revisions to the Form I–914, Supplement B. It is not clear which version of the form the commenter refers to in its suggestions. In discussing the commenter's proposed edits, DHS will use references to the version of the Form I–914, Supplement B entitled, ''(I–914B) Supplement B, Declaration of Law Enforcement Officer for Victim of Trafficking in Persons 1.9.2017'' in the

rulemaking docket. The commenter made the same request it made with respect to Form I–914 and Form I–914, Supplement A to expand the options for answering the question on gender on page 1, part A, ''Victim Information.'' DHS will make the suggested revision to the question about gender for the same reasons discussed above in DHS's response to comments to Form I–914.

Comment: The commenter recommended that at page 3, part E, ''Family Members Implicated in Trafficking,'' in the question regarding whether the applicant believes that their family members were involved in the applicant's trafficking to the United States, DHS delete the phrase ''to the United States.'' The commenter noted that the statutory requirement for eligibility is that the victim be physically present on account of trafficking and that there is no requirement that the trafficker trafficked the victim to the United States or brought the person to the United States for the purpose of trafficking.

Response: DHS agrees with the comment and is revising the question accordingly. *See* new page 4, part 5, ''Family Members Implicated in Trafficking,'' question 1.

The following suggestion was resolved by subsequent revisions to the Form I–914, Supplement B and is maintained in the form revision published with this rule:

- Page 2, part C, ''Statement of Claim,'' item 1, add the words ''patronizing, or soliciting'' after ''obtaining'' to reflect statutory changes made by the JVTA to the definition of sex trafficking codified at 22 U.S.C. 7102 and reflected in the definition of sex trafficking in the 2016 interim rule at 8 CFR 214.11(a).

Form I–914, Supplement B Instructions

One commenter made several requests to revise the Form I–914, Supplement B Instructions to the version entitled, ''(I–914B) Instructions for Supplement B, Declaration of Law Enforcement Officer for Victim of Trafficking in Persons 1.9.2017.''

Commenter: Regarding the first paragraph included on page 1, in the section, ''What is the Purpose of this Form?,'' the commenter recommended DHS add language that ''a formal investigation or prosecution is not required in order for a LEA to complete an endorsement.'' The commenter also suggested that DHS move to the beginning of the second paragraph under this heading the language that USCIS, not the LEA, makes the decision regarding whether the applicant meets the eligibility requirements for T nonimmigrant status. The commenter wrote that some law enforcement officers believed that criminal charges or convictions were needed before Form I–914, Supplement B could be signed and that signing a Supplement B would lead to the automatic approval of an immigration benefit.

Response: The commenter's first suggestion was resolved by revisions to the Form I–914, Supplement B Instructions published on February 27, 2017, in conjunction with the 2016 interim rule. The instructions on page 1 in the third paragraph under the heading, ''When Should I Use Form I–914, Supplement B?'' clearly state that a formal investigation is not a requirement for an LEA to sign the form. The instructions also state in the first paragraph that a formal investigation or prosecution is not required for an LEA to complete the form. DHS declines to make the commenter's recommendation to move the language about USCIS' role in the adjudication process. DHS believes it is appropriate to describe the purpose of Form I–914, Supplement B before clarifying the respective roles of USCIS and the LEA signing the form. *See* new page 1, ''When Should I Use Form I–914, Supplement B?''.

Comment: At page 1 ''When Should I Use Form I–914, Supplement B,'' and at page 2, part C, ''Statement of the Claim,'' item 1, the commenter suggested adding the statutory citation for the definition of ''a severe form of trafficking in persons'' when explaining that to qualify for T nonimmigrant status, an applicant must meet that definition. *See* TVPA 103, 22 U.S.C. 7102. The commenter wrote that some officers interpret ''severe'' as extremely cruel or egregious activity or to mean the length of time in trafficking. The commenter wrote, for example, that a law enforcement officer had stated that 2 months of involuntary servitude was ''not severe enough'' to be trafficking. Other officers, the commenter continued, have stated that human trafficking means sex trafficking and have not recognized labor trafficking survivors as victims.

Response: DHS agrees it is important for LEAs to understand the term but declines to include the statutory citation to TVPA section 103, 22 U.S.C. 7102. The instructions refer the reader to the ''Statement of Claim'' section to read a definition, which includes a plain language definition that incorporates relevant text from the statute. *See* new page 2, part 3, ''Statement of Claim,'' item 1.

Comment: The commenter suggested at page 2, ''General Instructions,'' part A, ''Victim Information,'' number 1, that DHS remove from the instructions the text, ''as shown on his or her birth certificate or legal name change document,'' for the same reasons discussed above in the section on the Form I–914 Instructions.

Response: DHS has revised the language in a similar manner as the Form I–914 Instructions. The language now refers to a ''birth certificate, passport, or other legal document.'' As discussed above in the context of the same suggestion with respect to Form I–914 Instructions, it is important to provide clear instruction on what name USCIS is requesting. Neither this explanation nor the question on Form I–914, Supplement B indicate that the applicant must submit a specific document to obtain T nonimmigrant status or for law enforcement to sign a Form I–914, Supplement B. *See* new page 2, part 1, ''Victim Information,'' item 1.

Comment: The commenter suggested that at page 2, part B, ''Agency Information,'' number 1, DHS revise the discussion of certifying agencies to mirror language in the preamble to the 2016 interim rule and to include other agencies, such as the U.S. Department of Labor, that have the authority to provide a Form I–914, Supplement B.

Response: DHS agrees that the language in this section is inconsistent with the definition of LEA at 8 CFR 214.201 (previously 8 CFR 214.11(a)). Although DHS did not include every example of a certifying agency, DHS revised the Form I–914, Supplement B Instructions for consistency with the language in new 8 CFR 214.201 and included a cite to the new regulation. *See* new page 2, part 2, ''Agency Information,'' item 1.

The following suggestions were resolved by revisions to the Form I–914, Supplement B Instructions published on February 27, 2017, in conjunction with the 2016 interim rule, and/or in the December 2, 2021, publication:

- Page 3, part C.1.D, ''Statement of Claim,'' delete the option for law enforcement officers to certify that they believe the individual is not a victim of trafficking.

- Page 3, part D, ''Cooperation of Victim,'' add language clarifying that if an applicant is unable to cooperate with LEA requests due to physical or psychological trauma or age, ''the applicant must provide additional evidence.''

2. Comments on Information Collection Changes to Form I–914, Application for T Nonimmigrant Status, and Related Forms and Instructions Published With Final Rule (60 Day Notice)

DHS received several comments on the January 10, 2018, **Federal Register** notice, many of which suggested revisions to the forms and associated instructions. DHS responds to those recommendations for each form, supplement, or instructions. DHS does not respond to comments outside the scope of the information collection.

Form I–914

Comment: A few commenters requested that on page 1, part 2, ''U.S. Physical Address,'' the form include instructions informing applicants that they could provide a safe mailing address instead of their physical address. The commenters stated many victims of trafficking are involved in multiple legal systems and are often required to provide the T nonimmigrant status application to the trafficker as part of the criminal or civil discovery process. Additionally, they stated that under this rule, DHS may disclose an applicant's information to an LEA that may be required to share this information with the trafficker to comply with constitutional requirements during criminal prosecution, potentially jeopardizing the applicant's safety. The commenters further suggested that DHS could instruct them to provide just the ZIP code of their physical address to ensure that applicants can have their biometrics appointments scheduled at the nearest ASC.

Response: DHS shares the commenters' goal of ensuring the safety of applicants for T nonimmigrant status; however, DHS declines to make these changes. As discussed previously, DHS requests the applicant's physical street address for internal information purposes and consistent with requirements that individuals applying for visas register their presence. *See* INA secs. 221(b), 261, 265, 8 U.S.C. 1201(b), 1301, 1305. Although DHS appreciates the concern regarding information provided to law enforcement agencies, that authority exists for the purpose of promoting investigation and prosecution of traffickers, not to put victims of trafficking at risk. If law enforcement is obligated to turn over a T nonimmigrant status application in the context of a criminal prosecution, law enforcement and the prosecutor should take steps to ensure the victim's safety.

Comment: The same commenters recommended adding an instruction at page 2, part 2, ''Other Information,'' question 9, for applicants to check the box corresponding to the gender with which they identify. The commenters mentioned USCIS' policy to change the gender on official immigration documents, such as employment authorization cards and documentation of immigration status, if the individual can provide specifically enumerated evidence verifying a change in gender.

Response: DHS appreciates the sensitivity that surrounds the issue of gender identity. Although DHS declines to make universal changes at this time to questions and data collections regarding sex, gender, male, female, mother, father, sister, brother, and other gender-related terms, as discussed above, DHS will add a third gender identity option to the Form I–914 and related forms.

Comment: On page 3, part 4, ''Additional Information About Your Application,'' questions 3.b. and 4.b., commenters suggested changes to the instruction to provide an explanation and supporting documentation for the answers to the questions. The commenters recommended deleting language indicating that the applicant should attach documents in support of their claim to be a victim of a severe form of trafficking in persons and the specific facts supporting the claim. The commenters also suggested deleting instructions in 3.b. and 4.b. to use extra space on the form to provide explanations for affirmative answers to questions regarding the physical presence requirement and the extreme hardship requirement. Finally, they recommended adding an instruction that the personal narrative statement describing the trafficking also address each eligibility requirement for T nonimmigrant status.

Both commenters stated the current language appears to suggest that a one-sentence explanation will be sufficient evidence of the physical presence and extreme hardship eligibility requirements. They also expressed that the recommended additional language would help ensure that the personal narrative sufficiently addresses all eligibility requirements. One of the commenters stated it has observed an increase in RFEs for lack of sufficient information in the initial T visa application on these two eligibility requirements. The commenter stated that the additional language could reduce the number of RFEs and delays in processing time.

Response: DHS agrees that it is important for applicants to provide sufficient information regarding their eligibility for T nonimmigrant status in their initial application. DHS already deleted the instruction included in 3.b. and 4.b., which it agrees may not have encouraged applicants to provide sufficient information as to the physical presence and extreme hardship eligibility requirements. DHS also already included an instruction to address the eligibility requirements in the personal narrative statement. DHS has deleted the instructions in questions 1, 3, and 4 requested the applicant attach evidence or documentation; instead, DHS has included in the introductory paragraph that the applicant should attach evidence and documents to support their claim if they answer ''Yes'' to questions 1–4. The applicant bears the burden of establishing their eligibility for T nonimmigrant status and available documentation corroborating the applicant's claim should be provided.

Comment: About page 3, part 4, ''Additional Information About Your Application,'' question 5, which asks whether the applicant has reported the crime they claim to have suffered, one commenter suggested DHS change the word ''crime'' to ''trafficking.'' The commenter stated this change will clarify that applicants must report a crime that includes trafficking as at least one central reason for the commission of the crime.

Response: DHS agrees and has already changed the wording to ''trafficking crime,'' which is more specific and appropriate, given the requirement that the applicant be a victim of ''a severe form of trafficking in persons'' and comply with any reasonable law enforcement requests for assistance in an investigation or prosecution of a crime involving acts of trafficking in persons. *See* INA sec. 101(a)(15)(T)(i)(I), (III), 8 U.S.C. 1101(a)(15)(T)(i)(I), (III).

Commenter: Regarding page 3, part 4, ''Additional Information About Your Application,'' commenters suggested adding the parenthetical ''(if any)'' after the question requesting the criminal case number. The commenters stated that the recommended language would provide clarification that a police report case number is not required and that it would reinforce that a law enforcement declaration or documentation of criminal investigation is not required to file for a T visa. One of the commenters stated it frequently encounters the misconception that a law enforcement declaration is required to apply for a T visa, causing some survivors and advocates to unnecessarily delay filing their application until a law enforcement report is made or a

criminal investigation is instigated. The commenters also suggested deleting the request for an explanation if the applicant did not report to law enforcement. They instead suggested adding in an instruction to provide the explanation in the applicant's personal narrative. Two commenters stated that question 7 suggests that the explanation of why the survivor has not reported the trafficking crime can be achieved by a brief sentence and makes it appear as if reporting to law enforcement is optional rather than reinforcing the need for the applicant to raise either the trauma-based exception or age-based exemption to the requirement to comply with reasonable law enforcement requests.

Response: DHS agrees with the commenters' suggestion regarding the case number and has already revised the form to state that the applicant should indicate ''the case number assigned, if any.'' *See* new page 3, part 3, question 5. However, DHS declines to remove the requirement that an applicant explain why they did not report the crime. The current form indicates that an applicant should explain the circumstances. Applicants have the option to either provide an explanation on the form or in their personal narrative statement. DHS does not see the need to further specify where the explanation is included.

Comment: Regarding page 3, part 4, ''Additional Information About Your Application,'' questions 8 and 9 (now questions 6 and 7), two commenters recommended deleting the instruction for minors under 18 years of age to skip question 9.b. (now question 7) related to whether the minor reported their trafficking to law enforcement. The commenters stated that although minors are exempt from the general requirement to comply with reasonable law enforcement requests for assistance in the investigation or prosecution of acts of trafficking, many minor applicants do report their trafficking victimization to law enforcement and do not need to skip the question. The commenters further stated that forcing minors to skip question 9.b. regarding cooperation with law enforcement may jeopardize their opportunity to adjust status to lawful permanent residence early based on the criminal investigation or prosecution having been completed. The commenters also stated the language creates unnecessary confusion that only those who are minors at the time of filing Form I–914 are eligible for an exemption to the requirement to comply with reasonable law enforcement requests when USCIS has stated that minors under 18 at the time of the victimization can meet this exemption.

Response: DHS agrees with the commenter's stated rationale and has deleted this instruction.

Comment: At page 4, part 4, ''Additional Information About Your Application (continued),'' questions 14.a.–14.b. (now question 9), commenters suggested deleting both questions regarding the circumstances of the applicant's most recent entry. Two commenters stated that question 3.a. (now question 3) already sufficiently addressed the physical presence eligibility requirement and question 14.a. confuses the physical presence eligibility requirement and reinforces existing physical presence misconceptions. The first misconception is that an applicant's latest entry must be based on the trafficking and does not recognize that there are other alternative exceptions to satisfy the physical presence requirement when the latest entry is not related to the trafficking. Commenters wrote that question 14.a. also reinforces the misconception that a victim of severe form of trafficking in persons is required to be trafficked across the United States border. One commenter stated that question 14.a. misstates the physical presence eligibility requirement. Neither the statutory language nor the regulatory language requires that an applicant's last entry be related to the trafficking.

Response: As discussed previously in response to comments on Form I–914 published with the IFR, the commenters are correct with respect to the statutory eligibility requirements, *see* INA sec. 101(a)(15)(T), 8 U.S.C. 1101(a)(15)(T); however, including these questions does not mean that an applicant must show their last entry was related to the trafficking suffered. The questions help provide information to adjudicators about the general circumstances of the applicant's most recent arrival, whether related to the trafficking or not, and information regarding the applicant's immigration history. All this information assists adjudicators in understanding the full history and facts of an applicant's claim. Accordingly, DHS declines to delete the questions; however, DHS has combined the two into a new question at new page 4, part 3, item 9.

Comment: At page 4, part 5, ''Processing Information,'' the introductory paragraph instructs applicants to answer affirmatively any question that applies even if their records were sealed, otherwise cleared or the applicants have been told they no longer have a record. Commenters requested DHS add an instruction that applicants could answer ''no'' to questions 1.b. through 1.f. and ''n/a'' to questions 2–5 regarding their criminal history if they had been granted vacatur. The commenter stated that vacatur is a form of relief for trafficking survivors who were forced to commit illegal acts by their traffickers and that, unlike expungement, vacatur is the recognition from the criminal justice system that a mistake was made, that the accused was wrongfully accused and in fact is a victim, and that the arrest or conviction should never have occurred. The commenters expressed that vacatur completely eradicates a survivor's criminal history as if the arrest and conviction had not occurred, instead of excusing criminal behavior; vacatur also recognizes that victims who did not have the requisite *mens rea* to commit the criminal act should not be penalized. They also stated that the current instructions are confusing and may lead to the inadvertent or illegal disclosure of state court records where state confidentiality laws may prevent disclosure of juvenile state court files without a court order. One of these commenters also requested that DHS delete instructions to answer each question about the applicant's criminal history regardless of whether the criminal records were sealed or otherwise cleared.

Response: DHS recognizes that victims of human trafficking may be forced to commit illegal acts at the hands of their traffickers; however, DHS declines to make the requested changes because having all information relevant to an applicant's trafficking experience is helpful to the adjudication. Applicants have an opportunity to explain in their personal statement and through their supporting evidence, the circumstances of any criminal activity. As the instructions state, answering ''yes'' to the questions regarding criminal conduct and inadmissibility will not necessarily lead to a denial of the application.

Comment: Another commenter requested DHS add an instruction that applicants could answer questions in the negative if their response related to prostitution that they were forced to engage in by their trafficker. The commenter stated the question could lead to filing unnecessary inadmissibility waivers, fee waivers, and additional explanations.

Response: DHS responded to a similar comment above. As discussed above, the question is appropriate as written because engaging in prostitution is a ground of inadmissibility, whether or not connected to victimization. If the

applicant has engaged in this type of conduct and the prostitution was connected to the trafficking, the applicant can request a waiver but must still answer the question to address possible inadmissibility. USCIS will examine all the evidence submitted and decide on a case-by-case basis whether to grant any waiver request.

Comment: Regarding page 4, part 5, ''Processing Information,'' question 1.a., one commenter requested DHS delete the question which asks whether the applicant has ever committed a crime or offense for which the applicant has not been arrested. The commenter stated the question was vague and overbroad and goes beyond the statutory grounds of inadmissibility at section 212(a)(2) of the INA, 8 U.S.C. 1182(a)(2). The commenter further stated that the question would encompass very minor criminal infractions as well as serious criminal activity, and that the question assumes applicants have sufficient legal knowledge to answer accurately.

Response: DHS declines to delete the question. As discussed previously in response to a similar comment above, answers to this question are useful for adjudicators in gathering relevant information related to determining admissibility and assessing the applicant's truthfulness. In addition, in DHS's experience, answers to the question have provided information relevant to the applicant's trafficking experiences.

Comment: One commenter stated that DHS's changes to the inadmissibility questions dramatically expand the scope of information sought without identifying the need for the expansion. According to the commenter, these changes appear intended to bolster an adjudicator's ability to deny applications on attenuated discretionary grounds. The commenter stated that this was especially troubling given that several of these expanded queries relate to potential inadmissibility grounds or other discretionary concerns that are often incidental to the trafficking or the victim's attendant vulnerabilities that helped precipitate the trafficking victimization.

Response: DHS will not change the wording or delete any of the inadmissibility questions as a result of this comment. The changes to these questions do not change the meaning of any of the statutory grounds of inadmissibility but were meant to make the questions less legalistic and use plain language to facilitate greater understanding of their meaning. The changes were also made to promote consistency with changes to questions on admissibility used in other USCIS forms.

Comment: Regarding page 5, part 5, ''Processing Information,'' question 7, one commenter suggested making a change to the inadmissibility question related to whether the applicant ever imported prostitutes. The commenter stated that the phrase ''imported prostitutes'' was dehumanizing and insensitive, especially because many victims who suffered sex trafficking will be using this form and suggested, in the alternative, the phrase ''prostituted persons'' or ''persons in prostitution.''

Response: DHS declines to make this change. The question uses the statutory language from section 212(a)(2)(D) of the INA, 8 U.S.C. 1182(a)(2)(D) and is not meant to ascribe any characteristics to the people referenced.

Comment: At page 8, part 7, ''Applicant's Statement, Contact Information, Declaration, Certification, and Signature,'' commenters requested DHS add to the paragraph on the authorization of release of information that ''any disclosure shall be in accordance with the VAWA confidentiality provisions at 8 U.S.C. 1367 and 8 CFR 214.14(e).'' One commenter stated this inclusion would clarify and reinforce the applicability of these confidentiality provisions.

Response: DHS agrees that it is important that applicants understand that their release of information is subject to the confidentiality provisions at 8 U.S.C. 1367 and is adding in language regarding these provisions.

Comment: One commenter requested DHS not restrict the forms from editing to allow users to make comments directly on the form. The commenter is a national technical assistance provider and uses forms to provide training and technical assistance by creating comments and guidance on how to complete specific sections of the forms.

Response: DHS declines to make any changes in response to the comment. Nevertheless, stakeholders can obtain an unlocked version of the form for training purposes by contacting the information contact for this rule.

The following suggestion was resolved by subsequent revisions to the Form I–914:

- Page 2, part 2, ''General Information About You (Victim),'' ''Information About Your Last Arrival in the United States,'' questions: 14.b.–14.f, add the parenthetical ''(if any)'' after the requests for recent passport or travel document information.

Form I–914, Supplement A

DHS received several comments on Form I–914, Supplement A, some of which were duplicative of comments received on Form I–914. For the following comments, DHS declines to make the requested change for the same rationale stated in response to suggestions to revise Form I–914:

- Page 1, part 2, U.S. Physical Address, 2.a.–2.e, include instructions informing applicants they could provide a safe mailing address instead of their physical address;
- Page 2, part 3, ''Current or Intended U.S. Physical Address,'' 4.a.–4.e., include instructions informing applicants they could provide a safe mailing address instead of their family member's physical address;
- One commenter made a general comment about DHS's proposed changes to the inadmissibility questions, stating that the changes dramatically expand the scope of information sought without identifying the need for the expansion;
- One commenter requested DHS not restrict the forms from editing to allow users to have the capability to make comments directly on the form.

Comment: Two commenters repeated their comment on the Form I–914 that DHS should add language at page 8, ''Applicant's Statement, Contact Information, Declaration, Certification, and Signature,'' to the paragraph on the authorization of release of information that ''any disclosure shall be in accordance with the VAWA confidentiality provisions at 8 U.S.C. 1367 and 8 CFR 214.14(e).''

Response: For the reason discussed above, DHS agrees to add language referencing the confidentiality protections included in 8 U.S.C. 1367.

The following suggestions were resolved by subsequent revisions to the Form I–914, Supplement A:

- Page 3, part 3, ''Information About Your Family Member,'' question 16 (asked for ''Your Current Immigration Status or Category''), change the question to add ''Family Member's'' after ''Your'' and delete the reference to ''Category'';
- Page 4, part 3, ''Additional Information About Your Family Member,'' question 37 directs the applicant to answer questions 38–40.g. if the applicant answers question 37 affirmatively and to skip to item 41.a. if the applicant answers question 37 negatively. One commenter stated that it was not clear whether applicants who respond affirmatively to the question must answer question 41.b;
- Page 4, part 3, ''Additional Information About Your Family Member,'' question 41.b., add a space to write that the family member is currently in removal proceedings;

• Page 5, part 4, ''Processing Information,'' question 15 regarding whether the family member has ever ''illicitly (illegally) trafficked or benefited from the trafficking of any controlled substance, such as chemicals, illegal drugs, or narcotics?,'' remove the reference to illegal drugs;

• Page 8, Part 5, ''Applicant's Statement, Contact Information, Declaration, Certification, and Signature,'' item 8.a., remove requirement of a signature from an applicant's family members who are not in the United States.

Form I–914 Instructions

DHS received several comments on the Form I–914 Instructions, many of which were duplicative of comments received on the Form I–914. For the following comments, DHS declines to make the requested changes for the same rationale discussed in response to comments on Form I–914:

• Page 4, part 2, ''General Information About You (Victim),'' items 4.a.–4.e., ''U.S. Physical Address,'' and items 5.a.–5.f., ''Safe Mailing Address;'' page 7, ''Specific Instruction for Form I–914, Supplement A,'' part 2, ''General Information About You (Principal Applicant (Victim)),'' items 2.a.–3.e., ''U.S. Physical Mailing Address'' and items 3.a.–3.f., ''Safe Mailing Address,'' commenters requested DHS include instructions informing applicants that could provide a safe mailing address in lieu of their physical address and just provide the ZIP code of their physical address to ensure a biometrics appointment near their physical location.

DHS provides individualized responses to the remaining comments.

Comment: Commenters recommended several changes to the description of the adult or minor children at page 2, item 2.C.3 including deleting the parenthetical phrase specifying the relationship of the adult or minor children to the applicant's family members. The commenters made a similar recommendation at page 14, ''Evidence to Establish T Nonimmigrant Status For Your Family Member,'' item 3.C. The commenters stated that applicants and advocates often struggle with understanding the ''derivative of a derivative'' category and stated that removing this language will simplify the description and avoid confusion.

Response: DHS appreciates the complex nature of this category of eligible family members and the value of simplifying instructions but believes the additional information could be helpful to applicants in confirming the meaning of the description of the eligible family members.

Comment: At page 4, part 2, ''General Information About You (Victim),'' items 1.a.–1.c., ''Your Full Legal Name,'' and page 7, part 2, ''General Information About You (Principal Applicant (Victim)),'' items 1.a.–1.c., ''Your Full Legal Name,'' commenters recommended DHS delete its request for the applicant's and family member's legal name as shown on the individual's ''birth certificate or legal name change document.'' The commenter stated that some trafficking survivors do not have access to identity documents with the applicant's legal name and that the current text could create an evidentiary barrier for victims who do not have these documents.

Response: As discussed previously in response to this same comment to the Form I–914 instructions published on December 20, 2016, it is essential for DHS to know the name of the applicant or their family member as it appears on official identification documents so that DHS can conduct proper background checks and ensure there is no confusion about the identity of the person receiving the status, if approved. Neither this explanation nor the questions on the form indicate that evidence of a birth certificate or legal name change document is a requirement to obtain status. DHS has already amended the language to state ''birth certificate, passport, or other legal document.'' Furthermore, the requirement does not in any way impact an applicant's evidentiary burden.

Comment: At page 4, part 2, ''General Information About You (Victim),'' item 9, which requests the applicant's gender, commenters consistent with comments to Form I–914 and Form I–914, Supplement A, requested an instruction regarding an additional checkbox for applicants who identify as transgender or, as one commenter stated, ''a non-binary option for LGBTQI applicants.'' Another commenter also made a similar comment at page 8, part 3, ''Information about Your Family Member,'' item 8, ''Gender.''

Response: For the rationale discussed above in response to similar comments on Form I–914, DHS will make this change.

Comment: At page 5, items 14.a.–14.f., ''Passport and Travel Document Numbers,'' commenters suggested making changes to this instruction on providing passport and travel document information to take into account the fact that trafficking survivors often do not have these documents and that having a passport is not required to apply for T nonimmigrant status. One of the commenters made a similar comment at page 10, ''Specific Instructions for Form I–914, Supplement A.''

Response: DHS agrees that many trafficking victims may lack access to passports or travel documentation, and, therefore, adds to the instructions at both pages for applicants to provide the passport and travel document information ''if applicable and if known.''

Comment: One commenter requested that DHS add a similar instruction in relation to questions about the applicant's last arrival into the United States and the applicant's current immigration status or category at page 5, item 15.–16.b., ''Information About Your Last Arrival in the United States'' and item 17, ''Current Immigration Status or Category.''

Response: DHS declines to adopt this recommendation. This information should be reasonably available to the applicant, as it does not require the applicant to have particular documents in their possession. If an applicant does not know the information, the applicant can write ''unknown'' and provide an explanation.

Comment: About page 6, part 5, ''Processing Information,'' commenters requested DHS delete instructions to answer each question about the applicant's criminal history regardless of whether the criminal records were sealed or otherwise cleared. One of the commenters also made this suggestion in reference to page 10, ''Specific Instructions for Form I–914, Supplement A,'' part 4, ''Processing Information,'' items 1.a.–44.c. Both commenters stated the language was unduly burdensome, confusing to trafficking survivors, and assumes applicants have sufficient legal knowledge to respond accurately. One of the commenters also recommended deleting the instruction at page 6, part 5, ''Processing Information,'' for applicants to answer affirmatively to the questions about their conduct, regardless of whether the actions or offenses occurred in the United States or anywhere in the world. Another commenter requested DHS add an instruction at page 6, part 5, ''Processing Information,'' that applicants could answer questions about their conduct in the negative if their conduct involved prostitution that they were forced to engage in by their trafficker.

Response: DHS declines to delete any language from these instructions. All of an applicant's prior conduct is relevant to the adjudication of their application and DHS can consider any extenuating circumstances such as forced criminal conduct or other circumstances that

may have led to the applicant's records being sealed or criminal history being cleared.

Comment: At page 7, ''Specific Instructions for Form I–914, Supplement A,'' one commenter recommended throughout that DHS replace the use of the pronouns ''his'' and ''hers'' with ''family member'' or ''derivative'' to provide more clarity to the applicant.

Response: DHS has revised the use of pronouns to be gender neutral throughout but declines to adopt this suggestion because DHS believes the use of pronouns is clear.

Comment: At page 11, ''Specific Instructions for Form I–914, Supplement B,'' one commenter suggested adding an instruction that if applicants do not submit the Form I–914, Supplement B, they should provide alternative evidence to show victimization and cooperation with law enforcement. Another commenter suggested that DHS add a similar instruction but recommended that it state that applicants ''must'' provide additional evidence to show victimization and cooperation with law enforcement. The commenters also suggested referring applicants to the section of the Form I–914, Supplement B Instructions on ''Evidence of Cooperation with Reasonable Requests from Law Enforcement'' for additional information. The commenters expressed that the language would clarify that the I–914 Supplement B is not required and is no longer considered primary evidence and would prompt applicants to consider providing alternate evidence.

Response: DHS had already included an instruction that applicants may provide other evidence and directs applicants to the relevant portion of the Form I–914, Supplement B Instructions; however, to emphasize that applicants must provide evidence to show victimization and cooperation with law enforcement, DHS has revised the language to state that an applicant ''must'' provide other evidence.

Comment: At page 11, ''What Evidence Must You Submit?,'' commenters suggested that the initial paragraph state that applicants may submit ''any credible evidence'' in accordance with 8 CFR 214.11(d)(2)(ii) (new 8 CFR 214.204). In addition, the commenters suggested adding language that the application may not be denied for failure to submit particular evidence, but only if the evidence that was submitted was not credible or otherwise failed to establish eligibility and that the ''any credible evidence'' standard is discretionary. Commenters also suggested including mention of the ''any credible evidence'' standard in the ''General Instructions'' at page 2.

Response: DHS agrees that it is important to mention the ''any credible evidence'' standard and has added language in the form instructions to describe the standard. DHS is not adding language on the standard in the ''General Instructions'' at page 2 as one mention should be sufficient.

Comment: At page 12, ''Evidence of Cooperation with Reasonable Requests from Law Enforcement,'' in the introductory paragraph, commenters requested DHS amend the sentence specifying that it is USCIS' role to decide whether the applicant meets the eligibility requirements for T nonimmigrant status. The commenter suggested DHS include the phrase ''regardless of whether [the] LEA choose[s] to investigate or prosecute the trafficking crime.'' Commenters stated that the proposed language would further clarify that USCIS has the final determination of whether an applicant is eligible for T nonimmigrant status and that this determination is not dependent on a declaration from law enforcement. One commenter added that this proposed language will provide clarity to applicants that an LEA's unwillingness to sign a Form I–914, Supplement B should not be a deterrent to filing the application for T nonimmigrant status and to provide additional reassurance to LEAs that the Form I–914, Supplement B is not a determination of an individual's eligibility to obtain T nonimmigrant status.

Response: DHS declines the suggested change. The introductory paragraph clearly states that Form I–914, Supplement B is not required, and states that eligibility for T nonimmigrant status is not dependent upon whether the LEA pursues an investigation or prosecution. It also already states that USCIS determines whether an applicant meets the eligibility requirements.

Comment: At page 16, ''Waiver of Grounds of Inadmissibility,'' commenters suggested the inclusion of the standards that USCIS uses in determining whether an applicant or their family member is eligible for a waiver of inadmissibility. The commenters stated this addition will provide clarity that the applicant may be eligible to receive a waiver and provides additional guidance on when USCIS will use its discretion to waive grounds of inadmissibility.

Response: DHS declines to make this change. The suggested language conflates two different waiver standards included in section 212(d)(3) and (d)(13) of the INA, 8 U.S.C. 1182(d)(3), (d)(13). The ''Waiver of Grounds of Inadmissibility'' section was added for contextual information. The standards and requirements for a waiver are discussed in detail on the separate inadmissibility waiver application forms. The standards and requirements that apply are too detailed and complex to include in these form instructions.

Comment: At page 16, ''What is the Filing Fee?,'' the Instructions state that there is no fee for the Form I–914 and commenters recommended adding a discussion of fees for other related forms, available fee waivers and where to find more information on these topics, to provide clear guidance on where more information can be obtained.

Response: DHS appreciates the suggestions but declines to adopt them. The information provided on fees and fee waivers for all related forms is sufficiently specified through vehicles such as the USCIS website or Form G–1055, Fee Schedule.

Comment: One commenter requested DHS include information earlier in the ''General Instructions'' on the 8 U.S.C. 1367 protections related to disclosure and to the prohibitions on using information provided solely by a perpetrator. The commenter also requested DHS include information on which agency the applicant should contact with questions or concerns about confidentiality violations.

Response: DHS believes the Instructions only need to mention the 8 U.S.C. 1367 protections once. DHS does not believe it is necessary to include information on which agency to contact if the applicant has questions or concerns about confidentiality violations because that is outside the scope of instructions for completing a form. In addition, USCIS provides information on its website on how to make a complaint about employee misconduct.

The following suggestions were resolved by subsequent revisions to the Form I–914 Instructions:

- Page 1, ''Principal Applicant,'' question 1.C., add language about enforcement agencies with the authority to detect or investigate trafficking crimes.
- Page 1, ''Who May File Form I–914?,'' item 2, ''Principal Applicant Filing for Eligible Family Members at the Same Time,'' delete the phrase ''at the same time'' from this title and the instruction, and add an instruction that the applicant may file a Supplement A with an initial application or at a later time;

• Page 3, ''General Instructions,'' ''Copies,'' delete the statement that USCIS may destroy original documents that are submitted when not required or requested;

• Page 10, part 5, ''Applicant's Statement, Contact Information, Declaration, Certification, and Signature,'' ''NOTE;'' page 11, ''Initial Evidence,'' item 4; page 11, ''Initial Evidence,'' second item 1, remove requirement that all eligible family members sign the Supplement A;

• Page 10, part 5, ''Applicant's Statement, Contact Information, Declaration, Certification, and Signature,'' ''Note;'' page 11, ''Initial Evidence,'' delete the instruction that all family members must sign Form I–914, Supplement A;

• Page 11, ''What Evidence Must You Submit?,'' delete the first two sentences of the initial paragraph, which instruct applicants to submit all evidence requested in the Instructions and warns that a failure to provide required evidence could result in a rejection or denial of the application;

• Page 15, ''Unavailable Documents,'' delete language that suggests applicants can provide secondary evidence if a required document is not available and that USCIS may require a certification from an appropriate civil authority if a necessary document is unavailable;

• Page 17, ''Processing Information,'' ''Confidentiality,'' add examples of the entities to which an applicant's information could be disclosed under 8 U.S.C. 1367.

Form I–914, Supplement B

DHS received three comments on Form I–914, Supplement B, two of which are similar to comments made on Form I–914 and Form I–914, Supplement A regarding questions about the gender of applicants and family members at page 1, part 1, ''Victim Information,'' ''Other Information About Victim,'' question 8. For the same reasons discussed above, DHS will instruct that responses to questions about the applicant's gender on Form I–914, Supplement B reflect the gender with which the applicant identifies.

The following suggestion was resolved by subsequent revisions to the Form I–914, Supplement B:

• Page 2, part 3, ''Statement of Claim,'' ''Type of Trafficking,'' question 1.e., remove the option for law enforcement to indicate a belief that the applicant is not a victim of trafficking.

Form I–914, Supplement B Instructions

Comment: For page 1, ''What is the Purpose of Form I–914, Supplement B?,'' ''Description,'' commenters suggested DHS move to the beginning of the second paragraph under this heading the language that USCIS, not the LEA, makes the decision regarding whether the applicant meets the eligibility requirements for T nonimmigrant status and add a phrase that signing a Supplement B does not lead to automatic approval of the T visa application. The commenters wrote that the changes would correct the misconception that criminal charges or convictions were needed before Form I–914, Supplement B could be signed and that signing a Supplement B would lead to the automatic approval of an immigration benefit. Another commenter suggested adding language that officers can sign the Form I–914, Supplement B even if there is no investigation opened. That commenter stated that the existing language in the Form I–914, Supplement B Instructions has not been sufficient to empower some law enforcement agents to sign the Form I–914, Supplement B if a prosecuting authority decides not to open a case. The commenter also suggested DHS add detailed language about the compliance with reasonable law enforcement requests requirement to give examples of sufficient cooperation and include language that there is a presumption of compliance for applicants who reported the trafficking incident and had not denied any reasonable requests for assistance.

Response: For reasons discussed previously in response to similar suggestions when the Form I–914, Supplement B Instructions were published on December 20, 2016, DHS declines to make these changes. The instructions on page 1 in the third paragraph under the heading, ''When Should I Use Form I–914, Supplement B?'' clearly state that a formal investigation is not a requirement for an LEA to sign the form. DHS does not believe it is necessary to provide more detail regarding the compliance with reasonable law enforcement requests requirement. Law enforcement decides at its own discretion whether to provide a Form I–914, Supplement B, and an applicant does not have to submit Form I–914, Supplement B to receive T nonimmigrant status. The regulations do not include a presumption of compliance with reasonable law enforcement requests, and DHS declines to include language to that effect in the Form I–914, Supplement B Instructions.

DHS also declines to adopt the recommendation to move the language about USCIS' role in the adjudication process. DHS believes it is appropriate to describe the purpose of Form I–914, Supplement B before clarifying the respective roles of USCIS and the LEA signing the form. DHS also does not believe it is necessary to add a phrase that signing does not lead to automatic approval of the application for T nonimmigrant status. The Form I–914, Supplement B Instructions already state that by providing a Supplement B, the LEA is not giving an immigration benefit.

Comment: For page 1, ''When Should I Use Form I–914, Supplement B?,'' one commenter requested that DHS not use the phrase ''on account of'' but ''as a result of'' when describing the physical presence on account of trafficking eligibility requirement. The commenter stated that the phrase is a legal term of art that will generate confusion and will dissuade law enforcement agents from signing a Form I–914, Supplement B.

Response: DHS agrees with the commenter and has changed this language for consistency.

Comment: Regarding page 3, part 1, ''Victim Information,'' items 1.a.–1.c., ''Full Legal Name of Victim,'' commenters repeated a request made in connection with the Form I–914 and the Form I–914, Supplement A to delete instructions to provide the applicant's name as shown on their birth certificate or legal name change document.

Response: As discussed previously, DHS declines to make this change, but has revised the question to include ''other legal documents.''

Comment: Regarding page 3, part 1, ''Victim Information,'' item 8, ''Gender,'' commenters provided similar suggestions to those made on Form I–914 and Form I–914, Supplement A regarding providing additional options to respond to the question about the applicant's gender.

Response: For the same reasons discussed previously, DHS will instruct that the response reflect the gender with which the applicant identifies.

Comment: For page 4, ''General Instructions,'' items 10.–12.b., one commenter stated that asking for the case number, case status, and, if applicable, the FBI Universal Control Number or State Identification Number is likely to dissuade LEAs from signing a Form I–914 Supplement B because they will believe they need to have an identifying case number associated with the investigation. The commenter suggested adding language that to sign a Form I–914, Supplement B, an investigation consisting of an initial report is sufficient, and no case number is required.

Response: DHS does not believe that asking for this information will dissuade LEAs from providing a Form I–914,

Supplement B. The ''General Instructions'' at page 2 make it clear that if the LEA does not have certain information, the LEA can leave the field blank. The Form I–914, Supplement B Instructions at page 1 clarify that the LEA does not necessarily need to formally launch an investigation or file charges to provide a Form I–914, Supplement B. In addition, the instructions indicate this information should be filled out only if applicable. DHS will retain the question because the case identifying information is helpful if USCIS needs to inquire further with the LEA about the case.

Comment: About page 4, part 3, ''Statement of Claim,'' items 1.a.–1.e., ''Type of Trafficking,'' one commenter stated that the options available to LEAs to choose which type of trafficking occurred do not account for sex or labor trafficking that did not result in a completed sex act or completed labor/service.

Response: DHS agrees and has added a statement clarifying that victims of attempted labor or sex trafficking can be considered victims of a severe form of trafficking in persons.

Comment: Regarding page 4, part 3, ''Statement of Claim,'' item 2, ''Victimization Description,'' LEAs are instructed to identify the relationship between the victimization and the crime under investigation or prosecution. One commenter requested the instructions clarify that the LEA's own investigation independently satisfies the threshold and that a separate investigation opened by a prosecutor is not required.

Response: DHS feels that the Instructions do not suggest the need for a separate investigation or prosecution and do not need to be changed.

Comment: At page 4, part 3, ''Statement of Claim,'' items 3.a.–3.b., ''Fear of Retaliation or Revenge,'' the instruction asks LEAs to indicate whether the applicant has expressed any fear of retaliation or revenge if removed from the United States. One commenter stated that it was unlikely that many victims will feel comfortable enough to provide much detail to LEAs about why they fear returning to their home country but did not recommend any specific changes.

Response: DHS does not believe any change is necessary. In some cases, trafficking victims may share information with LEAs about what they fear will happen to them if removed from the United States. In other cases, as the commenter stated, they may not. The instruction asks for the information if it exists and, if it is shared, it can help adjudicators understand the full facts of a case. If the LEA has no information about this topic and applicants want to show they have such a fear, they can submit other relevant credible evidence.

Comment: Regarding page 5, part 5, ''Family Members Implicated in Trafficking,'' one commenter expressed that requiring LEAs to include the names of family members ''who they believe to be affected by the trafficking may instill fear and uncertainty in a survivor's mind.'' The commenter stated that applicants may not want to disclose this information initially, and it could come out later creating the appearance of an inconsistency and affect their credibility.

Response: DHS understands trafficking victims may be hesitant to admit that a family member was involved in their trafficking; however, DHS will maintain this question. Again, the Form I–914, Supplement B Instructions do not require this information, and whether the information exists does not directly impact an applicant's eligibility for T nonimmigrant status. However, if an LEA has this information, it can help USCIS understand the full facts of an applicant's victimization. The information may also be relevant to the family member's eligibility for derivative T nonimmigrant status, as section 214(o)(1) of the INA, 8 U.S.C. 1184(o)(1), provides that an individual is ineligible for admission to the United States as a T nonimmigrant if there is substantial reason to believe they have committed an act of a severe form of trafficking in persons. If the family member is an immigrant USCIS may be able to use the information provided to deny or revoke immigration status if appropriate.

The following suggestions were resolved by subsequent revisions to the Form I–914, Supplement B Instructions:

- Page 1, ''What is the Purpose of Form I–914, Supplement B?,'' ''Description,'' add language that ''a formal investigation or prosecution is not required in order for a LEA to complete an endorsement'';
- Page 3, part 1, ''Victim Information,'' items 4–6, add that LEAs should provide this information if known;
- Page 4, part 3, ''Statement of Claim,'' items 1.a.-1.e., ''Type of Trafficking,'' remove the option for an LEA to indicate that the applicant for T nonimmigrant status is not a victim of trafficking;
- Page 4, part 4, ''Cooperation of the Victim,'' add that the victim must provide additional evidence if they claim they are unable to cooperate with law enforcement requests for assistance.

3. Changes to Form I–914, Form I–765, and Related Forms and Instructions Published With Final Rule

a. Discretionary and Technical Changes to Form I–914 Package

i. Overarching Changes

To improve readability, DHS made non-substantive edits to questions, headings and narrative in the forms and the associated instructions. DHS revised all forms and associated instructions to use gender neutral language. DHS has also updated all references to the regulations.

Throughout the forms and instructions, DHS has revised the reference to law enforcement officials to match the new definition found at new 8 CFR 214.201.

On the Form I–914 and Form I–914, Supplement A, in the ''For USCIS Use Only'' section, DHS changed its reference from ''Conditional Approval'' to ''Waitlisted,'' which is a more accurate descriptor for this internal process.

ii. Specific Form Changes

Form I–914

At new page 3, part 3, ''Additional Information,'' item 6, DHS has revised the question to read that the applicant *was* under 18 years of age at the time at least one of the acts of trafficking occurred, and as discussed above, has removed the parenthetical instructing the applicant to skip item 7 if they answered yes to item 6. The relevant inquiry is the applicant's age at the time at least one of the acts of trafficking occurred, not at the time of filing, as clarified in the Preamble and the regulations. Similarly, in item 7, DHS has added that an explanation of why an individual did not comply with reasonable requests for assistance is only required if the individual was over the age of 18 at the time one of the acts of trafficking occurred.

At new page 7, part 5, ''Information About Your Family Members,'' DHS has added ''Information About Your Spouse'' to item 1 to clarify that the information being requested (date of birth, country of birth, etc.) is for the applicant's spouse. DHS has also renumbered the items, and under ''Information About Your Children,'' has deleted ''relationship,'' as the relationship should always be ''child.''

DHS deleted language at the end of part 5 of Form I–914 regarding completion of Form I–914, Supplement A. This language is unnecessary to include in the form as the Form I–914 Instructions provide clear guidance on the topic.

As previously discussed, in updating standard language at new page 9, ''Applicant's Declaration and Certification,'' DHS added language so that the applicant understands that any disclosure will be in accordance with the confidentiality protections contained in 8 U.S.C. 1367 and new 8 CFR 214.216.

At new page 11, part 9, ''Additional Information,'' DHS has added ''if any'' after A-Number and instructed the applicant to sign and date each additional sheet of paper included with the application. These additions will help ensure the integrity of additional sheets included with the application.

Form I–914, Supplement A

DHS has revised the name of the Supplement A to ''Application for Derivative T Nonimmigrant Status,'' as the prior title incorrectly implied that the application could only be filed by family members of T–1 recipients, rather than T–1 applicants *or* recipients.

As discussed above, DHS has combined part 1 and part 2, such that they both are now under new part 1, ''Family Members for Whom You Are Filing,''

At new page 2, part 4, ''Information About Your Family Member,'' DHS has revised item 2, ''Other Names Used'' to state that the applicant should provide any other names ''your family member has used'' rather than ''you have used.'' This clarifies the information being sought.

At new page 5, part 5, ''Processing Information,'' DHS has revised the first paragraph for clarity.

DHS made the same additions in the Form I–914, Supplement A regarding release of information to new page 9, ''Applicant's Declaration and Certification'' that it made to the same section in Form I–914 and for the same reasons as discussed in the previous section discussing changes to Form I–914. In the same section, at the end of the paragraph just prior to the signature, DHS has added a note stating that if a family member is in the United States, they must verify the information in Supplement A and sign the Supplement A. Stakeholders had indicated confusion over who was required to sign the form. Finally, in the Applicant's signature block, DHS included ''(if any)'' after the ''Safe Phone Number'' field to indicate the field is not required, and revised item 7, to clarify that the signature is for the family member for whom the applicant is filing (rather than using the less clear terminology of ''derivative'').

Form I–914 Instructions

As noted previously, DHS has added language at new page 1, ''What Is the Purpose of Form I–914?,'' to refer applicants to the language of the definition of ''a severe form of trafficking'' included in the section ''Evidence to Establish T Nonimmigrant Status,'' to provide easy reference to the definition.

DHS added a note regarding filing for adult or minor children of eligible family members at new page 2, ''Who May File Form I–914,'' item 2(C)(3) to clarify that although applications for all eligible family members can be filed concurrently, USCIS will not approve the application for an adult or minor child unless the application for derivative T nonimmigrant status for their parent has already been approved, consistent with existing policy. USCIS Policy Memorandum, *New T Nonimmigrant Derivative Category and T and U Nonimmigrant Adjustment of Status for Applicants from the Commonwealth of the Northern Mariana Islands* (Oct. 30, 2014). DHS also added this note at new page 4, ''Completing Form I–914, Supplement A, Application for Derivative T Nonimmigrant Status,'' ''Part 1. Family Member For Whom You Are Filing.''

At new page 2, ''General Instructions,'' DHS has added a note for applicants with attorneys who wish to receive communication from USCIS about filings related to the I–914, they should include those additional form numbers on the Form G–28, Notice of Entry of Appearance as Attorney or Accredited Representative.

At new page 3, part 5, ''Information about Your Family Members,'' DHS clarified its guidance that all children regardless of age or marital status should be included, which is consistent with the change made to the Form I–914, Supplement A.

DHS had already included an instruction that applicants may provide other evidence and directs applicants to the relevant portion of the Form I–914, Supplement B Instructions; however, to emphasize that applicants must provide evidence to show victimization and cooperation with law enforcement, DHS has revised the language at new page 7, ''Completing Form I–914, Supplement B, Declaration of Law Enforcement Officer for Victim of Trafficking in Persons to state that an applicant ''must'' provide other evidence.

At new page 7, ''Initial Evidence,'' DHS deleted the instruction to submit a copy of the principal applicant's Form I–914 with a Form I–914, Supplement A, due to enhanced processing procedures. DHS has also added an instruction that an applicant must include all evidence at the time of filing, and that any credible evidence can be submitted.

At new page 8, ''Evidence to Establish T Nonimmigrant Status,'' item 2, DHS has replaced ''as a result of'' with ''on account of,'' as discussed above, for consistency with the regulation. DHS has also added a grant of Continued Presence as a type of evidence that can be submitted to establish that an individual is or has been a victim of trafficking. DHS has also added a note that an applicant may explain why they did not provide or attempt to obtain a Supplement B (even though it is not required). In addition, DHS has added a list of evidence that an applicant may submit to establish tier claim that they were unable to cooperate with requests from law enforcement due to trauma, or due to their age.

At new page 9, ''Personal Statement,'' DHS has revised the list of what the applicant's personal statement should include, due to changes in the regulations relating the contents of the statement at new 8 CFR 214.204(c).

At new page 11, DHS has included a personal statement from the principal applicant or a derivative family member as an example of credible evidence describing the danger of retaliation, due to changes in the regulations at new 8 CFR 214.211(f)(3). DHS has also changed the section on this page from ''Unavailable Documents'' to ''Required Evidence.'' DHS has removed any reference to secondary evidence, as well as the list of secondary evidence, and instead instructs that applicants may submit any credible evidence, consistent with the evidentiary standard USCIS applies.

At new page 12, ''Initial Processing,'' DHS has added that a Form I–914 may also be rejected if the form's *required fields* are not completely filled out or the forms do not include *required* initial evidence. This will support timely applicant notification if USCIS determines that they are missing critical information that would otherwise delay processing or result in a denial of their request. As a result, applicants will have an opportunity to resolve the issue(s) with their filing sooner than if USCIS accepted the filing and ultimately issued a Request for Additional Evidence or Notice of Intent to Deny. Additionally, this will allow USCIS to focus its limited resources on cases that are properly completed and filed.

At new page 12, DHS has added a section titled ''Bona Fide Determination Process'' to describe the new, streamlined bona fide determination

process codified at 8 CFR 214.205. At the same page, DHS has also revised ''Employment Authorization'' to include reference to the bona fide determination process.

Form I–914, Supplement B and Form I–914, Supplement B Instructions

DHS has changed the title of Form I–914, Supplement B to ''Declaration for Trafficking Victim'' for simplicity and for ease of reference.

DHS has revised Form I–914, Supplement B at new page 2, part 3, ''Statement of Claim,'' ''Note:'' to reference the correct regulatory provision because USCIS is redesignating these provisions in the final rule. DHS has removed the language from part 3, ''Statement of Claim'' requesting the LEA attach the results of any name or database inquiry, as well as any relevant reports and findings, because this requirement was removed from the regulations.

DHS clarified at new page 4, part 6, ''Attestation,'' that the officer signing Form I–914, Supplement B is certifying their belief that the individual has been a victim of a severe form of trafficking in persons and is not certifying that it is an established fact that the individual is a victim.

DHS has added a new part 7, ''Additional Information,'' and included references throughout Form I–914, Supplement B and its Instructions to use the new part 7 if extra space is needed to complete any section. DHS has revised ''law enforcement officer'' to ''certifying official'' in recognition of the fact that many individuals who complete Supplement B may not consider themselves law enforcement officials.

On new page 2 of the Instructions in the section, ''General Instructions,'' DHS has included guidance to leave a field blank if the answer to a question is unknown. DHS also added a new section below entitled ''Specific Instructions.''

DHS has clarified at new page 3, part 3, ''Statement of Claim,'' item 1, that the official signing the Form I–914, Supplement B should base their analysis as to whether an individual is or has been a victim of a severe form of trafficking in persons based on the practices to which the victim was subjected (as listed in new 8 CFR 214.201), rather than any criminal violations or prosecutions.

At new page 3, part 5, ''Family Members Implicated in Trafficking,'' DHS added a ''NOTE:'' and replaced the word ''principal applicant'' with ''victim'' based on regulatory changes to terminology.

Also at new page 3, ''How Can I Provide Further Information at a Later Date?,'' DHS has replaced the term ''revoke'' with ''withdraw or disavow'' to mirror a change in the wording of the regulations.

At new page 4, under ''DHS Privacy Notice,'' ''PURPOSE:'' and ''DISCLOSURE,'' DHS replaced ''you'' with ''the applicant,'' because Supplement B is filled out by someone other than the applicant. This clarifies that the purpose is to determine the applicant's eligibility, and that failure to provide the applicant's information could result in denial of their application.

Form I–765 Instructions

DHS has revised the Form I–765 Instructions to include a section titled ''Bona Fide Determination Process for T Nonimmigrant Status Principal Applicants and Eligible Family Members.'' This change describes the bona fide determination process, including how to obtain work authorization, codified at new 8 CFR 214.205.

List of Subjects

8 CFR Part 212

Administrative practice and procedure, Aliens, Immigration, Passports and visas, Reporting and recordkeeping requirements.

8 CFR Part 214

Administrative practice and procedure, Aliens, Cultural exchange program, Employment, Foreign officials, Health professions, Reporting and recordkeeping requirements, Students.

8 CFR Part 245

Aliens, Immigration, Reporting and recordkeeping requirements.

8 CFR Part 274a

Administrative practice and procedure, Aliens, Cultural exchange program, Employment, Penalties, Reporting and recordkeeping requirements, Students.

Accordingly, DHS amends chapter I of title 8 of the Code of Federal Regulations as follows:

PART 212—DOCUMENTARY REQUIREMENTS: NONIMMIGRANTS; WAIVERS; ADMISSION OF CERTAIN INADMISSIBLE ALIENS; PAROLE

■ 1. The authority citation for part 212 continues to read as follows:

Authority: 6 U.S.C. 111, 202(4) and 271; 8 U.S.C. 1101 and note, 1102, 1103, 1182 and note, 1184, 1185 note (section 7209 of Pub. L. 108–458, 118 Stat. 3638), 1187, 1223, 1225, 1226, 1227, 1255, 1359; 8 CFR part 2. Section 212.1(q) also issued under section 702, Pub. L. 110–229, 122 Stat. 754, 854.

■ 2. Revise § 212.16 to read as follows:

§ 212.16 Applications for exercise of discretion relating to T nonimmigrant status.

(a) *Requesting the waiver.* An applicant requesting a waiver of inadmissibility under section 212(d)(3)(A)(ii) or (d)(13) of the Act must submit an Application for Advance Permission to Enter as a Nonimmigrant, or successor form as designated by USCIS in accordance with 8 CFR 103.2.

(b) *Treatment of waiver request.* USCIS, in its discretion, may grant a waiver request based on section 212(d)(13) of the Act of the applicable ground(s) of inadmissibility, except USCIS may not waive a ground of inadmissibility based on section 212(a)(3), (a)(10)(C), or (a)(10)(E) of the Act. An applicant for T nonimmigrant status is not subject to the ground of inadmissibility based on section 212(a)(4) of the Act (public charge) and is not required to file a waiver form for the public charge ground. Waiver requests are subject to a determination of national interest and connection to victimization as follows.

(1) *National interest.* USCIS, in its discretion, may grant a waiver of inadmissibility request if it determines that it is in the national interest to exercise discretion to waive the applicable ground(s) of inadmissibility.

(2) *Connection to victimization.* An applicant requesting a waiver under section 212(d)(13) of the Act on grounds other than the health-related grounds described in section 212(a)(1) of the Act must establish that the activities rendering them inadmissible were caused by, or were incident to, the victimization described in section 101(a)(15)(T)(i)(I) of the Act.

(3) *Criminal grounds.* In exercising its discretion, USCIS will consider the number and seriousness of the criminal offenses and convictions that render an applicant inadmissible under the criminal and related grounds in section 212(a)(2) of the Act. In cases involving violent or dangerous crimes, USCIS will only exercise favorable discretion in extraordinary circumstances, unless the criminal activities were caused by, or were incident to, the victimization described under section 101(a)(15)(T)(i)(I) of the Act.

(c) *No appeal.* There is no appeal of a decision to deny a waiver request. Nothing in this section is intended to prevent an applicant from re-filing a

request for a waiver of a ground of inadmissibility in appropriate cases.

(d) *Revocation.* USCIS, at any time, may revoke a waiver previously authorized under section 212(d) of the Act. There is no appeal of a decision to revoke a waiver.

PART 214—NONIMMIGRANT CLASSES

■ 3. The authority citation for part 214 continues to read as follows:

Authority: 6 U.S.C. 202, 236; 8 U.S.C. 1101, 1102, 1103, 1182, 1184, 1186a, 1187, 1221, 1281, 1282, 1301–1305, 1357 and 1372; sec. 643, Pub. L. 104–208, 110 Stat. 3009–708; Pub. L. 106–386, 114 Stat. 1477–1480; section 141 of the Compacts of Free Association with the Federated States of Micronesia and the Republic of the Marshall Islands, and with the Government of Palau, 48 U.S.C. 1901 note, and 1931 note, respectively; 48 U.S.C. 1806; 8 CFR part 2; Pub. L. 115–218, 132 Stat. 1547 (48 U.S.C. 1806).

§§ 214.1 through 214.15 [Designated as Subpart A]

■ 4. Designate §§ 214.1 through 214.15 as subpart A and add a heading for subpart A to read as follows:

Subpart A—Classes A through S

■ 5. Revise § 214.11 to read as follows:

§ 214.11 Former regulations for noncitizen victims of severe forms of trafficking in persons.

For DHS and USCIS regulations governing Noncitizen Victims of Severe Forms of Trafficking in Persons, see subpart C of this part.

Subpart B—[Added and Reserved]

■ 6. Add and reserve subpart B.

■ 7. Add subpart C to read as follows:

Subpart C—Noncitizen Victims of Severe Forms of Trafficking in Persons

Sec.

§ 214.200 Scope of this subpart.

This subpart governs the submission and adjudication of an Application for T Nonimmigrant Status, including a request by a principal applicant on behalf of an eligible family member for derivative status.

§ 214.201 Definitions.

Where applicable, USCIS will apply the definitions provided in section 103 and 107(e) of the Trafficking Victims Protection Act (TVPA), 22 U.S.C. 7102, and 8 U.S.C. 1101, 1182(d), and 1184, with due regard for the definitions and application of these terms in 28 CFR part 1100 and the provisions of 18 U.S.C. 77. As used in this section the term:

Abuse or threatened abuse of the legal process means the use or threatened use of a law or legal process whether administrative, civil, or criminal, in any manner or for any purpose for which the law was not designed, in order to exert pressure on another person to cause that person to take some action or refrain from taking some action.

Application for Derivative T Nonimmigrant Status means a request by a principal applicant on behalf of an eligible family member for derivative T–2, T–3, T–4, T–5, or T–6 nonimmigrant status on an Application for T Nonimmigrant Status.

Application for T Nonimmigrant Status means a request by a principal applicant for T–1 nonimmigrant status on the form designated by USCIS for that purpose.

Child means a person described in section 101(b)(1) of the Act.

Coercion means threats of serious harm to or physical restraint against any person; any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or the abuse or threatened abuse of the legal process.

Commercial sex act means any sex act on account of which anything of value is given to or received by any person.

Debt bondage means the status or condition of a debtor arising from a pledge by the debtor of their personal services or those of a person under their control as a security for debt, if the value of those services as reasonably assessed is not applied toward the liquidation of the debt or the length and nature of those services are not respectively limited and defined.

Derivative T nonimmigrant means an eligible family member who has been granted T–2, T–3, T–4, T–5, or T–6 derivative status. A family member outside of the United States is not a derivative T nonimmigrant until they are issued a T–2, T–3, T–4, T–5, or T–6 visa by the Department of State and they are admitted to the United States in derivative T nonimmigrant status.

Eligible family member means:

(1) A family member eligible for derivative T nonimmigrant status based on their relationship to a principal applicant or T–1 nonimmigrant and, if required, upon a showing of a present danger of retaliation;

(2) In the case of a principal applicant or T–1 nonimmigrant who is 21 years of age or older, the spouse and children of such applicant;

(3) In the case of a principal applicant or T–1 nonimmigrant under 21 years of age, the spouse, children, unmarried siblings under 18 years of age, and parents of such applicant; and

(4) Regardless of the age of a principal applicant or T–1 nonimmigrant, any parent or unmarried sibling under 18 years of age, or adult or minor child of a derivative of such principal applicant or T–1 nonimmigrant where the family member faces a present danger of retaliation as a result of the principal applicant or T–1 nonimmigrant's escape from a severe form of trafficking in persons or cooperation with law enforcement.

Involuntary servitude, for the purposes of this part:

(1) Means a condition of servitude induced by means of any scheme, plan, or pattern intended to cause a person to believe that, if the person did not enter into or continue in such condition, that person or another person would suffer serious harm or physical restraint; or a condition of servitude induced by the abuse or threatened abuse of legal process; and

(2) Includes a condition of servitude in which the victim is forced to work for the trafficker by the use or threat of physical restraint or physical injury, or by the use or threat of coercion through the law or the legal process. This definition encompasses those cases in which the trafficker holds the victim in servitude by placing the victim in fear of such physical restraint or injury or legal coercion.

Law Enforcement Agency (LEA) means a Federal, State, Tribal, or local law enforcement agency, prosecutor, judge, labor agency, children's protective services agency, adult protective services agency, or other

authority that has the responsibility and authority for the detection, investigation, and/or prosecution of severe forms of trafficking in persons under any administrative, civil, criminal, or Tribal laws. Federal LEAs include but are not limited to the following: Department of Justice (including U.S. Attorneys' Offices, Civil Rights Division, Criminal Division, U.S. Marshals Service, Federal Bureau of Investigation (FBI)); U.S. Immigration and Customs Enforcement (ICE), U.S. Customs and Border Protection (CBP); Department of State (including Diplomatic Security Service); Department of Labor (DOL); Equal Employment Opportunity Commission (EEOC); National Labor Relations Board (NLRB); Offices of Inspectors General (OIG); Bureau of Indian Affairs (BIA) Police, and Offices for Civil Rights and Civil Liberties.

Law Enforcement Agency (LEA) declaration means an official LEA declaration submitted on the Declaration for Trafficking Victim.

Law enforcement involvement, for purposes of establishing physical presence, means law enforcement action beyond receiving the applicant's reporting and may include the LEA interviewing the applicant or otherwise becoming involved in detecting, investigating, or prosecuting the acts of trafficking.

Peonage means a status or condition of involuntary servitude based upon real or alleged indebtedness.

Principal applicant means a noncitizen who has filed an Application for T Nonimmigrant Status.

Request for assistance means a request made by an LEA to a victim to assist in the detection, investigation, or prosecution of the acts of trafficking in persons or the investigation of a crime where acts of trafficking are at least one central reason for the commission of that crime. The reasonableness of the request is assessed using the factors delineated at § 214.208(c).

Serious harm means any harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing labor or services in order to avoid incurring that harm.

Severe form of trafficking in persons means sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act is under the age of 18 years; or the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.

Sex trafficking means the recruitment, harboring, transportation, provision, obtaining, patronizing, or soliciting of a person for the purpose of a commercial sex act.

T–1 nonimmigrant means the victim of a severe form of trafficking in persons who has been granted T–1 nonimmigrant status.

United States means the fifty States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the U.S. Virgin Islands, Guam, and the Commonwealth of the Northern Mariana Islands.

Victim of a severe form of trafficking in persons (victim) means a noncitizen who is or has been subjected to a severe form of trafficking in persons.

§ 214.202 Eligibility for T–1 nonimmigrant status.

An applicant is eligible for T–1 nonimmigrant status under section 101(a)(15)(T)(i) of the Act if they demonstrate all of the following, subject to section 214(o) of the Act:

(a) *Victim.* The applicant is or has been a victim of a severe form of trafficking in persons, according to § 214.206.

(b) *Physical presence.* The applicant is physically present in the United States, American Samoa, the Commonwealth of the Northern Mariana Islands, or at a port-of-entry thereto, according to § 214.207.

(c) *Compliance with any reasonable request for assistance.* The applicant has complied with any reasonable request for assistance from law enforcement or meets one of the conditions described below. The reasonableness of the request is assessed using the factors delineated at § 214.208(c).

(1) *Exemption for minor victims.* An applicant who was under 18 years of age at the time at least one act of trafficking occurred is not required to comply with any reasonable request for assistance.

(2) *Exception for trauma.* An applicant who, due to physical or psychological trauma, is unable to cooperate with a reasonable request for assistance from law enforcement is not required to comply with such reasonable request.

(d) *Hardship.* The applicant would suffer extreme hardship involving unusual and severe harm upon removal, according to § 214.209.

(e) *Prohibition against traffickers in persons.* No applicant will be eligible to receive T nonimmigrant status if there is substantial reason to believe that the applicant has committed an act of a severe form of trafficking in persons.

§ 214.203 Period of admission.

(a) *T–1 Principal.* T–1 nonimmigrant status may be approved for a period not to exceed 4 years, except as provided in section 214(o)(7) of the Act.

(b) *Derivative family members.* A derivative family member who is otherwise eligible for admission may be granted T–2, T–3, T–4, T–5, or T–6 nonimmigrant status for an initial period that does not exceed the expiration date of the initial period approved for the T–1 principal applicant, except as provided in section 214(o)(7) of the Act.

(c) *Notice.* At the time an applicant is approved for T nonimmigrant status or receives an extension of T nonimmigrant status, USCIS will notify the applicant when their T nonimmigrant status will expire. USCIS also will notify the applicant that the failure to apply for adjustment of status to lawful permanent resident during the period of T nonimmigrant status, as set forth in 8 CFR 245.23, will result in termination of the applicant's T nonimmigrant status in the United States at the end of the 4-year period or any extension.

§ 214.204 Application.

(a) *Jurisdiction.* USCIS has sole jurisdiction over all applications for T nonimmigrant status.

(b) *Filing an application.* An applicant seeking T–1 nonimmigrant status must submit an Application for T Nonimmigrant Status on the form designated by USCIS in accordance with 8 CFR 103.2 and with the evidence described in paragraph (c) of this section.

(1) *Applicants in pending immigration proceedings.* (i) An applicant in removal proceedings under section 240 of the Act, or in exclusion or deportation proceedings under former sections 236 or 242 of the Act (as in effect prior to April 1, 1997), and who wishes to apply for T–1 nonimmigrant status must file an Application for T Nonimmigrant Status directly with USCIS.

(ii) In its discretion, ICE may exercise prosecutorial discretion, as appropriate, while USCIS adjudicates the Application for T Nonimmigrant Status, including applications for derivatives.

(2) *Applicants with final orders of removal, deportation, or exclusion.* An applicant subject to a final order of removal, deportation, or exclusion may file an Application for T Nonimmigrant Status directly with USCIS.

(i) The filing of an Application for T Nonimmigrant Status has no effect on DHS authority or discretion to execute a final order of removal, although the applicant may request an administrative stay of removal pursuant to 8 CFR 241.6(a).

(ii) If the applicant is in detention pending execution of the final order, the period of detention (under the standards of 8 CFR 241.4) reasonably necessary to bring about the applicant's removal will be extended during the period the stay is in effect.

(iii) If USCIS subsequently determines under the procedures in § 214.205 that the application is bona fide, the final order of removal, deportation, or exclusion will be automatically stayed, and the stay will remain in effect until a final decision is made on the Application for T Nonimmigrant Status.

(3) *Referral of applicants for removal proceedings.* USCIS generally will not refer an applicant for T nonimmigrant status for removal proceedings while the application is pending or following denial of the application, absent serious aggravating circumstances, such as the existence of an egregious criminal history, a threat to national security, or where the applicant is complicit in committing an act of trafficking.

(4) *Minor applicants.* When USCIS receives an application from a principal applicant under the age of 18, USCIS will notify the Department of Health and Human Services to facilitate the provision of interim assistance.

(c) *Initial evidence.* An Application for T Nonimmigrant Status must include:

(1) A detailed, signed personal statement from the applicant, in their own words, addressing:

(i) The circumstances surrounding the applicant's victimization, including:

(A) The nature of the victimization; and

(B) To the extent possible, the following:

(*1*) When the victimization occurred;

(*2*) How long the trafficking lasted;

(*3*) How and when they escaped, were rescued, or otherwise became separated from the traffickers;

(*4*) The events surrounding the trafficking;

(*5*) Who was responsible for the trafficking; and

(*6*) The circumstances surrounding their entry into the United States, if related to the trafficking;

(ii) How the applicant's physical presence in the United States relates to the trafficking; (iii) The hardship, including harm or mistreatment the applicant fears if they are removed from the United States; and

(iv) Whether they have complied with any reasonable law enforcement request for assistance and whether any criminal, civil or administrative records relating to the acts of trafficking exist, if known, (or if applicable, why the age exemption or trauma exception applies); and

(2) Any credible evidence that supports any of the eligibility requirements set out in §§ 214.206 through 214.208.

(d) *Inadmissible applicants.* If an applicant is inadmissible to the United States, they must submit a request for a waiver of inadmissibility on the Application for Advance Permission to Enter as a Nonimmigrant, or successor form as designated by USCIS accordance with 8 CFR 103.2, in accordance with form instructions and 8 CFR 212.16, and accompanied by supporting evidence.

(e) *Evidence from law enforcement.* An applicant may wish to submit evidence from an LEA to help establish eligibility, including victimization and the compliance with reasonable requests for assistance. An LEA declaration:

(1) Is optional evidence;

(2) Is not given any special evidentiary weight;

(3) Does not grant an immigration benefit and does not lead to automatic approval of the Application for T Nonimmigrant Status;

(4) Must be submitted on the ''Declaration for Trafficking Victim,'' and must be signed by a supervising official responsible for the detection, investigation, or prosecution of severe forms of trafficking in persons;

(5) Is completed at the discretion of the certifying official; and

(6) Does not require that a formal investigation or prosecution be initiated.

(f) *Any credible evidence.* All evidence demonstrating cooperation with law enforcement will be considered under the any credible evidence standard.

(g) *USCIS determination.* USCIS, not the LEA, will determine if the applicant was or is a victim of a severe form of trafficking in persons, and otherwise meets the eligibility requirements for T nonimmigrant status.

(h) *Disavowed or withdrawn LEA declaration.* An LEA may disavow or withdraw the contents of a previously submitted declaration and should provide a detailed explanation of its reasoning in writing. After disavowal or withdrawal, the LEA declaration generally will no longer be considered as evidence of the applicant's compliance with requests for assistance in the LEA's detection, investigation, or prosecution, but may be considered for other purposes.

(i) *Continued Presence.* An applicant granted Continued Presence under 28 CFR 1100.35 should submit documentation of the grant of Continued Presence. If revoked, the grant of Continued Presence will generally no longer be considered as evidence of the applicant's compliance with requests for assistance in the LEA's investigation or prosecution but may be considered for other purposes.

(j) *Other evidence.* An applicant may also submit any evidence regarding entry or admission into the United States or permission to remain in the United States. An applicant may also note that such evidence is contained in their immigration file.

(k) *Biometric services.* All applicants for T–1 nonimmigrant status must submit biometrics in accordance with 8 CFR 103.16.

(l) *Evidentiary standards, standard of proof, and burden of proof.* (1) The burden is on the applicant to demonstrate eligibility for T–1 nonimmigrant status by a preponderance of the evidence. The applicant may submit any credible evidence relating to a T nonimmigrant application for consideration by USCIS.

(2) USCIS will conduct a review of all evidence and may investigate any aspect of the application.

(3) Evidence previously submitted by the applicant for any immigration benefit request or relief may be used by USCIS in evaluating the eligibility of an applicant for T–1 nonimmigrant status. USCIS will not be bound by previous factual determinations made in connection with a prior application or petition for any immigration benefit or relief. USCIS will determine, in its sole discretion, the evidentiary value of previously or concurrently submitted evidence.

(4) USCIS will consider the totality of the evidence the applicant submitted and other evidence available to USCIS in evaluating an Application for T Nonimmigrant Status.

(m) *Bona fide determination.* Once an applicant submits an Application for T Nonimmigrant Status or Application for Derivative T Nonimmigrant Status, USCIS will conduct an initial review to determine if the application is bona fide under the provisions of § 214.205. USCIS will conduct an initial review of an eligible family member's Application for Derivative T Nonimmigrant Status to determine if the application is bona fide if the principal's Application for T Nonimmigrant Status has been deemed bona fide.

(n) *Decision.* After completing its review of the application and evidence, USCIS will issue a decision approving

or denying the application in accordance with 8 CFR 103.3.

(o) *Approval.* If USCIS determines that the applicant is eligible for T–1 nonimmigrant status, USCIS will approve the application and grant T–1 nonimmigrant status, subject to the annual limitation as provided in § 214.210. USCIS will provide the applicant with evidence of T–1 nonimmigrant status. USCIS may also notify other parties and entities of the approval as it determines appropriate, including any LEA providing an LEA declaration and the Department of Health and Human Service's Office of Refugee Resettlement, consistent with 8 U.S.C. 1367.

(1) *Applicants with an outstanding order of removal, deportation, or exclusion issued by DHS.* For an applicant who is the subject of an order of removal, deportation, or exclusion issued by DHS, the order will be deemed cancelled by operation of law as of the date of the USCIS approval of the application.

(2) *Applicants with an outstanding order of removal, deportation, or exclusion issued by the Department of Justice.* An applicant who is the subject of an order of removal, deportation or exclusion issued by an immigration judge or the Board of Immigration Appeals (Board) may seek rescission of such order by filing a motion to reopen and terminate removal proceedings with the immigration judge or the Board. ICE may agree, as a matter of discretion, to join such motion to overcome any applicable time and numerical limitations of 8 CFR 1003.2 and 1003.23.

(3) *Employment authorization.* An individual granted T–1 nonimmigrant status is authorized to work incident to status. An applicant does not need to file a separate Application for Employment Authorization to be granted employment authorization. USCIS will issue an initial Employment Authorization Document (EAD) to such T–1 nonimmigrants for the duration of the T–1 nonimmigrant status. An applicant granted T–1 nonimmigrant status seeking to replace an EAD that was lost, stolen, or destroyed must file an Application for Employment Authorization in accordance with form instructions.

(p) *Travel abroad.* In order to return to the United States after travel abroad and continue to hold T–1 nonimmigrant status, a T–1 nonimmigrant must be granted advance parole pursuant to section 212(d)(5) of the Act prior to departing the United States.

(q) *Denial.* Upon denial of an application, USCIS will notify the applicant in accordance with 8 CFR 103.3. USCIS may also notify any LEA providing an LEA declaration and the Department of Health and Human Service's Office of Refugee Resettlement. If an applicant appeals a denial in accordance with 8 CFR 103.3, the denial will not become final until the administrative appeal is decided.

(1) *Effect on bona fide determination.* Upon denial of an application, any benefits derived from a bona fide determination will automatically be revoked when the denial becomes final.

(2) *Applicants previously in removal proceedings.* In the case of an applicant who was previously in removal proceedings that were terminated on the basis of a pending Application for T Nonimmigrant Status, once a denial becomes final, DHS may file a new Notice to Appear to place the individual in removal proceedings again.

(3) *Applicants subject to an order of removal, deportation, or exclusion.* In the case of an applicant who is subject to an order of removal, deportation, or exclusion that had been stayed due to the pending Application for T Nonimmigrant Status, the stay will be automatically lifted as of the date the denial becomes final.

§ 214.205 Bona fide determination.

(a) *Bona fide determinations for principal applicants for T nonimmigrant status.* If an Application for T Nonimmigrant Status is submitted after August 28, 2024, USCIS will conduct an initial review to determine if the application is bona fide.

(1) *Request for evidence.* If an Application for T Nonimmigrant Status was pending as of August 28, 2024, and additional evidence is required to establish eligibility for principal T nonimmigrant status, USCIS will issue a request for evidence, and conduct a bona fide review based on available evidence.

(2) *Initial review criteria.* After initial review, USCIS will deem an Application for T Nonimmigrant Status bona fide if:

(i) The applicant has submitted a properly filed and complete Application for T Nonimmigrant Status;

(ii) The applicant has submitted a signed personal statement; and

(iii) The results of initial background checks are complete, have been reviewed, and do not present national security concerns.

(3) *Secondary review criteria.* If initial review does not establish an Application for T Nonimmigrant Status is bona fide, USCIS will conduct a full T nonimmigrant status eligibility review. An Application for T Nonimmigrant Status that meets all eligibility requirements will be approved, or if the statutory cap has been reached, will receive a bona fide determination.

(b) *Bona fide determinations for eligible family members in the United States.* Once a principal applicant's application has been deemed bona fide, USCIS will conduct an initial review for any eligible family members in the United States who have filed an Application for Derivative T Nonimmigrant Status to determine whether their applications are bona fide.

(1) If an Application for Derivative T Nonimmigrant Status was pending as of August 28, 2024, and additional evidence is required to establish eligibility for derivative T nonimmigrant status, USCIS will issue a request for evidence and conduct a bona fide review based on available evidence.

(2) After initial review, USCIS will determine an Application for Derivative T Nonimmigrant Status is bona fide if:

(i) The eligible family member is in the United States at the time of the bona fide determination;

(ii) The principal applicant or T–1 nonimmigrant has submitted a properly filed and complete Application for Derivative T Nonimmigrant Status;

(iii) The Application for Derivative T Nonimmigrant Status is supported by credible evidence that the derivative applicant qualifies as an eligible family member; and

(iv) Initial background checks are complete, have been reviewed, and do not present national security concerns.

(3) If initial review does not establish an Application for Derivative T Nonimmigrant Status is bona fide, USCIS will conduct a full T nonimmigrant status eligibility review. An Application for Derivative T Nonimmigrant Status that meets all eligibility requirements during this secondary review will be approved, or if the statutory cap has been reached, will receive a bona fide determination.

(c) *Notice of USCIS determination.* If USCIS determines that the Application for T Nonimmigrant Status or Application for Derivative T Nonimmigrant Status is bona fide under this section, USCIS will issue written notice of that determination, and inform the applicant that they may be considered for deferred action and may file an Application for Employment Authorization if they have not already filed one. The notice will also inform the applicant that any final order of removal, deportation, or exclusion is automatically stayed as set forth in paragraph (g) of this section. An

application will be treated as a bona fide application as of the date of the notice.

(d) *Not considered bona fide.* If an application is incomplete or presents national security concerns, it will not be considered bona fide. There are no motion or appeal rights for a bona fide determination upon initial review under this section.

(1) For applications found not to be bona fide upon initial review, USCIS will proceed to full T nonimmigrant status eligibility review as described in paragraphs (a)(3) and (b)(3) of this section, generally in order of application receipt date.

(2) If an application is found through this review not to establish eligibility for T nonimmigrant status, the application will be denied in accordance with § 214.204(q).

(e) *Exercise of discretion.* (1) Once USCIS deems an Application for T Nonimmigrant Status or Application for Derivative T Nonimmigrant Status bona fide, USCIS may consider the applicant for deferred action.

(2) If, after review of the available information including background checks, USCIS determines that deferred action is warranted in a particular case as an exercise of enforcement discretion, USCIS will then proceed to adjudication of the Application for Employment Authorization, if one has been filed.

(3) There are no motion or appeal rights for the exercise of enforcement discretion under this section.

(f) *Bona fide determinations for applicants in removal proceedings.* This section applies to applicants whose Applications for T Nonimmigrant Status or Applications for Derivative T Nonimmigrant Status have been deemed bona fide and who are in removal proceedings under section 240 of the Act, or in exclusion or deportation proceedings under former sections 236 or 242 of the Act (as in effect prior to April 1, 1997). In such cases, ICE may exercise prosecutorial discretion, as appropriate, while USCIS adjudicates an Application for Derivative T Nonimmigrant Status.

(g) *Stay of final order of removal, deportation, or exclusion.* (1) If USCIS determines that an application is bona fide it automatically stays the execution of any final order of removal, deportation, or exclusion.

(2) This administrative stay will remain in effect until any adverse decision becomes final.

(3) Neither an immigration judge nor the Board has jurisdiction to adjudicate an application for a stay of removal, deportation, or exclusion on the basis of the filing of an Application for T Nonimmigrant Status or Application for Derivative T Nonimmigrant Status.

§ 214.206 Victim of a severe form of trafficking in persons.

(a) *Evidence.* The applicant must submit evidence that demonstrates:

(1) That they are or have been a victim of a severe form of trafficking in persons. Except in instances of sex trafficking involving victims under 18 years of age, severe forms of trafficking in persons must involve both a particular means (force, fraud, or coercion) and a particular end or a particular intended end (sex trafficking, involuntary servitude, peonage, debt bondage, or slavery); or

(2) If an applicant has not performed labor or services, or a commercial sex act, they must establish that they were recruited, transported, harbored, provided, or obtained for the purposes of subjection to sex trafficking, involuntary servitude, peonage, debt bondage, or slavery, or patronized or solicited for the purposes of subjection to sex trafficking.

(3) The applicant may satisfy the requirements under paragraph (a)(1) or (2) of this section by submitting:

(i) The applicant's personal statement, which should describe the circumstances of the victimization suffered. For more information regarding the personal statement, see § 214.204(c).

(ii) Any other credible evidence, including but not limited to:

(A) Trial transcripts;

(B) Court documents;

(C) Police reports or other documentation from an LEA;

(D) News articles;

(E) Copies of reimbursement forms for travel to and from court;

(F) Affidavits from case managers, therapists, medical professionals, witnesses, or other victims in the same trafficking scheme;

(G) Correspondence or other documentation from the trafficker;

(H) Documents used in furtherance of the trafficking scheme such as recruitment materials, advertisements, pay stubs, logbooks, or contracts;

(I) Photographs or images;

(J) An LEA declaration as described in § 214.204(c); or

(K) Documentation of a grant of Continued Presence under 28 CFR 1100.35.

(b) [Reserved]

§ 214.207 Physical presence.

(a) *Requirement.* To be eligible for T–1 nonimmigrant status, an applicant must be physically present in the United States, American Samoa, the Commonwealth of the Northern Mariana Islands, or at a port-of-entry thereto on account of such trafficking. USCIS considers the applicant's presence in the United States at the time of application. An applicant must demonstrate that they are physically present under one of the following grounds:

(1) Are currently being subjected to a severe form of trafficking in persons;

(2) Were liberated from a severe form of trafficking in persons by an LEA, at any time prior to filing the Application for T Nonimmigrant Status;

(3) Escaped a severe form of trafficking in persons before an LEA was involved, at any time prior to filing the Application for T Nonimmigrant Status;

(4) Were subject to a severe form of trafficking in persons at some point in the past and their current presence in the United States is directly related to the original trafficking in persons, regardless of the length of time that has passed between the trafficking and filing of the Application for T Nonimmigrant Status; or

(5) Have been allowed entry into the United States for participation in the detection, investigation, prosecution, or judicial processes associated with an act or perpetrator of trafficking.

(i) An applicant will be deemed physically present under this provision regardless of where such trafficking occurred.

(ii) To demonstrate that the applicant's physical presence is for participation in an investigative or judicial process, the applicant must submit documentation to show valid entry into the United States and evidence that this valid entry is for participation in investigative or judicial processes associated with an act or perpetrator of trafficking.

(b) *Departure from the United States.* An applicant who has voluntarily departed from or has been removed from the United States at any time after the act of a severe form of trafficking in persons is deemed not to be present in the United States as a result of such trafficking in persons unless:

(1) The applicant's reentry into the United States was the result of the continued victimization of the applicant;

(2) The applicant is a victim of a new incident of a severe form of trafficking in persons;

(3) The applicant has been allowed reentry into the United States for participation in the detection, investigation, prosecution, or judicial process associated with an act or a perpetrator of trafficking. An applicant will be deemed physically present

under this provision regardless of where such trafficking occurred. To demonstrate that the applicant's physical presence is for participation in an investigative or judicial process, the applicant must submit documentation to show valid entry into the United States and evidence that this valid entry is for participation in investigative or judicial processes associated with an act or perpetrator of trafficking;

(4) The applicant's presence in the United States is on account of their past or current participation in investigative or judicial processes associated with an act or perpetrator of trafficking, regardless of where such trafficking occurred. The applicant may satisfy physical presence under this provision regardless of the length of time that has passed between their participation in an investigative or judicial process associated with an act or perpetrator of trafficking and the filing of the Application for T Nonimmigrant Status; or

(5) The applicant returned to the United States and received treatment or services related to their victimization that cannot be provided in their home country or last place of residence outside the United States.

(c) *Evidence.* The applicant must submit evidence that demonstrates that their physical presence in the United States, American Samoa, the Commonwealth of the Northern Mariana Islands, or at a port-of-entry thereto, is on account of trafficking in persons. USCIS will consider any credible evidence presented to determine the physical presence requirement, including but not limited to:

(1) A detailed personal statement describing the applicant's current presence in the United States on account of the trafficking, including:

(i) The circumstances describing the victimization, including when the events took place, the length and severity of the trafficking, how and when the applicant escaped, was rescued, or otherwise became separated from the traffickers, when the trafficking ended, and when and how the applicant learned that they were a victim of human trafficking;

(ii) An explanation of any physical health effects or psychological trauma the applicant has suffered as a result of the trafficking and a description of how this trauma impacts the applicant's life at the time of filing;

(iii) The financial impact of the victimization;

(iv) The applicant's ability to access mental health services, social services, and legal services;

(v) Any relevant description of the applicant's cooperation with law enforcement at the time of filing;

(vi) A description of how the victimization relates to the applicant's current presence in the U.S., if relevant.

(2) Affidavits, evaluations, diagnoses, or other records from the applicant's service providers (including therapists, psychologists, psychiatrists, and social workers) documenting the therapeutic, psychological, or medical services the applicant has sought or is currently accessing as a result of victimization and that describe how the applicant's life is being impacted by the trauma at the time of filing, and describing any mental health conditions resulting from the trafficking;

(3) Documentation of any stabilizing services and benefits, including financial, language, housing, or legal resources, the applicant is accessing or has accessed as a result of being trafficked. For those services and benefits not currently being accessed, the record should demonstrate how those past services and benefits related to trauma the applicant is experiencing at the time of filing;

(4) An LEA declaration as described in § 214.204(c) or other statements from LEAs documenting the cooperation between the applicant and the LEA or law enforcement involvement in liberating the applicant;

(5) Documentation of a grant of Continued Presence under 28 CFR 1100.35;

(6) Any other documentation of entry into the United States or permission to remain in the United States, such as parole under section 212(d)(5) of the Act, or a notation that such evidence is contained in the applicant's immigration file;

(7) Copies of news reports, law enforcement records, or court records; or

(8) Any other credible evidence to establish the applicant's current presence in the United States is on account of the trafficking victimization.

§ 214.208 Compliance with any reasonable request for assistance in the detection, investigation, or prosecution of an act of trafficking.

(a) *Requirement.* To be eligible for T–1 nonimmigrant status, an applicant must have complied with any reasonable request for assistance from an LEA in the detection, investigation, or prosecution of acts of trafficking or the investigation of a crime where acts of trafficking are at least one central reason for the commission of that crime, unless the applicant meets an exception or exemption described in paragraph (e) of this section.

(b) *Applicability.* An applicant must, at a minimum, contact an LEA with proper jurisdiction to report the acts of a severe form of trafficking in persons. Credible evidence documenting a single contact with an LEA may suffice. Reporting may be telephonic, electronic, or through other means. An applicant who has never had contact with an LEA regarding the acts of a severe form of trafficking in persons will not be eligible for T–1 nonimmigrant status, unless they meet an exemption or exception as described in paragraph (e) of this section.

(c) *Reasonable requests.* An applicant need only show compliance with reasonable requests made by an LEA for assistance in the investigation or prosecution of the acts of trafficking in persons. The reasonableness of the request depends on the totality of the circumstances. Factors to consider include, but are not limited to:

(1) General law enforcement and prosecutorial practices;

(2) The nature of the victimization;

(3) The specific circumstances of the victim;

(4) The victim's capacity, competency, or lack thereof;

(5) Trauma suffered (both mental and physical) or whether the request would cause further trauma;

(6) Access to support services;

(7) The safety of the victim or the victim's family;

(8) Compliance with previous requests and the extent of such compliance;

(9) Whether the request would yield essential information;

(10) Whether the information could be obtained without the victim's compliance;

(11) Whether a qualified interpreter or attorney was present to ensure the victim understood the request;

(12) Cultural, religious, or moral objections to the request;

(13) The time the victim had to comply with the request;

(14) The age, health, and maturity of the victim; and

(15) Any other relevant circumstances surrounding the request.

(d) *Evidence.* An applicant must submit evidence that demonstrates that they have complied with any reasonable request for assistance in a Federal, State, Tribal, or local detection, investigation, or prosecution of trafficking in persons, or a crime where trafficking in persons is at least one central reason for the commission of that crime. In the alternative, an applicant can submit evidence to demonstrate that they should be exempt under paragraph (e) of this section. If USCIS has any question

about whether the applicant has complied with a reasonable request for assistance, USCIS may contact the LEA. The applicant may satisfy this requirement by submitting any of the following:

(1) An LEA declaration as described in § 214.204(c);

(2) Documentation of a grant of Continued Presence under 28 CFR 1100.35; or

(3) Any other evidence, including affidavits of witnesses. In the victim's statement prescribed by § 214.204(c), the applicant should show that an LEA that has responsibility and authority for the detection, investigation, or prosecution of severe forms of trafficking in persons has information about such trafficking in persons, that the victim has complied with any reasonable request for assistance in the investigation or prosecution of such acts of trafficking, and, if the victim did not report the crime, why the crime was not previously reported.

(e) *Exception or exemption.* An applicant who has not had contact with an LEA or who has not complied with any reasonable request may be excepted or exempt from the requirement to comply with any reasonable request for assistance in an investigation or prosecution if either of the following circumstances apply:

(1) *Trauma.* The applicant is unable to cooperate with a reasonable request for assistance from an LEA in the detection, investigation, or prosecution of acts of trafficking in persons due to physical or psychological trauma. An applicant must submit credible evidence of the trauma experienced. The applicant may satisfy this exception by submitting:

(i) A personal statement describing the trauma and explaining the circumstances surrounding the trauma the applicant experienced, including their age, background, maturity, health, disability, and any history of abuse or exploitation;

(ii) A signed statement from a qualified professional, such as a medical professional, mental health professional, social worker, or victim advocate, who attests to the victim's mental state or medical condition;

(iii) Medical or psychological records documenting the trauma or its impact;

(iv) Witness statements;

(v) Photographs;

(vi) Police reports;

(vii) Court records and court orders;

(viii) Disability determinations;

(ix) Government agency findings; or

(x) Any other credible evidence.

(2) *Age.* The applicant was under 18 years of age at the time of victimization. An applicant who was under 18 years of age at the time at least one of the acts of trafficking occurred is exempt from the requirement to comply with any reasonable request for assistance in the detection, investigation, or prosecution, but they must submit evidence of their age at the time of the victimization. Where available, an applicant should include an official copy of their birth certificate, a passport, or a certified medical opinion. USCIS will also consider any other credible evidence submitted regarding the age of the applicant.

(f) *Exception or exemption established.* When an applicant has established that the exception or exemption applies, they are not required to have had any contact with law enforcement or comply with future requests for assistance, including reporting the trafficking. USCIS reserves the authority and discretion to contact the LEA involved in the case, if appropriate.

§ 214.209 Extreme hardship involving unusual and severe harm.

To be eligible for T–1 nonimmigrant status, an applicant must demonstrate that removal from the United States would subject the applicant to extreme hardship involving unusual and severe harm.

(a) *Standard.* A finding of extreme hardship involving unusual and severe harm may be based on the following factors.

(b) *Factors.* Factors that may be considered in evaluating whether removal would result in extreme hardship involving unusual and severe harm should include both traditional extreme hardship factors and factors associated with having been a victim of a severe form of trafficking in persons. These factors include, but are not limited to:

(1) The age, maturity, and personal circumstances of the applicant;

(2) Any physical or psychological issues the applicant has that necessitate medical or psychological care not reasonably available in the foreign country to which the applicant would be returned;

(3) The nature and extent of the physical and psychological consequences of having been a victim of a severe form of trafficking in persons;

(4) The impact of the loss of access to the United States courts and the criminal justice system for purposes relating to the incident of a severe form of trafficking in persons or other crimes perpetrated against the applicant, including criminal and civil redress for acts of trafficking in persons, criminal prosecution, restitution, and protection;

(5) The reasonable expectation that the existence of laws, social practices, or customs in the foreign country to which the applicant would be returned would penalize the applicant severely for having been the victim of a severe form of trafficking in persons;

(6) The likelihood of re-victimization and the need, ability, and willingness of foreign authorities to protect the applicant;

(7) The likelihood that the trafficker or others acting on behalf of the trafficker in the foreign country would cause the applicant harm;

(8) The likelihood that the applicant's individual safety would be threatened by the existence of civil unrest or armed conflict; or

(9) Current or likelihood of future economic harm.

(c) *Evidence.* (1) An applicant is encouraged to describe and document all factors that may be relevant to the case, as there is no guarantee that a particular reason(s) will satisfy the requirement.

(2) Hardship to persons other than the applicant may be considered in determining whether an applicant will suffer the requisite hardship only if the related evidence demonstrates specifically that the applicant will suffer extreme hardship upon removal as a result of hardship to persons other than the applicant.

(3) The applicant may satisfy this requirement by submitting any credible evidence regarding the nature and scope of the hardship if the applicant was removed from the United States, including evidence of hardship arising from circumstances surrounding the victimization and any other circumstances.

(4) An applicant may submit a personal statement or other evidence, including evidence from relevant country condition reports and any other public or private sources of information.

§ 214.210 Annual numerical limit.

(a) *5,000 per fiscal year.* DHS may not grant T–1 nonimmigrant status to more than 5,000 principal applicants in any fiscal year.

(b) *Waiting list.* If the numerical limit prevents further grants of T–1 nonimmigrant status, USCIS will place applicants who receive a bona fide determination pursuant to § 214.205 on a waiting list. USCIS:

(1) Will assign priority on the waiting list based on the date the application was properly filed, with the oldest applications receiving the highest priority for processing;

(2) Will in the next fiscal year, issue a number to each application on the waiting list, in the order of the highest priority; and

(3) After T–1 nonimmigrant status has been issued to eligible applicants on the waiting list, USCIS will issue any remaining T–1 nonimmigrant numbers for that fiscal year to new eligible applicants in the order the applications were filed.

(c) *Unlawful presence.* While an applicant for T nonimmigrant status in the United States is on the waiting list, the applicant will not accrue unlawful presence under section 212(a)(9)(B) of the Act.

(d) *Removal from the waiting list.* An applicant may be removed from the waiting list consistent with law and policy. Applicants on the waiting list must remain admissible to the United States and otherwise eligible for T nonimmigrant status. If at any time prior to final adjudication USCIS receives information that an applicant is no longer eligible for T nonimmigrant status, the applicant may be removed from the waiting list. USCIS will provide notice to the applicant of that decision.

§ 214.211 Application for eligible family members.

(a) *Eligibility.* Subject to section 214(o) of the Act, an applicant who has applied for or has been granted T–1 nonimmigrant status (principal applicant) may apply for the admission of an eligible family member, who is otherwise admissible to the United States, in derivative T nonimmigrant status if accompanying or following to join the principal applicant.

(1) *Principal applicant 21 years of age or older.* For a principal applicant who is 21 years of age or over, eligible family member means a T–2 (spouse) or T–3 (child).

(2) *Principal applicant under 21 years of age.* For a principal applicant who is under 21 years of age, eligible family member means a T–2 (spouse), T–3 (child), T–4 (parent), or T–5 (unmarried sibling under the age of 18).

(3) *Family member facing danger of retaliation.* Regardless of the age of the principal applicant, if the eligible family member faces a present danger of retaliation as a result of the principal applicant's escape from the severe form of trafficking or cooperation with law enforcement, in consultation with the law enforcement agency investigating a severe form of trafficking, eligible family member means a T–4 (parent), T–5 (unmarried sibling under the age of 18), or T–6 (adult or minor child of a derivative of the principal applicant). In cases where the LEA has not investigated the acts of trafficking after the applicant has reported the crime, USCIS will evaluate any credible evidence demonstrating derivatives' present danger of retaliation.

(4) *Admission requirements.* The principal applicant must demonstrate that the applicant for whom derivative T nonimmigrant status is being sought is an eligible family member of the T–1 principal applicant, as defined in § 214.201, and is otherwise eligible for that status.

(b) *Application.* (1) *Application submission.* A T–1 principal applicant may submit an Application for Derivative T Nonimmigrant Status in accordance with the form instructions.

(i) The Application for Derivative T Nonimmigrant Status for an eligible family member may be filed with the T–1 application, or separately.

(ii) T nonimmigrant status for eligible family members is dependent on the principal applicant having been granted T–1 nonimmigrant status and the principal applicant maintaining T–1 nonimmigrant status.

(iii) If a T–1 nonimmigrant cannot maintain status due to their death, the provisions of section 204(l) of the Act may apply.

(2) *Eligible family members in pending immigration proceedings.* (i) If an eligible family member is in removal proceedings under section 240 of the Act, or in exclusion or deportation proceedings under former sections 236 or 242 of the Act (as in effect prior to April 1, 1997), the principal applicant or T–1 nonimmigrant must file an Application for Derivative T Nonimmigrant Status directly with USCIS.

(ii) At the request of the eligible family member, ICE may exercise prosecutorial discretion, as appropriate, while USCIS adjudicates an Application for Derivative T Nonimmigrant Status.

(3) *Eligible family members with final orders of removal, deportation, or exclusion.* (i) If an eligible family member is the subject of a final order of removal, deportation, or exclusion, the principal applicant must file an Application for Derivative T Nonimmigrant Status directly with USCIS.

(ii) The filing of an Application for Derivative T Nonimmigrant Status has no effect on ICE's authority or discretion to execute a final order, although the applicant may file a request for an administrative stay of removal pursuant to 8 CFR 241.6(a).

(iii) If the eligible family member is in detention pending execution of the final order, the period of detention (under the standards of 8 CFR 241.4) will be extended while a stay is in effect for the period reasonably necessary to bring about the applicant's removal.

(c) *Required supporting evidence.* In addition to the form, an Application for Derivative T Nonimmigrant Status must include the following:

(1) Biometrics.

(2) Evidence demonstrating the relationship of an eligible family member, as provided in § 214.211(d).

(3) In the case of an applicant seeking derivative T nonimmigrant status based on danger of retaliation, evidence demonstrating this danger as provided in § 214.211.

(4) If an eligible family member is inadmissible based on a ground that may be waived, a request for a waiver of inadmissibility under section 212(d)(13) or section 212(d)(3) of the Act must be filed in accordance with § 212.16 of this subchapter and submitted with the completed application package.

(d) *Relationship.* Except as described in paragraph (e) of this section, the family relationship must exist at the time:

(1) The Application for T Nonimmigrant Status is filed;

(2) The Application for T Nonimmigrant Status is adjudicated;

(3) The Application for Derivative T Nonimmigrant Status is filed;

(4) The Application for Derivative T Nonimmigrant Status is adjudicated; and

(5) The eligible family member is admitted to the United States if residing abroad.

(e) *Relationship and age-out protections*—(1) *Protection for new child of a principal applicant.* If the T–1 principal applicant establishes that they have become a parent of a child after filing the application for T–1 nonimmigrant status, the child will be deemed to be an eligible family member eligible to accompany or follow to join the T–1 principal applicant.

(2) *Age-out protection for eligible family members of a principal applicant under 21 years of age.* (i) If the T–1 principal applicant was under 21 years of age when they applied for T–1 nonimmigrant status, USCIS will continue to consider a parent or unmarried sibling as an eligible family member.

(ii) A parent or unmarried sibling will remain eligible even if the principal applicant turns 21 years of age before adjudication of the application for T–1 nonimmigrant status.

(iii) An unmarried sibling will remain eligible even if the unmarried sibling is over 18 years of age at the time of

adjudication of the T–1 application, so long as the unmarried sibling was under 18 years of age at the time the T–1 application was filed.

(iv) The age of an unmarried sibling when USCIS adjudicates the T–1 application, when the principal applicant or T–1 nonimmigrant files the Application for Derivative T Nonimmigrant Status, when USCIS adjudicates the derivative application, or when the unmarried sibling is admitted to the United States does not affect eligibility.

(3) *Age-out protection for child of a principal applicant.* (i) USCIS will continue to consider a child as an eligible family member if the child was under 21 years of age at the time the principal filed the Application for T Nonimmigrant Status, but reached 21 years of age while the principal's application was still pending.

(ii) The child will remain eligible even if the child is over 21 years of age at the time of adjudication of the T–1 application.

(iii) As long as the child is under age 21 when the Application for T Nonimmigrant Status is filed and reaches age 21 while such application is pending, the age of the child when the principal applicant or T–1 nonimmigrant files the Application for Derivative T Nonimmigrant Status, when USCIS adjudicates the Application for Derivative T Nonimmigrant Status, or when the child is admitted to the United States does not affect eligibility.

(4) *Marriage of an eligible family member.* (i) An eligible family member seeking T–3 or T–5 status must be unmarried when the principal applicant files an Application for T Nonimmigrant Status, when USCIS adjudicates the Application for T Nonimmigrant Status, when the principal applicant or T–1 nonimmigrant files the Application for Derivative T Nonimmigrant Status, when USCIS adjudicates the Derivative T Nonimmigrant Status, and if relevant, when the family member is admitted to the United States.

(ii) Principal applicants who marry while their Application for T Nonimmigrant Status is pending may file an Application for Derivative T Nonimmigrant Status on behalf of their spouse, even if the relationship did not exist at the time they filed their Application for T Nonimmigrant Status.

(iii) Similarly, the principal applicant may apply for a stepparent or stepchild if the qualifying relationship was created after they filed their Application for T Nonimmigrant Status but before it was approved.

(iv) USCIS evaluates whether the marriage creating the qualifying spousal relationship or stepchild and stepparent relationship exists at the time of adjudication of the principal's application and through completion of the adjudication of the derivative's application.

(f) *Evidence demonstrating a present danger of retaliation.* A principal applicant or T–1 nonimmigrant seeking derivative T nonimmigrant status for an eligible family member on the basis of facing a present danger of retaliation as a result of the principal applicant's or T–1 nonimmigrant's escape from a severe form of trafficking or cooperation with law enforcement, must demonstrate the basis of this danger. USCIS may contact the LEA involved, if appropriate. An applicant may satisfy this requirement by submitting:

(1) Documentation of a previous grant of advance parole to an eligible family member;

(2) A signed statement from a law enforcement agency describing the danger of retaliation;

(3) A personal statement from the principal applicant or derivative applicant describing the danger the family member faces and how the danger is linked to the victim's escape or cooperation with law enforcement; and/or

(4) Any other credible evidence, including trial transcripts, court documents, police reports, news articles, copies of reimbursement forms for travel to and from court, and affidavits from other witnesses. This evidence may be from the United States or any country in which the eligible family member is facing danger of retaliation.

(g) *Biometric submission; evidentiary standards.* The provisions for biometric submission and evidentiary standards described in § 214.204(b) and (d) apply to an eligible family member's Application for Derivative T Nonimmigrant Status.

(h) *Review and decision.* USCIS will review the application and issue a decision in accordance with paragraph (d) of this section.

(i) *Derivative approvals.* A noncitizen whose Application for Derivative T Nonimmigrant Status is approved is not subject to the annual limit described in § 214.210. USCIS will not approve an Application for Derivative T Nonimmigrant Status unless and until it has approved T–1 nonimmigrant status for the principal applicant.

(1) *Approvals for eligible family members in the United States.* When USCIS approves an Application for Derivative T Nonimmigrant Status for an eligible family member in the United States, USCIS will concurrently approve T nonimmigrant status for the eligible family member. USCIS will notify the T–1 nonimmigrant of such approval and provide evidence of T nonimmigrant status to the derivative.

(2) *Approvals for eligible family members outside the United States.* When USCIS approves an application for an eligible family member outside the United States, USCIS will notify the T–1 nonimmigrant of such approval and provide the necessary documentation to the Department of State for consideration of visa issuance.

(3) *Employment authorization.* (i) A noncitizen granted derivative T nonimmigrant status may apply for employment authorization by filing an Application for Employment Authorization in accordance with form instructions.

(ii) For derivatives in the United States, the Application for Employment Authorization may be filed concurrently with the Application for Derivative T Nonimmigrant Status or at any later time.

(iii) For derivatives outside the United States, an Application for Employment Authorization based on their T nonimmigrant status may only be filed after admission to the United States in T nonimmigrant status.

(iv) If the Application for Employment Authorization is approved, the derivative T nonimmigrant will be granted employment authorization pursuant to 8 CFR 274a.12(c)(25) for the period remaining in derivative T nonimmigrant status.

(4) *Travel abroad.* In order to return to the United States after travel abroad and continue to hold derivative T nonimmigrant status, a noncitizen granted derivative T nonimmigrant status must either be granted advance parole pursuant to section 212(d)(5) of the Act and 8 CFR 223 or obtain a T nonimmigrant visa (unless visa exempt under 8 CFR 212.1) and be admitted as a T nonimmigrant at a designated port of entry.

§ 214.212 Extension of T nonimmigrant status.

(a) *Eligibility.* USCIS may grant extensions of T–1 nonimmigrant status beyond 4 years from the date of approval in 1-year periods from the date the T–1 nonimmigrant status ends if:

(1) An LEA detecting, investigating, or prosecuting activity related to acts of trafficking certifies that the presence of the applicant in the United States is necessary to assist in the detection, investigation, or prosecution of such activity; or

(2) USCIS determines that an extension is warranted due to exceptional circumstances.

(b) *Application for a discretionary extension of status.* Upon application, USCIS may extend T–1 nonimmigrant status based on law enforcement need or exceptional circumstances. A T–1 nonimmigrant may apply for an extension by submitting the form designated by USCIS in accordance with form instructions. A derivative T nonimmigrant may file for an extension of status independently if the T–1 nonimmigrant remains in valid T nonimmigrant status, or the T–1 nonimmigrant may file for an extension of T–1 status and request that this extension be applied to the derivative family members in accordance with the form instructions.

(c) *Timely filing.* An applicant should file the application to extend nonimmigrant status before the expiration of T nonimmigrant status. If T nonimmigrant status has expired, the applicant must explain in writing the reason for the untimely filing. USCIS may exercise its discretion to approve an untimely filed application for extension of T nonimmigrant status.

(d) *Evidence.* In addition to the application, a T nonimmigrant must include evidence to support why USCIS should grant an extension of T nonimmigrant status. The nonimmigrant bears the burden of establishing eligibility for an extension of status and that a favorable exercise of discretion is warranted.

(e) *Evidence of law enforcement need.* An applicant may demonstrate law enforcement need by submitting evidence that comes directly from an LEA, including:

(1) A new LEA declaration;

(2) Evidence from a law enforcement official, prosecutor, judge, or other authority who can detect, investigate, or prosecute acts of trafficking, such as a letter on the agency's letterhead, email, or fax; or

(3) Any other credible evidence.

(f) *Exceptional circumstances.* (1) USCIS may, in its discretion, extend status beyond the 4-year period if it determines the extension of the period of such nonimmigrant status is warranted due to exceptional circumstances as described in section 214(o)(7)(iii) of the Act. (2) USCIS may approve an extension of status for a principal applicant, based on exceptional circumstances, when an approved eligible family member is awaiting initial issuance of a T visa by an embassy or consulate and the principal applicant's T–1 nonimmigrant status is soon to expire.

(g) *Evidence of exceptional circumstances.* An applicant may demonstrate exceptional circumstances by submitting:

(1) The applicant's affirmative statement; or

(2) Any other credible evidence, including but not limited to:

(i) Medical records;

(ii) Police or court records;

(iii) News articles;

(iv) Correspondence with an embassy or consulate; and

(v) Affidavits from individuals with direct knowledge of or familiarity with the applicant's circumstances.

(h) *Mandatory extensions of status for adjustment of status applicants.* USCIS will automatically extend T nonimmigrant status when a T nonimmigrant properly files an application for adjustment of status during the period of T nonimmigrant status, in accordance with 8 CFR 245.23. No separate application for extension of T nonimmigrant status, or supporting evidence, is required.

§ 214.213 Revocation of approved T nonimmigrant status.

(a) *Automatic revocation of derivative status.* An approved Application for Derivative T Nonimmigrant Status will be revoked automatically if the family member with an approved derivative application notifies USCIS that they will not apply for admission to the United States. An automatic revocation cannot be appealed.

(b) *Revocation on notice/grounds for revocation.* USCIS may revoke an approved Application for T Nonimmigrant Status following issuance of a notice of intent to revoke if:

(1) The approval of the application violated the requirements of section 101(a)(15)(T) of the Act or this subpart or involved error in preparation, procedure, or adjudication that led to the approval;

(2) In the case of a T–2 spouse, the applicant's divorce from the T–1 principal applicant has become final;

(3) In the case of a T–1 principal applicant, an LEA with jurisdiction to detect, investigate, or prosecute the acts of severe forms of trafficking in persons notifies USCIS that the applicant has refused to comply with a reasonable request to assist with the detection, investigation, or prosecution of the trafficking in persons and provides USCIS with a detailed explanation in writing; or

(4) The LEA that signed the LEA declaration withdraws it or disavows its contents and notifies USCIS and provides a detailed explanation of its reasoning in writing.

(c) *Procedures.* (1) USCIS may revoke an approved application for T nonimmigrant status following a notice of intent to revoke.

(i) The notice of intent to revoke must be in writing and contain a statement of the grounds for the revocation and the time period allowed for the T nonimmigrant's rebuttal.

(ii) The T nonimmigrant may submit evidence in rebuttal within 30 days of the notice.

(iii) USCIS will consider all relevant evidence in determining whether to revoke the approved application for T nonimmigrant status.

(2) If USCIS revokes approval of the previously granted T nonimmigrant status application, USCIS:

(i) Will provide written notice to the applicant; and

(ii) May notify the LEA who signed the LEA declaration, any consular officer having jurisdiction over the applicant, or the Office of Refugee Resettlement of the Department of Health and Human Services.

(3) If an applicant appeals the revocation, the decision will not become final until the administrative appeal is decided in accordance with 8 CFR 103.3.

(d) *Effect of revocation.* Revocation of T–1 nonimmigrant status will terminate the principal's status as a T nonimmigrant and result in automatic termination of any derivative T nonimmigrant status. If a derivative application is pending at the time of revocation of T–1 nonimmigrant status, such pending applications will be denied. Revocation of a T–1 nonimmigrant status or derivative T nonimmigrant status also revokes any waiver of inadmissibility granted in conjunction with such application. The revocation of T–1 nonimmigrant status will have no effect on the annual numerical limit described in § 214.210.

§ 214.214 Removal proceedings.

(a) Nothing in this section prohibits DHS from instituting removal proceedings for conduct committed after admission, or for conduct or a condition that was not disclosed prior to the granting of T nonimmigrant status, including misrepresentations of material facts in the Application for T–1 Nonimmigrant Status or in an Application for Derivative T Nonimmigrant Status, or after revocation of T nonimmigrant status.

(b) ICE will maintain a policy regarding the exercise of discretion toward all applicants for T nonimmigrant status and T nonimmigrants. This policy will address, but need not be limited to,

ICE's discretionary decision-making in proceedings before the Executive Office for Immigration Review and considerations related to ICE's immigration enforcement actions involving T visa applicants and T nonimmigrants.

§ 214.215 USCIS employee referral.

(a) Any USCIS employee who, while carrying out their official duties, comes into contact with a noncitizen believed to be a victim of a severe form of trafficking in persons and is not already working with an LEA may consult, as necessary, with the ICE officials responsible for victim protection, trafficking investigations and prevention, and deterrence.

(b) The ICE office may, in turn, refer the victim to another LEA with responsibility for detecting, investigating, or prosecuting acts of trafficking.

(c) If the noncitizen has a credible claim to victimization, USCIS may advise the individual that they can submit an Application for T Nonimmigrant Status and seek any other benefit or protection for which they may be eligible, provided doing so would not compromise the noncitizen's safety.

§ 214.216 Restrictions on use and disclosure of information relating to applicants for T nonimmigrant classification.

(a) The use or disclosure (other than to a sworn officer or employee of DHS, the Department of Justice, the Department of State, or a bureau or agency of any of those departments, for legitimate department, bureau, or agency purposes) of any information relating to the beneficiary of a pending or approved Application for T Nonimmigrant Status is prohibited unless the disclosure is made in accordance with an exception described in 8 U.S.C. 1367(b).

(b) Information protected under 8 U.S.C. 1367(a)(2) may be disclosed to Federal prosecutors to comply with constitutional obligations to provide statements by witnesses and certain other documents to defendants in pending Federal criminal proceedings.

(c) Agencies receiving information under this section, whether governmental or non-governmental, are bound by the confidentiality provisions and other restrictions set out in 8 U.S.C. 1367.

(d) DHS officials are prohibited from making adverse determinations of admissibility or deportability based on information obtained solely from the trafficker, unless the applicant has been convicted of a crime or crimes listed in section 237(a)(2) of the Act.

PART 245—ADJUSTMENT OF STATUS TO THAT OF PERSON ADMITTED FOR PERMANENT RESIDENCE

■ 8. The authority citation for part 245 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1182, 1252, 1255; Pub. L. 105–100, section 202, 111 Stat. 2160, 2193; Pub. L. 105–277, section 902, 112 Stat. 2681; Pub. L. 110–229, tit. VII, 122 Stat. 754; 8 CFR part 2.

■ 9. Revise § 245.23 to read as follows:

§ 245.23 Adjustment of noncitizens in T nonimmigrant classification.

(a) *Eligibility of principal T–1 applicants.* Except as described in paragraph (c) of this section, a noncitizen may be granted adjustment of status to that of a noncitizen lawfully admitted for permanent residence, provided the noncitizen:

(1) Applies for such adjustment.

(2) Was lawfully admitted to the United States as a T–1 nonimmigrant, as defined in 8 CFR 214.201.

(3) Continues to hold T–1 nonimmigrant status at the time of application.

(4) Has been physically present in the United States for a continuous period of at least 3 years since the date of lawful admission as a T–1 nonimmigrant, or has been physically present in the United States for a continuous period during the investigation or prosecution of acts of trafficking and the Attorney General has determined that the investigation or prosecution is complete, whichever period is less; except

(i) If the applicant has departed from the United States for any single period in excess of 90 days or for any periods in the aggregate exceeding 180 days, the applicant shall be considered to have failed to maintain continuous physical presence in the United States for purposes of section 245(l)(1)(A) of the Act; and

(ii) If the noncitizen was granted T nonimmigrant status, such noncitizen's physical presence in the CNMI before, on, or after November 28, 2009, and subsequent to the grant of T nonimmigrant status, is considered as equivalent to presence in the United States pursuant to an admission in T nonimmigrant status.

(5) Is admissible to the United States under the Act, or otherwise has been granted a waiver by USCIS of any applicable ground of inadmissibility, at the time of examination for adjustment.

(6) Has been a person of good moral character since first being lawfully admitted as a T–1 nonimmigrant and until USCIS completes the adjudication of the application for adjustment of status.

(7)(i) Has, since first being lawfully admitted as a T–1 nonimmigrant, and until the conclusion of adjudication of the application, complied with any reasonable request for assistance in the detection, investigation or prosecution of acts of trafficking, as defined in § 8 CFR 214.201; or

(ii) Would suffer extreme hardship involving unusual and severe harm upon removal from the United States, as provided in 8 CFR 214.209; or

(iii) Was younger than 18 years of age at the time of the victimization that qualified the T nonimmigrant for relief under section 101(a)(15)(T) of the Act, 8 U.S.C. 1101(a)(15)(T); or

(iv) Established an inability to cooperate with a reasonable request for assistance at the time their Application for T Nonimmigrant Status was approved, as defined in 8 CFR 214.202(c)(1) and (2).

(b) *Eligibility of derivative family members.* A derivative family member of a T–1 nonimmigrant status holder may be granted adjustment of status to that of a noncitizen lawfully admitted for permanent residence, provided:

(1) The T–1 nonimmigrant has applied for adjustment of status under this section and meets the eligibility requirements described under paragraph (a) of this section;

(2) The derivative family member was lawfully admitted to the United States in derivative T nonimmigrant status under section 101(a)(15)(T)(ii) of the Act, and continues to hold such status at the time of application;

(3) The derivative family member has applied for such adjustment; and

(4) The derivative family member is admissible to the United States under the Act, or otherwise has been granted a waiver by USCIS of any applicable ground of inadmissibility, at the time of examination for adjustment.

(5) The derivative family member does not automatically lose T nonimmigrant status when the T–1 nonimmigrant adjusts status.

(c) *Exceptions.* A noncitizen is not eligible for adjustment of status under paragraph (a) or (b) of this section if:

(1) Their T nonimmigrant status has been revoked pursuant to 8 CFR 214.213;

(2) They are described in section 212(a)(3), 212(a)(10)(C), or 212(a)(10)(E) of the Act; or

(3) They are inadmissible under any other provisions of section 212(a) of the Act and have not obtained a waiver of

inadmissibility in accordance with 8 CFR 212.18 or 214.210.

(4) Where the applicant establishes that the victimization was a central reason for their unlawful presence in the United States, section 212(a)(9)(B)(iii) of the Act is not applicable, and the applicant need not obtain a waiver of that ground of inadmissibility. The applicant, however, must submit with their application for adjustment of status evidence sufficient to demonstrate that the victimization suffered was a central reason for the unlawful presence in the United States. To qualify for this exception, the victimization need not be the sole reason for the unlawful presence but the nexus between the victimization and the unlawful presence must be more than tangential, incidental, or superficial.

(d) *Jurisdiction.* (1) USCIS shall determine whether a T–1 applicant for adjustment of status under this section was lawfully admitted as a T–1 nonimmigrant and continues to hold such status, has been physically present in the United States during the requisite period, is admissible to the United States or has otherwise been granted a waiver of any applicable ground of inadmissibility, and has been a person of good moral character during the requisite period.

(2) USCIS shall determine whether the applicant received a reasonable request for assistance in the investigation or prosecution of acts of trafficking as defined in 8 CFR 214.201 and 214.208(c), and, if so, whether the applicant complied in such request.

(3) If USCIS determines that the applicant failed to comply with any reasonable request for assistance, USCIS shall deny the application for adjustment of status unless USCIS finds that the applicant would suffer extreme hardship involving unusual and severe harm upon removal from the United States.

(e) *Application*—(1) *Filing requirements.* Each T–1 principal applicant and each derivative family member who is applying for adjustment of status must file an Application to Register Permanent Residence or Adjust Status; and

(i) Accompanying documents, in accordance with the form instructions;

(ii) A photocopy of the applicant's Notice of Action, granting T nonimmigrant status;

(iii) A photocopy of all pages of their most recent passport or an explanation of why they do not have a passport;

(iv) A copy of the applicant's Arrival-Departure Record; and

(v) Evidence that the applicant was lawfully admitted in T nonimmigrant status and continues to hold such status at the time of application. For T nonimmigrants who traveled outside the United States and returned to the United States after presenting an Advance Parole Document issued while the adjustment of status application was pending, the date that the applicant was first admitted in lawful T status will be the date of admission for purposes of this section, regardless of how the applicant's Arrival-Departure Record is annotated.

(2) *T–1 principal applicants.* In addition to the items in paragraph (e)(1) of this section, T–1 principal applicants must submit:

(i) Evidence, including an affidavit from the applicant and a photocopy of all pages of all of the applicant's passports valid during the required period (or equivalent travel document or a valid explanation of why the applicant does not have a passport), that they have been continuously physically present in the United States for the requisite period as described in paragraph (a)(2) of this section. Applicants should submit evidence described in § 245.22. A signed statement from the applicant attesting to the applicant's continuous physical presence alone will not be sufficient to establish this eligibility requirement. If additional documentation is not available, the applicant must explain why in an affidavit and provide additional affidavits from others with first-hand knowledge who can attest to the applicant's continuous physical presence by specific facts.

(A) If the applicant has departed from and returned to the United States while in T–1 nonimmigrant status, the applicant must submit supporting evidence showing the dates of each departure from the United States and the date, manner, and place of each return to the United States.

(B) Applicants applying for adjustment of status under this section who have less than 3 years of continuous physical presence while in T–1 nonimmigrant status must submit a document signed by the Attorney General or their designee, attesting that the investigation or prosecution is complete.

(ii) Evidence of good moral character in accordance with paragraph (g) of this section; and

(A) Evidence that the applicant has complied with any reasonable request for assistance in the investigation or prosecution of the trafficking as described in paragraph (f)(1) of this section since having first been lawfully admitted in T–1 nonimmigrant status and until the adjudication of the application; or

(B) Evidence that the applicant would suffer extreme hardship involving unusual and severe harm if removed from the United States as described in paragraph (f)(2) of this section.

(3) *Evidence relating to discretion.* Each applicant seeking adjustment under section 245(l) of the Act bears the burden of showing that discretion should be exercised in their favor. Where adverse factors are present, an applicant may offset these by submitting supporting documentation establishing mitigating equities that the applicant wants USCIS to consider. Depending on the nature of adverse factors, the applicant may be required to clearly demonstrate that the denial of adjustment of status would result in exceptional and extremely unusual hardship. Moreover, depending on the gravity of the adverse factors, such a showing might still be insufficient. For example, only the most compelling positive factors would justify a favorable exercise of discretion in cases where the applicant has committed or been convicted of a serious violent crime, a crime involving sexual abuse committed upon a child, or multiple drug-related crimes, or where there are security- or terrorism-related concerns.

(f) *Assistance in the investigation or prosecution or a showing of extreme hardship.* Each T–1 principal applicant must establish that since having been lawfully admitted as a T–1 nonimmigrant and up until the adjudication of the application, they complied with any reasonable request for assistance in the investigation or prosecution of the acts of trafficking, as defined in 8 CFR 214.201, or establish that they would suffer extreme hardship involving unusual and severe harm upon removal from the United States.

(1) Each T–1 applicant for adjustment of status under section 245(l) of the Act must submit evidence demonstrating that the applicant has complied with any reasonable requests for assistance in the investigation or prosecution of the human trafficking offenses during the requisite period; or

(2) In lieu of showing continued compliance with requests for assistance, an applicant may establish that they would suffer extreme hardship involving unusual and severe harm upon removal from the United States.

(i) The hardship determination will be evaluated on a case-by-case basis, in accordance with the factors described in 8 CFR 214.209.

(ii) Where the basis for the hardship claim represents a continuation of the hardship claimed in the Application for

T Nonimmigrant Status, the applicant need not re-document the entire claim, but rather may submit evidence to establish that the previously established hardship is ongoing. However, in reaching its decision regarding hardship under this section, USCIS is not bound by its previous hardship determination made under 8 CFR 214.209.

(g) *Good moral character.* A T–1 nonimmigrant applicant for adjustment of status under this section must demonstrate that they have been a person of good moral character since first being lawfully admitted as a T–1 nonimmigrant and until USCIS completes the adjudication of their applications for adjustment of status. Claims of good moral character will be evaluated on a case-by-case basis, taking into account section 101(f) of the Act and the standards of the community. The applicant must submit evidence of good moral character as follows:

(1) An affidavit from the applicant attesting to their good moral character, accompanied by a local police clearance or a state-issued criminal background check from each locality or state in the United States in which the applicant has resided for 6 or more months during the requisite period in continued presence or T–1 nonimmigrant status.

(2) If police clearances, criminal background checks, or similar reports are not available for some or all locations, the applicant may include an explanation and submit other evidence with their affidavit.

(3) USCIS will consider other credible evidence of good moral character, such as affidavits from responsible persons who can knowledgeably attest to the applicant's good moral character.

(4) An applicant who is under 14 years of age is generally presumed to be a person of good moral character and is not required to submit evidence of good moral character. However, if there is reason to believe that an applicant who is under 14 years of age may lack good moral character, USCIS may require evidence of good moral character.

(h) *Filing and decision.* An application for adjustment of status from a T nonimmigrant under section 245(l) of the Act shall be filed with the USCIS office identified in the instructions to the Application to Register Permanent Residence or Adjust Status. Upon approval of adjustment of status under this section, USCIS will record the noncitizen's lawful admission for permanent residence as of the date of such approval and will notify the applicant in writing. Derivative family members' applications may not be approved before the principal applicant's application is approved.

(i) *Denial.* If the application for adjustment of status or the application for a waiver of inadmissibility is denied, USCIS will notify the applicant in writing of the reasons for the denial and of the right to appeal the decision to the Administrative Appeals Office (AAO) pursuant to the AAO appeal procedures found at 8 CFR 103.3. Denial of the T–1 principal applicant's application will result in the automatic denial of a derivative family member's application.

(j) *Effect of Departure.* (1) If an applicant for adjustment of status under this section departs the United States, they shall be deemed to have abandoned the application, and it will be denied.

(2) If, however, the applicant is not under exclusion, deportation, or removal proceedings, and they filed an Application for Travel Document, in accordance with the instructions on the form, or any other appropriate form, and was granted advance parole by USCIS for such absences, and was inspected and paroled upon returning to the United States, they will not be deemed to have abandoned the application.

(3) If the adjustment of status application of such an individual is subsequently denied, they will be treated as an applicant for admission subject to sections 212 and 235 of the Act. If an applicant for adjustment of status under this section is under exclusion, deportation, or removal proceedings, USCIS will deem the application for adjustment of status abandoned as of the moment of the applicant's departure from the United States.

(k) *Inapplicability.* Sections 245.1 and 245.2 do not apply to noncitizens seeking adjustment of status under this section.

(l) *Annual limit of T–1 principal applicant adjustments*—(1) *General.* The total number of T–1 principal applicants whose status is adjusted to that of lawful permanent residents under this section may not exceed the statutory limit in any fiscal year.

(2) *Waiting list.* (i) All eligible applicants who, due solely to the limit imposed in section 245(l)(4) of the Act and paragraph (l)(1) of this section, are not granted adjustment of status will be placed on a waiting list. USCIS will send the applicant written notice of such placement.

(ii) Priority on the waiting list will be determined by the date the application was properly filed, with the oldest applications receiving the highest priority.

(iii) In the following fiscal year, USCIS will proceed with granting adjustment of status to applicants on the waiting list who remain admissible and eligible for adjustment of status in order of highest priority until the available numbers are exhausted for the given fiscal year.

(iv) After the status of qualifying applicants on the waiting list has been adjusted, any remaining numbers for that fiscal year will be issued to new qualifying applicants in the order that the applications were properly filed.

PART 274a—CONTROL OF EMPLOYMENT OF ALIENS

■ 10. The authority citation for part 274a continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1324a; 48 U.S.C. 1806; Pub. L. 101–410, 104 Stat. 890 (28 U.S.C. 2461 note); Pub. L. 114–74, 129 Stat. 599 (28 U.S.C. 2461 note); 8 CFR part 2.

■ 11. Amend § 274a.12 by reserving paragraphs (c)(37) through (39) and adding paragraph (c)(40) to read as follows:

§ 274a.12 Classes of aliens authorized to accept employment.

* * * * *

(c) * * *

(40) A noncitizen applicant for T nonimmigrant status, and eligible family members, who have pending, bona fide applications, and who merit a favorable exercise of discretion.

* * * * *

Alejandro N. Mayorkas,

Secretary, U.S. Department of Homeland Security.

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